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WEST KEY NUMBER SYSTEM

CALIFORNIA REPORTER

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29, 1903, being engaged as an engineer to operate a donkey engine, as a member of what was known as the donkey crew, along the line of the proposed chute, and under a crew foreman named Than Riggan. The donkey engine was being operated about a mile and a quarter from the mill, to which a trail ran along the line of the proposed chute, which the workmen used in going to and fro. On the afternoon of April 30th another crew, known as the blasting crew, under a foreman named Barney Lynch, moved over from some other point on the defendant's property some distance away to the line of the proposed chute, at a point in proximity to said trail and about 225 yards away from the station of the donkey engine but invisible from its location. This blasting crew made preparations to set off several blasts at this point during that afternoon, and were ready to do so between 5 and 6 o'clock after the men of other crews had quit their places of work for the day. The foreman of the blasting crew saw several men, including the foreman of the donkey crew, pass along the trail shortly after 5:30 o'clock that evening, and supposed that all of the men of that crew had gone by. He then set off the blasts. There is some dispute in the evidence as to whether the blasting crew called out "fire" loudly or at all just before the blasts went off; but there is no evidence that any member of that crew, or any one else in fact, went back along and up the trail to warn possible comers of the impending blasts. The evidence shows that the deceased had lingered at his engine for a few moments after the other men had left in order to make some slight repairs, and that this fact was known to his foreman, who did not, however, have time to impart this knowledge to the blasting crew when he reached the place where the blasts were about to be exploded, but had to run down the trail to save his own life. The evidence further shows that the deceased came along the trail at the moment of the explosion, and was evidently struck and fatally wounded by the flying rocks. He was found the next morning lying a few feet from the place of one of the blasts in an unconscious and dying condition, and he died that day without regaining consciousness. There was no evidence before the court at the trial tending in any degree to show that the deceased knew or should have known of the presence of the blasting crew at the place where he met his death, or that he had any warning of the impending explosion.

[1] The first contention of the appellant is that the complaint does not state facts sufficient to constitute a cause of action, for the reason that there is no allegation showing wherein the plaintiff was damaged by reason of the death of her minor son. No authority is cited in support of this contention. It has long been the settled law of this state that a parent is entitled, under a general allegation of damages, to recover, for the loss of service and the deprivation of the comfort, protection, and society of the child caused by its death, such damages as under all the circumstances of the case may be just. Code Civ. Proc. §§ 376, 377; Nehrbas v. C. P. R. R. Co., 62 Cal. 320; Bond v. United Railroads, 159 Cal. 270, 286, 113 Pac. 366, Ann. Cas. 1912C, 50; Peters v. S. P. Co., 160 Cal. 48, 70, 116 Pac. 400.

[2] The complaint in this action contains three counts. The first count alleges in substance that the deceased came to his death from the careless and negligent acts of the defendant in discharging certain powerful and dangerous dynamite placed without notice or warning to the decedent, and while he was passing the point of location of such blasts while going from his work along the trail which the defendant had provided for its employés. The second count avers that the accident complained of was caused through the negligence of the defendant in failing to adopt, promulgate, and use reasonable diligence to enforce proper and sufficient rules for the protection of the employés of the defendant from the dangers due to the use of dynamite and to blasting in the conduct of its business. The third count of the complaint alleges that the accident was caused by the negligence of the foreman of the blasting crew, and to the fact that the defendant, in addition to being responsible for his alleged direct acts of negligence, was itself guilty of negligence in retaining in its employ the said foreman of the blasting crew when it knew, or in the exercise of reasonable diligence should have known, that he was habitually careless, negligent, incompetent, and unfit to perform the dangerous and delicate work and duty of his position.

The cause was tried upon all of the issues tendered by these three counts in the complaint. Counsel for the appellant urges that, as to the second count of the complaint, there could be no recovery, for the reason that the evidence offered by the plaintiff affirmatively shows that a reasonable rule respecting the warning to be given before setting off blasts had been adopted and promulgated by the defendant. Apart from the question, determinable only by the jury, as to whether the orders given by the general foreman, William McLeod, to Barney Lynch, the foreman of the blasting crew, "to send one man down the chute to holler 'fire' before spitting the fuse, so that everybody could get out of the way," was a reasonable or sufficient precaution when setting off dangerous blasts, it is sufficient to note that no mention for a nonsuit was directed to the insufficiency of the evidence to sustain this particular count; and that since the case was submitted to the jury upon all three counts, if its verdict is sustainable upon both or either of the other counts, it would not be reversed because of any failure of proof to sustain the second count.

The main contentions of the appellant turn upon the issues presented by the first and third counts of the complaint, and raise the following questions for solution upon this appeal: First. Was Barney Lynch, the foreman of the blasting crew, negligent in failing to give proper, timely, and adequate warning of the impending blasts, by the discharge of which the deceased came to his death? Second. Was the said Barney Lynch, if so negligent, the fellow servant of the deceased, for whose negligence the plaintiff cannot recover in this action? Third. Was the defendant shown to have been negligent in employing, or retaining in its employment, the said Barney Lynch when he was habitually careless with respect to the use of proper precautions before discharging blasts, and when that fact was or should have been known to it prior to the fatality involved in this case?

[3] To the first of these questions it will be sufficient to say that without serious conflict the evidence quite sufficiently shows that Barney Lynch, the foreman of the defendant's blasting crew, was guilty of gross carelessness at the time of discharging the blasts by which the decedent was fatally injured. Even assuming that the foregoing rule, with respect to the warning to be given before a blast, was reasonably adequate for safety to the other employés of the defendant or to passers-by, it was a rule which was not complied with in the case under review. No man was sent either up or down the trail to warn comers of impending danger; and the cry of "fire," just before the blast, was palpably insufficient to notify any but those already aware of the impending explosion. Nor can it be urged in this connection that Than Riggan, the immediate foreman of the deceased as a member of the donkey crew, was negligent, for the proofs show that he only learned of the presence and impendency of these blasts a moment before their explosion, and when to notify the blasting crew would be futile, and to retrace his steps and warn the deceased impossible, because the fuses were smoking, and he was obliged to immediately flee down the trail to save his own life.

[4] The next and legal question presented is whether Barney Lynch, the foreman of the blasting crew, was a fellow servant of the deceased in a sense which would forestall a recovery for damages for his death. The fatality in question occurred prior to the passage of recent statutes changing the former rule with reference to responsibility for the acts of fellow servants. The defendant, in connection with its other activities, was at the time of the accident engaged in constructing a chute for the movement of logs from the woods to the mill. In the prosecution of this work three crews of men were engaged, the donkey crew, the jerry crew, and the blasting crew; each working under its own foreman, and each independently of the other, but each doing its allotted part of the general work of chute construction. It would seem to be settled beyond question, by the decisions of this state construing the law as it stood prior to the passage of the statute of 1907 (St. 1907, c. 97, p. 119), that the foreman and members of these several crews were fellow servants employed by the same employer in the same general business. Civ. Code, § 1970; Hogan v. C. P. R. R. Co., 49 Cal. 128; McLean v. Blue Point G. M. Co., 51 Cal. 255; Fagundes v. C. P. R. R. Co., 79 Cal. 97, 21 Pac. 437, 3 L. R. A. 824; Schwind v. Floristan P. & P. Co., 5 Cal. App. 197, 89 Pac. 1066; Vestner v. Northern Cal. P. Co., 158 Cal. 284, 110 Pac. 918. The cases from other jurisdictions cited by counsel for the respondent have no persuasive force against the foregoing authorities from our own state on this subject.

[5] It follows that, since Barney Lynch must be held to have been the fellow servant of the deceased, the plaintiff would not be entitled to recover for the detriment caused by his negligence, unless it should also appear that the defendant was negligent in the employment or retention of Barney Lynch as foreman of the blasting crew. It is in relation to this feature of the case that the main difficulties arise, or rather arose, at the trial.

[6, 7] Early in its course the plaintiff produced the witness Than Riggan, of whom this question was asked: "Do you know what Barney Lynch's general reputation as to carelessness or carefulness in the discharge of his duties on the blasting crew was prior to the accident?" This question, over the objection of the defendant, the court permitted the witness to answer, and he testified: "It was bad in camp." Substantially the same question was at intervals during the trial repeated to several other witnesses, and allowed to be answered similarly over the objection of the defendant. The specific objection which the defendant urged and repeated to these several questions and answers was that evidence of the general reputation of Barney Lynch about the camp for negligence in giving warning of the explosion of blasts was incompetent and inadmissible to bind the defendant until the foundation therefor had been laid by proof of actual carelessness upon former occasions in exploding blasts. The evidence as to reputation was admitted by the court unconditionally and without requiring such proof, though later in the case some slight evidence was introduced tending to show that Lynch had been careless upon one former occasion. The testimony of the former foreman, William McLeod, when analyzed in the light of his evident hostility to the defendant, goes no further than this, while the evidence of the former fellow workmen with Barney Lynch giving him a bad reputation is supported by no basis of fact or detail as to prior negligent acts. This evidence was not in itself sufficient to base opinions as to Barney Lynch's bad reputation for habitual carelessness upon, and we are thus brought face to face with the question

of the admissibility of evidence of the reputation of Barney Lynch for carelessness in blasting, in the absence of a sufficient showing as to his past carelessness in fact. The leading California case upon this point is the case of Gier v. Los Angeles C. E. Ry. Co., 108 Cal. 129, 41 Pac. 22, wherein it is very clearly pointed out that, in cases involving the precise question in issue here, it is the character and not the reputation of the employé which is the primary subject of consideration, and that in the absence of proof of specific acts of carelessness, sufficient to establish the character of the servant in respect to negligence, evidence of his reputation in that respect is inadmissible. The reason for this rule is that, the employé causing the injury and the person injured being fellow servants, the employer would not, under the law as it was at the time of the injury in question, be liable, unless it should be shown that the employer was negligent in retaining the careless and culpable employé in its service after it knew or should have known of his incompetency. In order to make this proof, two things were necessary to be shown: First, that the culpable employé was in fact incompetent by reason of his habitual carelessness; and, second, that the defendant knew or should have known of such incompetency prior to the injury complained of, and with this actual or imputed knowledge negligently retained the careless servant in its employ. The proof as to reputation could only be admissible for the purpose of imputing to the defendant knowledge of a fact which had become a matter of general repute, and hence could not be legally admitted until the foundation had been laid in proof of past acts of carelessness, which would in itself be sufficient to predicate a finding of the fact of incompetency upon; nor could the evidence of his reputation be admissible to prove the fact of incompetency; otherwise a defendant might be held responsible for its failure or refusal to discharge a perfectly competent but otherwise unpopular servant. It would thus seem to be clear, both by reason and precedent, that the court committed error in the admission of the testimony as to the previous reputation of Barney Lynch for carelessness, in the absence of a sufficient showing of the fact of his prior incompetency. Gier v. Los Angeles C. E. Ry. Co., 108 Cal. 129, 41 Pac. 22; Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. 733; Park v. N. Y. C. & C. Co., 155 N. Y. 215, 49 N. E. 674, 63 Am. St. Rep. 663; Youngs v. New York O. & W. Co., 154 N. Y. 764, 49 N. E. 1106.

[8] The appellant further contends that the court erred in the admission of testimony as to the discharge of Barney Lynch after the explosion in which the decedent lost his life. The respondent justifies the offer and admissibility of this evidence upon the ground that it tended to prove that William McLeod, the general foreman of the several crews engaged in building the chute along the line in which the accident occurred, stood in relation of vice principal of the defendant. It has been held that the power to employ and discharge the employés of a corporation may be shown in evidence as tending to mark the line of distinction between a vice principal, for whose negligence a corporation is responsible, and an ordinary employé and fellow servant of another, for whose negligence the principal is not to be held liable; and it has also been held that evidence of the exercise of the power of hiring and discharging employés furnishes some evidence of its delegation by the principal to the foreman or official actually exercising it. The particular vice of the ruling of the trial court in this respect did not so much consist in admitting the evidence of the discharge of Barney Lynch by the foreman, William McLeod, on the morning after the explosion, as it did in also allowing to be introduced in proof, over the defendant's objection, the conversation which accompanied the discharge. The record discloses that on the morning following the explosion, and shortly after the body of the dying youth had been borne into camp, the foreman, William McLeod, said to Barney Lynch: "This is some of your work. Get your things together and get out of here." Tr. fol. 212. The unmistakable implication of these words is that the injury to the decedent had been caused by the negligence of Lynch, and that for that reason he was being discharged. That this conclusion of the general foreman of the defendant, even assuming that he stood in the relation of vice principal to it, is one by which the defendant could not be bound, and was therefore improperly admitted in evidence, is well settled in this state. Beasley v. S. J. F. P. Co., 92 Cal. 388, 28 Pac. 485; Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32; Lissak v. Crocker Est. Co., 119 Cal. 442, 51 Pac. 688; Crawford v. Transatlantic Co., 125 Cal. 609, 58 Pac. 177; Peterson v. Mineral K. F. Co., 140 Cal. 624, 74 Pac. 162; Waldeck v. Pacific Coast S. S. Co., 2 Cal. App. 167, 83 Pac. 158.

There are a number of other errors alleged to have been committed during the trial and which are discussed in the briefs of counsel, but they are all practically covered by the review of the trial thus far undertaken, and hence need not be considered in detail.

We think that, for the reasons heretofore given, the judgment must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

24 Cal. App. 270

HAGEMAN v. O'BRIEN et al. (Civ. 1480.)

(District Court of Appeal, Second District, California. April 3, 1914. Rehearing Denied April 30, 1914. Denied by Supreme Court June 2, 1914.)

1. BROKERS (§ 43*)—COMMISSIONS—AGREEMENT TO DIVIDE—CONTRACT—REQUISITES—STATUTE.

Civ. Code, § 1624, subd. 6, providing that an agreement employing an agent or broker to purchase or sell real estate for a commission, is invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. *Held*, that such section was only designed to protect owners against unfounded claims of brokers, and did not apply to a contract between brokers by which the principal broker contracted to pay his assistant a specified sum for services rendered in making sales.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. BROKERS (§ 66*)—CONTRACTS INTER SE—CONSTRUCTION.

Defendants, being authorized agents for the sale of certain lands, wrote plaintiff agreeing to pay him "a commission of 5% on all the land," the writers sold through plaintiff's assistance, whether closed directly or indirectly by plaintiff, and later wrote another letter that, if plaintiff desired to operate in specified counties in the sale of certain lands controlled by the writers, they would pay a commission of $6 per hectare on all lands sold by plaintiff, commission payable to plaintiff when received by defendants. *Held* that, while the form of the letters were agreements to pay commissions, in substance, they were to share commissions received by paying the specified sums to plaintiff as and when the commissions were received by defendants from the owner of the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 51; Dec. Dig. § 66.*]

3. BROKERS (§ 53*)—COMMISSIONS—DIVISION.

Where defendants employed plaintiff to assist them in selling certain lands, agreeing to pay him specified prices on sales made through defendants' office, whether closed directly or indirectly by plaintiff, it was not necessary, in order to entitle plaintiff to compensation under such agreement, to show that he alone was the procuring cause of the sales, but only that plaintiff should show that he rendered substantial services in connection with the sales made, though the actual transaction with the purchasers was concluded by or through the defendants.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.*]

4. BROKERS (§ 86*)—SALES—DIVISION OF COMMISSIONS—RENDITION OF SERVICES—EVIDENCE.

In an action for division of brokers' commissions, evidence *held* to support a finding that plaintiff procured purchasers for the lands in question, or rendered such services in connection with the sales as would entitle him to compensation under the contracts of employment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. § 86.*]

5. NEW TRIAL (§ 92*)—GROUNDS—SURPRISE.

That the presiding judge directing the trial expressed an opinion for the guidance of counsel in the admission of testimony pursuant to which defendants' counsel omitted testimony they would otherwise have offered did not entitle them to a new trial for surprise; there being no showing that the court would have denied the right to introduce the evidence, so far as material, had it been offered.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 187; Dec. Dig. § 92.*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Carl Hageman against Charles F. O'Brien and another doing business as O'Brien & Garrett. Judgment for plaintiff. From an order denying defendants' motion for new trial, they appeal. Affirmed.

Frank James, of Los Angeles, for appellants. S. G. Tompkins, of San Jose, for respondent.

CONREY, P. J. This action is prosecuted by the plaintiff, a real estate agent, to recover commissions from the defendants, who also are real estate agents. The claim is based upon an alleged contract for services rendered by the plaintiff in connection with sales of land belonging to a certain corporation. Judgment was rendered in favor of the plaintiff, and defendants appeal from an order denying their motion for a new trial.

The lands that were sold are in Mexico. The defendants had their principal place of business in San Francisco, and the plaintiff was located in the county of Santa Clara. The defendants, being the authorized agents for the sale of said lands, delivered to plaintiff a letter dated October 22, 1908, in which they agreed to pay plaintiff "a commission of 5% on all the land we sell through your assistance, whether they are closed directly or indirectly by you." Defendants also delivered to plaintiff a letter, dated November 5, 1908, in which they said:

> "If you desire to operate in San Luis Obispo and Monterey counties, in the sale of the Yaqui Valley lands controlled by us, we will pay you a commission of $6 per hectare on all land sold by you, commission payable to you as and when received by us. All sales to be made through this office and subject to our approval. We will furnish you printed matter, such as we have, and will assist you in every way possible. It is understood, however, that you are to pay your own expenses such as office, advertising, commission to subagents," etc.

Of the sums included in the judgment in this action, $160 was allowed as a commission to plaintiff under the 5 per cent. agreement for land sold to G. B. Seely of Santa Clara county. The remainder of the judgment is on account of lands sold to James Martin, D. McFadden, W. H. Martin, and H. Bardin severally, who were residents of Monterey county.

[1] Among the grounds asserted in support of the motion for a new trial, appellants specify that the evidence is insufficient to support the court's findings wherein it was determined that the defendants employed plaintiff and agreed with him for commissions as alleged in the complaint, and was further determined that, pursuant to said agreement, plaintiff procured purchasers for portions of said lands, as alleged in the com-

plaint and set forth in the findings of fact. Appellants' first point in the argument is that the writings offered in evidence are insufficient to constitute a contract within the meaning of subdivision 6 of section 1624, Civil Code, which appellants claim is applicable to this case. The transactions between plaintiff and defendants here, and their relations to each other and to the property, were not such as to bring the case within the terms of that statute. The defendants were not owners employing plaintiff to sell their land. They were merely agents arranging with another agent to assist in the business of their agency. An agreement to pay for such services does not require a writing to establish its validity. The above-mentioned provision of the Civil Code is to the effect that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent. "That provision was only designed to protect owners of real estate against unfounded claims of brokers. It does not extend to agreements between brokers to co-operate in making sales for a share of the commissions." Gorham v. Heiman, 90 Cal. 346, 358, 27 Pac. 289, 292; Baker v. Thompson, 14 Cal. App. 175, 111 Pac. 373.

[2] While, in form, the letters of defendants to plaintiff were agreements to pay a commission, yet, in substance, they were to share the commissions received by paying the specified sums to plaintiff as and when the commissions were received by the defendants from the owner of the land.

[3] It is next contended that plaintiff did not render the services necessary to entitle him to commissions under the agreement as made. Various decisions are cited to show that, before plaintiff could recover herein, he must prove that he alone was the efficient or procuring cause of the sales. Appellants rely upon Armstrong v. Wann, 29 Minn. 126, 12 N. W. 345; Waterman v. Boltinghouse, 82 Cal. 659, 23 Pac. 195; Dolan v. Scanlan, 57 Cal. 261. It is further contended that, where several brokers contribute something toward the consummation of a sale under brokerage agreements which are not exclusive the owner is not liable to all of the brokers, but only to that one who is the predominating efficient cause of the sale, citing Glascock v. Van Fleet, 100 Tenn. 603, 46 S. W. 449. Under this and other decisions it is claimed that, under the circumstances of this case, the defendants had the right to make the sales themselves without becoming liable to plaintiff for commissions. Assuming that the decisions above noted and others referred to in the brief of appellants' counsel are sufficient authority for the rule as stated, and that such rule is enforceable as between a real estate agent or broker and a landowner who has employed him to make sales, it does not necessarily follow that this rule is applicable as between brokers acting together for the sale of land, and where the agreement between the brokers is in terms like those between the parties to this action. The first agreement applies specifically to lands sold by the defendants through the assistance of the plaintiff. The second agreement also provides that the sales shall be made through the office of the defendants and that the defendants would assist the plaintiff in every way possible in the efforts made by him to sell those lands. It is only necessary for the plaintiff to show that he rendered services in connection with the sales made, and that those services were substantial in character, even though the actual transaction with the purchasers was concluded by or through the defendants.

[4] There is in this record evidence which substantially supports the findings of the court in favor of the plaintiff with respect to the rendering of these services. This being so, the findings must be sustained. As to the sale to Seely, a resident of Santa Clara county, it is shown that the plaintiff called upon Seely and talked about those lands to him, and that subsequently the sale to Seely was closed up through the defendants. With respect to the other purchasers, residing in Monterey county, the facts in general outline are as follows: The plaintiff had advertised these Yaqui Valley lands in Monterey county and had directly interested Henry Bardin as a prospective purchaser. William Martin had become interested in the subject of these Yaqui Valley lands, and had talked with several people about them. He was acquainted with the plaintiff before he went to Mexico, having been introduced to plaintiff by a subagent of plaintiff, and he received from them some of plaintiff's pamphlets. His testimony is that plaintiff did not influence him to go to Mexico, and that one Wellbank, with whom he had business in San Francisco, suggested to him that, if he would go directly to the owners and buy from them, he might be able to make a better bargain than by dealing with the agents. With this idea in mind, William Martin procured James Martin and McFadden to go with him on the trip to Mexico, which resulted in their purchasing the lands. Plaintiff, having learned that William Martin and his party had started for Mexico, took with him Henry Bardin and followed the other party on the next train, overtaking them in Arizona, and the entire party traveled south on the same train to a point near the location of the Yaqui Valley lands. There the defendant Garrett was on the ground ready to meet purchasers. Garrett and Hageman were both active in showing the lands to these visitors, and sales resulted which were closed by Garrett before the parties returned to California. Immediately before the plaintiff returned home, Mr. Garrett gave him a memorandum in Garrett's handwriting containing the names

of James Martin, W. H. Martin, D. McFadden, and Henry Bardin, with figures showing the number of hectares purchased by each one, together with the figures "1030" (being the total number of hectares) multiplied by 6, making a total of $6,180. After arriving at his home in California the plaintiff reported these sales by letter to the office of defendants in San Francisco, and upon the faith of that report the bookkeeper of defendants gave him credit for the claimed commissions. After Garrett's return to San Francisco, the defendants repudiated the credit thus given, and took the position that the plaintiff had not earned those commissions, except with respect to 300 hectares sold to Henry Bardin. They paid him $1,800 on account of the Bardin sale. Some weeks later they sold to Henry Bardin an additional 100 hectares of adjoining land to that which he first purchased, and the judgment here includes $600 allowed to plaintiff as a commission arising out of that additional sale. The witnesses McFadden and James Martin, like the witness W. H. Martin, testified, in substance, that they were not influenced by the plaintiff to go to Mexico or to purchase said lands. Without repeating details of testimony any further, it is sufficient to say that, in our opinion, the evidence is ample to support the findings that the plaintiff procured purchasers for these lands as stated, at least to the extent that he rendered such services in connection with those sales as would be sufficient to entitle him to compensation under the contracts the substance of which we have stated.

[6] Finally, it is claimed on behalf of appellants that they should have a new trial on account of surprise which ordinary prudence could not have guarded against, and on account of irregularities in the orders of the court by which defendants were prevented from having a fair trial. With respect to these grounds of the motion, an affidavit was filed setting forth a part of the record, and it is claimed that by reason of the facts therein stated the defendants were prevented from presenting evidence material to their case. The defendant Garrett was on the witness stand, and was giving testimony as to what happened while the parties were in Mexico, and it is claimed that defendants were proceeding to show by him that the sales were made by him, and not by plaintiff, and that plaintiff was not the inducing cause thereof. The judge presiding at the trial suggested that his opinion at that time was that, unless the influence which induced the purchasers to go down to the Yaqui Valley originated in Monterey county, then he must take the testimony of the purchasers, whose depositions were on file, rather than that of the real estate men:

> "Unless plaintiff was instrumental in causing those people to leave Monterey county and go there, why he stands on very dangerous grounds, so far as his operations were concerned. I will give that very little consideration in the final judgment in the case. * * * I think we can shorten it up. I don't think there is any material dispute as to the transactions down there. If there was it would amount to nothing. Whether the plaintiff was there or Mr. Garrett was there at the time that the agreement or bargain was struck, that don't make any difference, as long as they were acting in concert."

After some further discussion, counsel for defendants desisted from offering further testimony of the witness with regard to the transactions in Mexico. No definite offer of testimony was made, or ruling thereon demanded of the court, more than the explanation of counsel that he was endeavoring to discover to the court what was the inducement or incentive to the parties to purchase this property, and that, in offering the testimony, he was dealing with motive or producing cause with respect to those sales, and proposing to show that nothing was done down there by Mr. Hageman to produce a new incentive or inducing cause to the making of those sales. It is now claimed that the defendants were misled by these interruptions and suggestions of the court, and that this is shown by the fact that the judge stated that he gave judgment in favor of the plaintiff upon the ground, among others, that:

> "Defendant Garrett's conduct and acts alone from the time he met the parties in Mexico until the last sale was made to W. H. Bardin in Salinas would justify the court in rendering judgment in favor of plaintiff."

This statement by the judge is not found in the findings of fact, and must have been merely a part of the opinion or statement by the judge in announcing what his decision would be. Even if, in passing upon the question of error in denying the motion for a new trial, we could consider the opinion or statement thus made by the judge, it would not alone be sufficient to show that defendants were prevented from having a fair trial. This question must be determined from the record of proceedings at the trial taken in connection with the findings of fact. This record, the essential part of which we have stated, does not support the claim of appellants respecting this matter. The mere fact that the judge presiding at a trial gives out some expression of opinion for the guidance of counsel during the progress of the case and suggests the shortening or condensing of the testimony to be given does not constitute a denial of the right to offer evidence, and is not error. In the absence of a contrary showing, it must be presumed that the court would not have denied the right of the party to produce in evidence any fact material to the case. Furthermore, we are not convinced that the suggestions made by the judge were out of place under the circumstances then appearing.

The order denying the motion of defendants for a new trial is affirmed.

We concur: **JAMES, J.; SHAW, J.**

24 Cal. App. 265

PACIFIC GAS & ELECTRIC CO. v. CHUBB.
(Civ. 1193.)

(District Court of Appeal, Third District, California. April 2, 1914.)

1. EMINENT DOMAIN (§ 265*)—COMPENSATION—ATTORNEY'S FEES—JUST COMPENSATION.

Const. art. 1, § 14, provides property shall not be taken or damaged for public use without just compensation, is for the property, and not to the owner, and does not include attorney's fees; the actual value of the land being declared by Code Civ. Proc. § 1249, the measure of compensation for property taken, and the basis of damages to property not taken, but injuriously affected.

[Ed. Note.—For other cases, see Eminent Domain, Cent.Dig. §§ 400, 690–693; Dec.Dig. § 265.*]

2. EMINENT DOMAIN (§ 265*)—"COSTS"—ATTORNEY'S FEES.

"Costs," which Code Civ. Proc. § 1255, provides may be allowed in condemnation proceedings, do not include attorney's fees; section 1021 expressly providing that attorney's fees are not included in the term "costs."

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 690–693; Dec. Dig. § 265.*

For other definitions, see Words and Phrases, vol. 2, pp. 1633–1640; vol. 8, p. 7620.]

3. EMINENT DOMAIN (§ 265*) — DISBURSEMENTS—ATTORNEYS.

Under Code Civ. Proc. § 1255a, providing that on the abandonment of a condemnation suit defendant may be awarded costs and disbursements, which shall include all necessary expenses incurred in preparing for trial, and reasonable attorney's fees, provided that "said costs and disbursements shall not include expenses incurred in preparing for trial, when the action is dismissed 40 days prior to the time set for the trial," attorney's fees are not allowable where there is not an abandonment of the action.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 690–693; Dec. Dig. § 265.*]

Appeal from Superior Court, Placer County; N. D. Arnot, Judge.

Condemnation proceeding by the Pacific Gas & Electric Company against M. M. Chubb. From the part of an order on taxation of costs denying him attorney's fees, defendant appeals. Affirmed.

Robinson & Robinson, of Oakland, for appellant. John M. Fulweiler, of Auburn, and Wm. B. Bosley and Thos. J. Straub, both of San Francisco, for respondent.

CHIPMAN, P. J. This was a proceeding in eminent domain in which the jury awarded the sum of $1,200 as damages. It is stated in the transcript:

> "There was not submitted to the jury, and the jury did not take into consideration any element of attorney's fees of the defendant in the case in its verdict."

In defendant's cost bill were included two items of costs for attorney's fees. A motion to tax the costs was made by plaintiff. At the hearing the items of attorney's fees were stricken out of the cost bill, and as to all other items it was allowed. Defendant appeals from so much of the order as denied attorney's fees.

[1] Appellant claims: First, that the "just compensation" to which the owner of the property is entitled, under section 14, art. 1, of the Constitution, includes reasonable disbursements made by him for attorneys at the trial; second, that section 1255a of the Code of Civil Procedure authorizes the recovery of such disbursements.

1. The constitutional provision is as follows:

> "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, * * * which compensation shall be ascertained by a jury, unless a jury be waived."

Section 1249, Code of Civil Procedure, provides that:

> "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date shall be the measure of compensation for all property to be actually taken and the basis of damages to property not actually taken but injuriously affected."

Obviously the jury could not take into account attorney's fees as an element of property value or of damage to property not taken, and it has been so held. Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833; San Jose R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522; Coburn v. Townsend, 103 Cal. 233, 37 Pac. 202. If the measure of compensation is to be the actual value of the land at the date the summons issues or at the date of the trial, and if this compensation is to be ascertained by a jury or a court sitting as a jury, and if the jury or court cannot take into account attorney's fees as an element of damage, it would seem to follow that the "just compensation" contemplated by the Constitution is the value of the land taken, and the damage to land not taken and nothing more. "Just compensation consists in making the owner good by an equivalent in money for the loss he actually sustains in the value of his property by being deprived of a portion of it." Laflin v. Chicago, etc., Co. (C. C.) 33 Fed. 415; Lewis, Em. Dom. (2d Ed.) § 462. The adjective "just" only emphasizes what would be true if omitted; namely, that the compensation should be equivalent of the property, and this compensation is "for the property, and not to the owner." Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463.

The procedure by which this just compensation is to be ascertained is as much the subject of statutory law as is the procedure by which the property is to be taken. There is no way to exercise the right of eminent domain except as prescribed by statute, and there is no way for the property owner to secure just compensation for his property except by statute law. A statute which would undertake to make the compensation in money less than its fair market value would violate the Constitution, which forbids the taking of private property without just compensation has been made, and less than the market value would not be just compensation.

[2] But there is nothing in the Constitution which prohibits the Legislature from providing that the owner of the property taken may be allowed his necessary costs or expenses in resisting the taking of his property or in ascertaining its value. Hence in the procedure prescribed by the Code of Civil Procedure we find, in section 1255, the following provision:

> "Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court."

The costs here referred to are the ordinary and usual costs attending trials and allowed under statutory provisions and it is expressly provided, by section 1021 of the same Code, that attorney's fees are not included in the term "costs." It has frequently been held that costs are recoverable only by virtue of some statute. If, then, attorney's fees are not allowed by statute as costs, and if they form no part of the "just compensation" which is to be ascertained by a jury or the court sitting as a jury, it is not possible to discover whence comes the power of the court to allow attorney's fees at all. That costs are allowable only by virtue of some statute, see Bond v. United Railroads, 20 Cal. App. 124, 128 Pac. 786, and cases there cited. That the term "costs," as used in the statute, does not include attorney's fees we have not only section 1021 as answer, but the courts have so held. Id.; Miller v. Kehoe, 107 Cal. 340, 40 Pac. 485. Whenever it is held otherwise by our courts it has been by virtue of express statutory authority. Section 1251, Code of Civil Procedure, allows attorney's fees in suit on bond given to recover payment of final judgment in condemnation proceedings; also in escheat proceedings; in a foreclosure suit, section 726; in partition, sections 796, 798; in suit by an executor on claim against the estate, section 1510; in injunctions vacated or dissolved in cases involving water, section 532. Attorney's fees as costs were allowed in mechanic's lien cases, section 1195, but have since been held an unwarranted exercise of power by the Legislature. These are all exceptions to, and confirmatory of, the rule laid down in section 1021, as to the compensation of attorneys.

Appellant's contention is that:

> "The jury in awarding damages not being in a position to make defendant whole, the courts have wisely held that this result must be obtained through a cost bill; that all defendant's necessary costs and disbursements must be placed therein; and that plaintiff corporation must pay the same."

Reliance is placed upon the decision in San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56, where, among other things, it was said:

> "To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of plaintiff, would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs."

In that case the discussion arose on a cost bill in an eminent domain case which included the usual and ordinary costs at the trial, such as witness' fees, mileage, clerk's fees, and the like, but did not include attorneys' fees. The question here was not presented, nor is the decision authority for holding that in such cases any costs are allowable except as authorized by statute.

It may not be questioned that it is within the legislative power to require the condemning party to pay to the landowner reasonable attorney's fees as part of his costs, but the Legislature has not done so in this state with the exception shortly to be noticed. It was said by the Supreme Court, in Coburn v. Townsend, 103 Cal. 233, 236, 37 Pac. 202, 203:

> "We do not know of any law that allows counsel fees in a general judgment for a defendant in a proceeding for condemnation."

We know of no decision in the appellate courts of this state since that case was decided which has changed or modified the rule.

We do not deem it necessary to comment upon the cases cited by appellant from other jurisdictions. It will be found, we think, in these cases that, where attorneys' fees have been allowed as costs, there was some provision of the statute authorizing it either expressly or impliedly. But, if we are mistaken in this, we must still adhere to what seems to be the settled rule in this state. Of the hundreds of cases which have been reviewed by our appellate courts, we have found none where attorneys' fees as costs or otherwise have ever been claimed or allowed.

[3] 2. Section 1255a, Code of Civil Procedure, provides that, upon the abandonment, express or implied, of the suit, a judgment on motion of defendant may be entered "awarding the defendant his costs and disbursements which shall include all necessary expenses incurred in preparing for trial and reasonable attorney's fees" which "may be claimed in and by a cost bill to be prepared, served and filed and taxed as in civil cases," provided that "said costs and disbursements shall not include expense incurred in preparing for trial when said action is dismissed forty days prior to the time set for the trial of said action." Appellant contends that this section "clearly recognizes that attorney's fees are an element of costs and disbursements," and that there is but one exception provided for, namely, "when there is a dismissal within forty days prior to the time set for the trial of the action." We cannot so construe the statute. There must first be an abandonment of the action, express or implied, before attorneys' fees are allowable as costs on a dismissal of the action. The exception is that, if the action is dismissed 40 days prior to the time set for the trial of the action, the expense incurred in preparing for trial shall not be included as costs and disbursements. This is the obvious meaning of the statute, which was not enacted to super-

sede section 1255, but to meet certain abuses arising out of resort to the action without seriously intending to prosecute it to a conclusion. Section 1255a can be held to apply only to the cases or the situation of cases as therein indicated. "Expressio unius exclusio alterius" would seem to apply. Where the case is prosecuted to a final conclusion, section 1255 confers upon the court the power in its discretion to allow costs. Lincoln Northern Ry. Co. v. Wiswell, 8 Cal. App. 578, 581, 97 Pac. 536. Where plaintiff abandons the action, section 1255a introduces another rule, and authorizes attorney's fees to be taxed as part of defendant's costs.

The order is affirmed.

We concur: HART, J; BURNETT, J.

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24 Cal. App. 278

SPRING VALLEY WATER CO. v. ALAMEDA COUNTY. (Civ. 1251.)

(District Court of Appeal, Third District, California. April 4, 1914.)

1. Taxation (§ 47*)—"Double Taxation."

Assessing to one land with its riparian rights, and to another the riparian rights, is double taxation, within the prohibition of the Constitution and Pol. Code, § 3607.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104–114; Dec. Dig. § 47.*

For other definitions, see Words and Phrases, vol. 3, pp. 2186, 2187.]

2. Taxation (§ 421*) — Assessment — "Real Estate"—Riparian Rights.

The inclusion in an assessment of land of riparian rights appurtenant thereto, being contemplated by Pol. Code, § 3617, part of the act as to taxation, defining the term "real estate" to include "all rights and privileges appertaining" to the land, an assessment of land not intended to include such rights should expressly show it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720–727, 729–735; Dec. Dig. § 421.*

For other definitions, see Words and Phrases, vol. 7, p. 5937; vol. 8, pp. 7778, 7779.]

3. Taxation (§ 421*)—Assessment—Description—"Riparian Right."

Under Pol. Code, § 3650, providing that the description in the assessment book, in case of land, shall be "by township, range, section, * * * and when such land is not in a congressional division * * * by metes and bounds, or other description sufficient to identify it," the description, after the township and county, "Riparian rights, the right to take, divert and use water from A. creek and its tributaries," is insufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720–727, 729–735; Dec. Dig. § 421.*

For other definitions, see Words and Phrases, vol. 7, p. 6244.]

4. Evidence (§ 387*)—Parol Evidence—Record of Assessment.

Parol evidence is not admissible to vary or affect the written record of an assessment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1698–1713; Dec. Dig. § 387.*]

Appeal from Superior Court, Alameda County; W. H. Waste, Everett J. Brown, and Wm. S. Wells, Judges.

Action by the Spring Valley Water Company against the County of Alameda. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. L. Hynes and Walter J. Burpee, both of Oakland, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondent.

BURNETT, J. Two actions were brought to recover taxes claimed to have been illegally collected. The first included the assessment for the fiscal year 1911-1912 and the other for 1912-1913. The amount of the two was $88,237, and the same legal question is involved in each action. In fact, they were tried together; but the record is presented in two different transcripts.

The trial was before Hons. William H. Waste, Everett J. Brown, and William S. Wells, judges of the superior court of Alameda county, sitting in bank, and they decided that the purported assessments, as follows: "In Washington township, said county: Riparian rights. The right to take, divert, and use water from Alameda creek and its tributaries," $21,677; and "In Pleasanton township, said county: Riparian rights. The right to take, divert, and use water from Alameda creek, Calaveras creek, Arroyo de Laguna, Arroyo del Valle, Arroyo Honda, San Antonio creek, and contributary branches," $20,160—were and are invalid and void. They based their conclusion, apparently, upon the following grounds:

"(1) That there is no sufficient or adequate description in the said assessment book of the property assessed, or intended to be assessed, as required by the Constitution and laws of the state of California. (2) That riparian rights do not, nor does the right to take, divert, and use water from creeks or streams, constitute property subject to assessment and taxation under the Constitution and laws of the state of California, apart from the land to which such riparian rights are appurtenant, or of which the same constitute and form part and parcel. * * * (4) That all of the riparian lands along the said Alameda creek, Calaveras creek, Arroyo de Laguna, Arroyo del Valle, Arroyo Honda, San Antonio creek, and contributory branches are elsewhere assessed in the said assessment book at their full cash value, including all riparian rights appurtenant thereto, or constituting part and parcel thereof, and that to assess the said riparian rights separately is to assess the same property twice. (5) That the riparian rights to the waters of the said stream are assessable only as appurtenant to, and part and parcel of, the lands riparian to the said streams, and are in the said assessment book illegally and improperly assessed separately therefrom. * * * (8) That, if it is intended in the said assessment to describe water in the said creeks, such water is not property subject to assessment under the Constitution and laws of the state of California, and the said assessment is so inextricably mingled with the assessment of riparian rights as not to be susceptible of separation therefrom."

The foregoing appear in the findings of the court, having been incorporated therein from the written protest of respondent against the payment of the tax. Some other grounds are set forth, also; but they are substantially covered by the quotation.

We think there can be no doubt as to the soundness of at least two of these reasons for holding the assessment to be void. In fact, the position of respondent is contested by the district attorney in a manner somewhat perfunctory; that official probably feeling that on account of the large amount involved and to avoid criticism he should invoke the judgment of an appellate court upon the question at issue.

[1] The primary principle underlying the judgment is as stated by Judge Cooley in his work on Taxation, p. 598, as follows:

> "The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own, the most important security which has been devised for the protection of the citizen in tax cases might be rendered valueless."

As suggested in his preface to the first edition of this work, so vast is the power of taxation, and so readily does it yield "to passion, excitement, prejudice, or private schemes," and so frequently is its execution committed to incompetent hands, that any stretch of power on the part of the Legislature which authorizes the tax or of the ministerial officers who levy or execute it should be unhesitatingly opposed and condemned.

It cannot be disputed that the provisions for the exercise of this power in this state are specific and complete. We are concerned here, however, only with sections 3607, 3617, and 3650 of the Political Code. The first of these provides, in a general way, as to what property is subject to taxation, and it prohibits double taxation. In fact, the Constitution itself precludes double taxation. Estate of Fair, 128 Cal. 607, 61 Pac. 184. It is true, also, that double taxation does not necessarily consist in assessing the same property twice to the same person, but may consist in requiring a double contribution to the same tax on account of the same property, though the assessments are to different persons. Germania Trust Co. v. San Francisco, 128 Cal. 589, 61 Pac. 178; Estate of Fair, supra.

[2] In the case at bar it appears that the land was fully assessed, and, in addition, the assessor listed the "riparian rights." But these rights are unmistakably "appurtenant to" and a part of the land. The case would be no different if the assessor had assessed the land and improvements thereon and thereafter had assessed again the improvements. It is true that in assessing the land he did not specify the "riparian rights"; but it must be assumed that he included them as they are a necessary part of the value of the land. "Riparian rights" are not common to the citizens at large; but they exist as an incident to the right of the soil adjacent to the water. In such ownership they have their origin. McCarthy v. Murphy, 119 Wis. 159, 96 N. W. 531, 100 Am. St. Rep. 876.

> "The rights which a riparian proprietor has with respect to water are entirely derived from his possession of the land abutting thereon." Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 3 Sup. Ct. 445, 4 Sup. Ct. 15, 27 L. Ed. 1070.

Said section 3617 provides that:

> "The term 'real estate' includes: 1. The possession of, claim to, ownership of, or right to the possession of land. 2. * * * and all rights and privileges appertaining thereto."

Riparian rights being "rights and privileges appertaining thereto," the statute contemplates, of course, their inclusion in the assessment of the land, and we must assume that this course was pursued. If the assessor did not intend to include the value of the riparian rights, it should so appear in his assessment.

As to the riparian rights claimed to belong to respondent independent of the ownership of the land, if we assume that they are capable of separate assessment, we would also be confronted with the presumption that they were included in the assessment for the full value of the lands to which said rights are appurtenant. It may be said, also, in this connection, that the other riparian lands as to which respondent did not own any rights were assessed in the same manner as the lands which we have already considered.

The situation, then, is that the lands owned by the Spring Valley Water Company, the lands not belonging to said company, but as to which it is claimed the company owned the riparian rights, and the lands as to which the company had no right were all assessed for their full cash value, without any deduction for riparian rights, and the assessment itself shows that this addition of $3,000,000 to the roll was in the face of the constitutional inhibition as to double assessment.

[3] But, assuming that these riparian rights were not included in the assessment of the parent estate, and that they are capable of separate and independent assessment, still the judgment must be affirmed, for the reason that the description of the property is too vague and indefinite. It is not disputed that they are interests in real property; but the only attempt at identification is the recital of the road and school district in which and of the creeks along which they are located. Said section 3650 provides that the property must be listed "under the appropriate head. * * * 2. Land, by township, range, section, or fractional section; and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, not exceeding in each and every tract six hundred and forty acres, locality, and the improvements thereon." Herein it is manifest there was no pretense of complying with

said requirement. It would be impossible from the assessor's description to identify the property. No idea can be formed even of the number of acres involved, or at what points or on which side of said streams the rights are located. The description would have been no more indefinite and uncertain if the assessor had simply listed the property as "the riparian rights" of respondent in the specified district.

Where the Legislature has declared specifically how a particular kind of property should be assessed on the assessment roll, the statute should be regarded as mandatory, not directory. Hammon v. Nix, 104 Fed. 689, 44 C. C. A. 132. This case holds that the assessor's failure to comply with the Colorado statute requiring the survey numbers of mining claims to be given on the assessment rolls renders a sale void if not corrected before.

Under a statute providing that resident lands shall be assessed by the number of the lot or such other description as it is commonly known by, the description "L. G. M.—J. M. occupant—75 acres," is insufficient. Jones v. Blanchard, 62 N. H. 651.

Under a statute providing that assessors in assessing certain bridges shall state "the metes and bounds of the ground occupied by such bridge" the assessors should state the length of the bridge and approach assessed. Keokuk & H. B. R. Co. v. People, 145 Ill. 596, 34 N. E. 482.

The foregoing are sufficient to indicate what particularity of compliance with the requirement of the statute is demanded of assessors in a matter of so much importance to the taxpayer.

If we conjecture that the assessor had in view the right to take water from said creeks to sell and assume that said right is property which is assessable to respondent, it is sufficient to say that in the condition of the assessment roll such conclusion would be nothing more than a mere conjecture and utterly insufficient to warrant a reversal of the judgment.

[4] It is true that an effort was made to supply the defect in the assessment by the testimony of J. C. Hedemark, chief deputy of the county assessor. After directing his attention to the assessments in question, he was asked:

> "Are you familiar with them, or sufficiently familiar with them to be able to state whether or not there was any deduction made from the amount of the assessments on account of riparian rights, or whether there were separate assessments made, one for the land, and the other for riparian rights?"

The district attorney, in explanation of this question, stated that his purpose was to show:

> "That the land was not assessed for as much as it would have been had the riparian rights been included in the assessments; that the riparian rights for all the various pieces of land that they owned were assessed separately and distinctly from the lands, in order that there might be one assessment of the water rights and one assessment of the real estate."

He further stated that his proposition was "to prove by this witness by extrinsic evidence that the books are incorrect." This the court held he could not do.

It is apparent from the preliminary examination of the witness that his testimony, if received, would have been hearsay, as he did not make the assessment. It is also manifest that his answer could at most have relieved the situation of the appearance of double assessment, and would not have removed the objection as to the description of the property.

But the ruling was clearly justifiable on the ground that parol evidence is not admissible to vary or affect the written record of the assessment.

> "Assessment is, from its legal requirement, and the necessity of preserving its evidence, a written entry, and must depend upon the records of the commissioner's office, and not upon parol testimony, or the private duplicate of the assessor." Philadelphia v. Miller, 49 Pa. 440.

In Allen v. McKay, 139 Cal. 94, 72 Pac. 713, it was held that:

> "The sole and exclusive evidence of the date of the assessment of real property is the date when the assessment roll was completed and certified by the assessor, and the parol evidence of the assessor is not admissible to show an earlier date of such assessment."

In Savings & Loan Soc. v. San Francisco, 146 Cal. 680, 80 Pac. 1089, it is declared:

> "It has often been said that the assessment roll, when completed and certified to the board of supervisors, is the only evidence of the acts and intentions of the assessor," citing cases.

In conclusion it may be stated that no suggestion has been made that respondent is seeking to avoid the payment of a just tax. While that proposition was not urged or directly presented, it is apparent, on the contrary, from what precedes that the assessment in controversy imposed an unjust as well as an illegal burden.

The judgment is affirmed.

I concur: CHIPMAN, P. J.

HART, J. I concur in the judgment on the ground last stated in the opinion of Justice BURNETT, viz.: That the riparian rights attempted to be assessed are not so described in the assessment as to conduce to a ready or definite identification of the particular water rights thus sought to be burdened. As pointed out by Justice BURNETT, the failure thus to describe said riparian rights is plainly repugnant to the requirements of section 3650 of the Political Code.

The findings and conclusions of law, however, appear to be susceptible of inferences which might be so construed as to establish the principle that riparian rights are not capable of being assessed separately from the lands to which they are appurtenant, and upon this point I am not now prepared to express an opinion satisfactory to myself. But it may not be amiss to suggest that, if such rights may be granted without granting the lands to which they are appurtenant, it would seem that necessarily they may be assessed as property separately from such lands, unless it may justly be held that, although so granted or conveyed to another, they are still to be included in the assessments of such lands, and thus assessed to the grantor of such rights. Manifestly if, having been so granted, such rights may be assessed to the grantee, who has not acquired the lands to which they are appurtenant, then they may be assessed separately from such lands while the title to both the lands and the rights still remain in one person. Of course, as Justice BURNETT declares, if such an assessment is permissible, the description of the riparian rights in the assessment must be such as clearly to show that such rights are connected with or appurtenant to the lands of which they are a part and parcel.

The obvious proposition may also be suggested that riparian rights, although in legal contemplation a part and parcel of the lands to which they are appurtenant, are a mere usufruct, and therefore, when it comes to the assessment of lands to which they are appurtenant, cannot be governed by the principle, "Cujus est solum ejus est usque ad cœlum, et ad inferos."

However, as stated, on the propositions here suggested I express no opinion, since there is no necessity therefor in this case.

24 Cal. App. 804

SPRING VALLEY WATER CO. v. ALAMEDA COUNTY. (Civ. 1252.)

(District Court of Appeal, Third District, California. April 4, 1914.)

Appeal from Superior Court, Alameda County; W. H. Waste, Everett J. Brown, and Wm. S. Wells, Judges.

Action by the Spring Valley Water Company against the County of Alameda. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. L. Hynes and Walter J. Burpee, both of Oakland, for appellant. McCutchen, Olney & Willard, of San Francisco, for respondent.

PER CURIAM. This appeal involves the same question as that decided in No. 1251, 141 Pac. 38, of the same title, and, upon authority of that decision, this day filed, the judgment is affirmed.

24 Cal. App. 229

KING v. REED. (Civ. 1095.)

(District Court of Appeal, Third District, California. Sept. 29, 1913. On Rehearing, April 2, 1914. Rehearing Denied by Supreme Court June 1, 1914.)

1. BROKERS (§ 67*)—RIGHT TO COMPENSATION.

Ordinarily a broker engaged to sell property cannot enforce a contract for compensation, where he was employed by and to be paid by both parties, for an agent cannot serve two masters, although the rule is otherwise as to mere middlemen.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52–54; Dec. Dig. § 67.*]

On Rehearing.

2. BROKERS (§ 67*) — COMPENSATION — "MIDDLEMEN."

One employed merely to bring the buyer and seller together, so as to enable them to make their own contract, is a mere "middleman," and where both parties agree he may recover compensation from each.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52–54; Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 5, p. 4500.]

3. BROKERS (§ 86*)—COMPENSATION—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action by a broker who effected a sale of a placer mine, evidence *held* to warrant a finding that he acted as a mere middleman, and that he was not guilty of any bad faith in accepting compensation from the purchasers, and hence might recover from the seller the agreed commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. § 86.*]

Appeal from Superior Court, Calaveras County; Fred V. Wood, Judge.

Action by J. E. King against Ira Hill Reed. From a judgment for plaintiff, defendant appeals. Affirmed.

Snyder & Snyder and Ira Hill Reed, all of San Andreas, for appellant. John Hancock, of San Andreas, and Frank R. Wehe, of San Francisco, for respondent.

HART, J. This is an action to recover the sum of $1,950, alleged to be due the plaintiff from the defendant for services in negotiating and consummating for the latter a sale of a gravel placer mine.

The complaint alleges that, on the 29th day of April, 1907, the defendant entered into a written contract with the plaintiff whereby the first named promised to pay the plaintiff 10 per cent. of the selling price of the gravel placer mine known as "Reed Drift Mine" in the event that plaintiff should sell said mine in accordance with the terms of a bond or agreement for the sale of the same, entered into by and between the plaintiff and the defendant on the 29th day of April, 1907; that the plaintiff thereafter, in pursuance of the terms of said agreement, succeeded in effecting a sale of said mine to J. J. Hickey and Charley Lamb for the sum of $36,000—

> "out of which amount, and under and in pursuance to the terms of said commission agreement, dated April 29, 1907, between the plaintiff and the defendant herein, there was due to plaintiff the sum of thirty-six hundred dollars, being the said ten per cent. of said selling price."

It is alleged that the defendant paid to the plaintiff, on account of the compensation due him under said commission agreement for so effecting the sale of said mine, the sum of $1,650, but no more than said sum, and that there is, therefore, a balance due the plaintiff on the commission which the defendant agreed to pay him for the services referred to the sum of $1,950, for which, together with interest thereon from the date that the same became due, judgment is prayed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The theory of the defense, as disclosed by the answer, is that the plaintiff, having accepted employment from both the vendor and the vendees to negotiate for the one the sale and the others for the purchase of the property involved, cannot recover upon the pleaded contract for reasons which will hereafter be made to appear.

The answer declares that the plaintiff, in the negotiations with the defendant for the purchase of the mine, in pursuance of the terms of his employment by Hickey and Lamb, induced the defendant to execute, on the 21st day of April, 1907, writings in the words and figures following, to wit:

> "It is hereby understood that if on or before next Friday, April 26th, 1907, Joseph E. King with a Mr. Lamb will visit the Reed mine that I agree to sell the latter the said property at the agreed purchase price of thirty-six thousand dollars and this offer to sell is to hold good for ten days after said Lamb appears on the ground.
>
> "Apr. 21st, 1907.
>
> "[Signed] Ira Hill Reed."
>
> "In the event of a sale of the Reed mine to a Mr. Lamb under an agreement of even date given to Joseph E. King fixing the purchase price at thirty-six thousand dollars it is understood that said King is entitled to a commission of ten per cent. pro rata on payments of said purchase price as made.
>
> "April 21, 1907.
>
> "[Signed] Ira Reed Hill."

Said negotiations, proceeds the answer, resulted, on or about the 29th day of April, 1907,

> "in the execution by the defendant of a contract and agreement for the sale of said premises by the defendant to the said Hickey and Lamb, the said contract having been made on behalf of said Hickey and Lamb in the name of plaintiff, J. E. King; that the purchase price of said premises provided in said contract and agreement was the sum of $36,000; that, on said 29th day of April, 1907, the plaintiff procured the defendant to make a further writing, which was and is in the words and figures following, to wit:
>
> "'It is understood and agreed that in the event of a sale of the Reed mine under a bond made this day to Joseph E. King at the stated price of thirty-six thousand dollars or at any other sum he is entitled to a commission of ten per cent. pro rata on payments as made.
>
> "'April 29th, 1907.
>
> "'[Signed] Ira Reed Hill.'"

The answer then avers that, during all said negotiations, the defendant believed that the plaintiff was acting solely for him, and was wholly ignorant of the fact that the plaintiff was acting for Hickey and Lamb therein; that the plaintiff never at any time disclosed to the defendant that he was representing Hickey and Lamb as their agent in said negotiations, but led the defendant to believe that he was acting therein for him alone; that the writings executed by the defendant and quoted above were executed by him with the understanding and belief that the plaintiff was solely representing him (defendant) in said transaction—

> "that defendant would not have executed said writings aforesaid if he had known or had notice before the execution thereof that the plaintiff was so acting as the agent and representative of said Hickey and Lamb."

It is alleged that Hickey and Lamb entered into a contract with the plaintiff whereby they agreed to pay him for effecting the purchase of said mine the sum of $1,800, and that plaintiff has been paid said amount by Hickey and Lamb. The payment of $1,650 by the defendant to the plaintiff, on account of the contract entered into by them, was made, so the answer alleges, before the defendant was made aware of the fact that the plaintiff conducted the negotiations referred to solely as the agent of Hickey and Lamb.

The defendant sets up a counterclaim against the plaintiff based upon the money received by the latter from the defendant under the circumstances above set forth.

The court found all the material allegations of the complaint to be true, and, as to the defense set up in the answer, found that:

> "It is not a fact, as alleged in paragraph 3, that plaintiff negotiated for the purchase of the mining claim or procured the defendant to execute the writings therein mentioned in pursuance only of his employment by Hickey and Lamb or solely as the agent or representative of said Hickey and Lamb."

The court further found that the plaintiff informed the defendant that Hickey and Lamb were to pay the plaintiff a compensation, either in money or an interest in the mine concerned here, to be thereafter fixed by them (Hickey and Lamb) for the services of the plaintiff in negotiating the purchase of said mine; that, upon April 29, 1907 (the date of the last commission agreement between the plaintiff and the defendant), and at all the times he paid the plaintiff said commission aggregating $1,650, and at all times subsequent to the 29th day of April, 1907—

> "the defendant understood and well knew that in the negotiations for the purchase and sale of said mine plaintiff was acting both as the agent of Hickey and Lamb and of defendant, and plaintiff never represented to defendant that he was acting in any other capacity" etc.

The court decided that the defendant was entitled to take nothing on account of the counterclaim set up in the answer, and gave judgment for the plaintiff in the sum sued for, with interest at the rate of 7 per cent. per annum from June 6, 1910. From said judgment and the order denying his motion for a new trial the defendant appeals.

The defendant, although admitting the execution of the agreement to pay the plaintiff a commission of 10 per cent. of the purchase price of the mine, nevertheless contends that said agreement is not binding upon him, since it is made to appear that the plaintiff had previously been employed by Hickey and Lamb to negotiate with the defendant for the purchase for them of said mine. In other words, the position of the defendant is that the plaintiff, in the transaction culminating in the sale of the mine to Hickey and Lamb, acted as the agent of both the latter and the defendant, and on the one hand negotiated for the purchase of the mine and on the other for its sale, and that it is contrary to the policy of the law, or, in other words, against public policy and sound morality, for a party to act as an agent of both parties to a transaction whereby the one purchases property from the other.

The contention of the defendant, as thus stated, presents the most important question involved in this dispute. It is, indeed, the only question submitted here requiring serious consideration.

Some of the authorities make a distinction in such cases between those where the parties to the transaction had knowledge of the fact that the agent is acting for both parties and those where the broker conceals the fact of his double employment. For instance, it is held in Puysley v. Murray, 4 E. D. Smith (N. Y.) 245, that the rule invoked by the defendant here does not apply where the parties are aware, previously to the consummation of the transaction, that the broker is acting as such for both, and the Pennsylvania Supreme Court, in Cannell v. Smith, 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395, appears to take the same view. But there are many cases which refuse to recognize such distinction and strongly condemn, as intrinsically opposed to those principles of right conduct and practice which should be observed in the prosecution of business dealings between man and man, those business transactions in which one and the same person represents, in the consummation thereof, both parties thereto, and in which the interests of the latter are necessarily antagonistic or conflicting. The cases last referred to rest the invalidity of a contract for a broker's commission in such case upon the broad grounds of public policy, and hold that it cannot even be enforced against a party who, knowing that the broker is already employed by the other party, expressly promises to pay him for his services. Lynch v. Fallon, 11 R. I. 311, 20 Am. Rep. 458. In that case it is said:

> "The general rule is that, though a person may be entitled to pay from both parties to a sale or exchange where he acts merely as a middleman to bring them together (Rupp v. Sampson et al., 16 Gray [Mass.] 398 [77 Am. Dec. 416]; Siegel v. Gould, 7 Lans. [N. Y.] 177), he cannot be allowed to serve as an agent or broker for both, because in such case there is a necessary conflict between his interest and duty, and he is exposed to a temptation to sacrifice the interests of one or both of his principals to secure his double commissions. As agent for the vendor, his duty is to sell at the highest price; as agent for the vendee, his duty is to buy for the lowest; *and, even if the parties bargain for themselves, they are entitled to the * * * skill, knowledge, and advice of the agent, and, at the same time, to communicate with him without the slightest fear of betrayal, so that it is hardly possible for him to be true to the one without being false to the other.* (Italics ours.) The claim to charge commissions to both parties is so unreasonable that it cannot be justified by any custom or usage" —citing a large number of cases.

In Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66, it was held that the broker could not recover of the party who last employed him, even though the double employment was known to both parties, and the party who first employed him had paid his commission. The court said:

> "The rule * * * forbids the courts to entertain an action founded upon such a contract. * * * It is perhaps possible for the same agent to serve both parties to such a transaction honestly and faithfully, but it is very difficult to do so, and the temptation to do otherwise is so strong that the law has wisely interposed a positive prohibition to every such attempt"—citing Story on Agency, secs. 210, 211.

In Rice v. Davis, 136 Pa. 439, 20 Atl. 513, 20 Am. St. Rep. 931, the plaintiff entered into an agreement with the defendant by the terms of which the former agreed to effect a sale of the latter's interest in a coal company for the sum of $45,000 and for that service the defendant agreed to pay the plaintiff a certain stipulated sum. The plaintiff, under an agreement with the purchasers, received for his services in the transaction four shares of the stock of the company, worth about $4,500. The defendant knew of this arrangement between the plaintiff and the purchasers of the stock. The defendant requested the trial court to instruct the jury that, under those circumstances, the plaintiff could not recover. This request was refused upon the ground that the defendant knew that Rice was to receive four shares of stock from the purchasers, the trial court saying that:

> "Knowledge of these facts by all the parties, without complaint or dissent at the time, and without any evidence of bad faith in the transaction, takes the case out of the class of cases to which we have been referred, where it has been held that an agent is not to be allowed compensation from both parties to a sale."

The judgment upon a verdict for the plaintiff was reversed by the Supreme Court in an opinion from which we feel justified in presenting here the following extended excerpt:

> "The principle, underlying this case, that an agent for the sale of property cannot, at the same time, act as agent for the purchase thereof, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that 'no man can serve two masters.' As a rule of public policy, it is distinctly recognized in our text-books on agency, and in numerous adjudicated cases, among which are Everhart v. Searle, 71 Pa. 256; Pennsylvania R. R. Co. v. Flanigan, 112 Pa. 558 [4 Atl. 364], and cases there cited. It forbids that any one intrusted with the interests of others shall in any manner make the business an object of personal interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interests at the expense of his principal. The various forms of agency to which the principle is applicable, and the reasons for upholding it, etc., are referred to in Everhart v. Searle, 71 Pa. 256. The controlling facts in that case were briefly these: Flagg, the owner of land, employed Searle to sell the same, and agreed to give him for his services all that he obtained over $125 per acre. Searle found several applicants for the land, but he finally agreed to give Everhart the preference, for which the latter agreed to pay him $500. Flagg and Everhart were brought together, and the sale was concluded. They each refused to pay Searle anything, because, by acting for both of them, he had undertaken to serve two mas-

ters. Suit was then brought against Everhart, and judgment obtained for the $500, and interest. On behalf of the defendant in error, it was contended that Searle neither did nor contemplated any wrong against either vendor or vendee; that neither of them was induced to act by any false representation made by him; that Flagg got his price for the land, and Everhart secured the preference for which he was willing to pay $500, and hence there was no error in permitting the plaintiff to recover. Referring to the position thus assumed, Chief Justice Thompson said there was plausibility and seeming force in the argument that Flagg, the plaintiff's principal in the sale, was not injured by the arrangement with the defendant, etc., but it is unsound. The transaction is to be regarded as against the policy of the law. It matters not that no fraud was meditated, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it. * * *

"Conceding, for the sake of argument, that it would be competent for persons, circumstanced as the parties in this case were, to waive or suspend, by mutual agreement, the operation of a rule of public policy, it cannot be successfully contended that such agreement may be inferred either from knowledge of the fact that such rule has been violated, or from silence or failure to dissent at the time, or from all these combined. Nothing short of clear and satisfactory proof of an express agreement to do so should be regarded as sufficient for that purpose."

The same point is discussed in the case of Clark v. Allen, 125 Cal. 276, 57 Pac. 985. It was there contended, as here, that the plaintiff acted as broker for both the seller and purchaser in a sale of real estate, and to be compensated by both. While the court held that the facts showed that the broker acted only as a middleman, and not as an agent or broker, and was therefore entitled to recover on his commission agreement with the seller as well as legally to claim the compensation agreed to be paid him by the purchaser, it declared that the general principle invoked here by the defendant was sound, thus recognizing the propriety of its application in all proper cases. See, also, Rauer's Law, etc., Co. v. Bradbury, 3 Cal. App. 256, 257, 84 Pac. 1007, opinion by Judge Harrison, and cases therein cited.

[1] With the rule as it is applied in the above last mentioned cases we are fully in accord, and cordially assent to the very just principle which forbids the enforcement of a contract for the compensation of a broker for consummating the sale of property where it is made to appear that he has been employed and is to be paid for his services by both parties to the transaction to which his contract relates. It is, as the above cases declare, no legal defense to such a contract to say that, in a given case, the broker may not have acted in bad faith or dishonestly with either of the parties, or that neither of the principals has suffered actual injury or loss by reason of his double employment. The vice of a double employment in such a case does not depend so much upon what its consequences may have been in a given case as upon what its result is most likely to be in all cases. In other words, the vice of a double employment in such a case inheres in that fact itself, because of the temptation it opens up for double dealing by the broker with one or the other of his principals—because, indeed, it is an employment which is directly opposed to the idea and principles underlying a confidential or fiduciary relation.

Of course, where, as in Clark v. Allen, supra, a party acts as a mere middleman, that is, where he is merely instrumental in bringing together the seller and buyer, who themselves wholly make and carry out the bargain without in that connection any interposition in any manner or degree by such middleman, the situation is entirely different, for then the latter acts as agent or broker for neither the seller nor buyer—there is, in other words, no fiduciary relation existing between him and either the seller or buyer in the transaction, and if, in such case, either or both desire and agree to compensate him for his trouble in bringing them together upon a proposition, with either the making or carrying out of which he has had nothing to do, there can be no legal or moral objection to the enforcement of such agreement.

We might, perhaps, be justified in resting the conclusion that the contract sued upon is one which, under the doctrine of the cases last above referred to, cannot be enforced upon the findings of the court; but the claim is urged that, although the plaintiff in a sense acted for both the vendor and the vendee, his position was only that of a middleman, and that the part he took in the transaction was merely to bring the parties together upon a proposition which was fixed and definite, he taking no part either in the making or carrying out of the bargain. It is therefore deemed essential, in order to determine this question, to look into the evidence to some extent.

It appears that the plaintiff, whose business was that of a broker, engaged principally in negotiating sales of mining properties, on an occasion long prior to the date of the first of the several transactions directly leading up to this litigation, had been employed by the defendant to sell the mine involved here. Originally Reed wanted $60,000 for the property, but later reduced the price to $40,000. King did not succeed in disposing of the mine at the time or on the terms above mentioned, and nothing more seems to have been done either by King or Reed looking to the sale of the mine until about the latter part of March, 1907, at which time King met Reed near a small bridge in the town of San Andreas, the place of residence of the latter, and had a conversation with him relative to the mine. King testified:

"He asked me in that conversation about the mine and suggested that I try to sell it. * * * The judge [referring to Reed] said, 'What can you do for me on the Reed mine? She is looking pretty good just now.' I said, 'Judge, I can't do anything for you on that mine; your price is too high.' He said, 'What would you call a reasonable price?' I said, 'Judge, I told you what I think a reasonable price for the mine, about $35,000.' He said, 'I wouldn't take that, Joe; that is like giving it away; however, I am kind of hard-pressed for money just now, and would take a reasonable figure for the mine.' I says, 'What do you call a reasonable figure, Judge?' He says, 'Why, I don't know just now. I will think the matter over and let you know.'"

It appears that one R. R. Smith was associated to some extent with the plaintiff in the business of selling mining property. It does not clearly appear whether Smith was a permanent partner of King, or merely connected with him in occasional deals of the character of the one here. It does appear, however, that in the particular transaction concerned here he was interested with King, and the two acted together or jointly in an effort to effect the sale or purchase of the property. Smith, it seems, prior to the time at which King secured the option involved here for the purchase of the mine from Reed, had been talking to Hickey and Lamb about purchasing the mine—that is to say, he endeavored to interest them in the property with a view of effecting a sale of it to them.

Lamb testified that a short while subsequent to the time Smith first spoke to him about buying the property, the latter introduced him to King. In his presence, Smith and King held a conversation in which it was agreed that King should procure an option for the purchase of the mine and that the same should thereafter be turned over to Hickey and Lamb. They (King and Smith), testified Lamb, said that they would secure the option at the very lowest price, and Hickey gave similar testimony, which was not contradicted or the fact to which it relates denied by either King or Smith. In this connection, it may furthermore be noted that Reed testified (and upon this point his testimony is nowhere contradicted) that King said to him that "he had parties he thought would take the mine, if I would put the price at the lowest possible figure." Hickey and Lamb concluded to take the option, if the same could be secured by King and the price for the mine was reasonable. King then proceeded to press negotiations with Reed for an option on the mine, and urged him to put the price of the property down to the lowest figure that he might be inclined to sell it for.

On April 20, 1907, and after the understanding had with Hickey and Lamb, as above related, and, as will be seen, prior to the date of the execution by Reed of the written memorandum of April 21, 1907, authorizing King to sell the mine and of the commission agreement of the same date, the plaintiff addressed the following letter to said R. R. Smith:

"Richard Russell Smith, Dear Sir and Friend —I went down to the old man's mine today & I panned 12 pans as they came out, of the mine & the result I ship to you today under a separate cover in the form of a package. You can show it and weigh it for Mr. Lam & tell Him that it is 12 Pans one pan off of each car just as it was coming to the mill to day when I was down there. He has a Brest about one hundred and 60 ft. wide of good dirt. I am to see him Monday & see about a Bond for time enough examine it & you tell Mr. Lamb I will surely count on him & you showing up when I phone to you that I have the Bond. I tell you friend Dick that property at $30,000.00 or $35,000.00 is cheap & awful cheap if a man gets Holt of it & opens it up. The old man has a good foreman there now but he is threatening to quit. The old man is still at the same old game of pulling his boss around. Now friend Dick I am going after the old man & pull him down for all I can & then I will turn it over to Mr. Lam, if he wants it for just what I get it for, he to allow us a small Interest in it a small Interest in that mine will be worth a lot more than a commission if the mine is put on its feet sure as I am writing this letter to you. Now if Mr. Lam, will Join us in this he will never regret his buy for he cannot fail. I have played this game of gravel mining to long to get very badly FOOLED. I am not one of Solomans profits or wise men but I know a good thing in gravel when I see it & that mine would be cheap at $50,000.00 but I am going to do my best to make the old man believe it would be well sold at $30,000. Well you and Mr. Lam will hear from me in a day or to be sure to show Mr. Lam the gold I send that mine is OK. Yours, J. E. King.

"Notice I have written this letter so as to get Lam interested so you can just let on as if you dont know whether I wanted you to expose my letter or Not but let him read it just the same; the mine is OK Dick. Joe."

After the above letter was written, and on the 29th day of April, 1907, Reed and the plaintiff entered into and executed a written agreement whereby the former agreed:

"In consideration of the faithful performance of the terms and conditions by said party of the second part (plaintiff) as hereinafter set forth, * * * to sell and convey the said 'Reed' mine to said party of the second part, at any time within sixty (60) days from the date of these presents, upon payments and conditions as follows"

—and then follows a specification of said "terms and conditions."

Contemporaneously with the execution of the foregoing agreement, the defendant executed a second commission agreement, whereby, as in the first similar agreement, he agreed to pay the plaintiff 10 per cent. on "the stated price of $36,000.00, or any other sum" for which the mine might be sold, the commission to be paid pro rata on payments as made according to the terms specified in the bond.

On May 18, 1907, King assigned the bond or option obtained from Reed for the purchase of the mine to Hickey and Lamb, the latter agreeing in writing to pay King, in consideration of said assignment—

"five per cent. of the total purchase price of the said $36,000.00, amounting to the sum of one thousand eight hundred dollars," etc.

Thereafter, Hickey and Lamb, exercising their right under said bond or option, purchased the mine from Reed for the sum of $36,000.

It was admitted by King that he received from Hickey and Lamb the sum of $900 on account of the commission which they agreed to pay him as a consideration for the bond or option.

It is, as we have seen, admitted in the complaint that King received from Reed the sum of $1,650 on account of the commission which the former agreed to pay him for negotiating the sale of the property.

The foregoing involves a sufficient review of the evidence to show beyond peradventure that, in the transaction resulting in the sale of the mine, the plaintiff was more than a mere middleman; that, indeed his position was that of a broker, and as such represented in the deal both the vendor and the vendees, negotiating for the one the sale and for the others the purchase of the property. Upon this point no question of conflict in the evidence arises. The plaintiff admitted the dual employment. In other words, according to his own testimony, he was *employed by* both the parties to the deal. His commission agreements with the vendor and vendees show that he was employed or retained by each of the parties to the transaction to consummate its execution, for which service he was to receive compensation from each. Obviously, where one is employed as a broker to sell or negotiate the purchase of property, he becomes the agent and not a mere middleman of the party thus employing him. His principal is then entitled to the full and exclusive benefit of his skill, knowledge, and advice in the transaction which thus he has agreed to manage, and obviously this service the broker cannot give if he also be employed by one intending or desiring to buy the property and whose interest in the transaction must necessarily be adverse to that of the owner.

The Smith letter, which constitutes testimony the verity of which is not required to be determined by the aid of those rules by which the question of the truth or falsity of testimony given ore tenus at nisi prius is tested, and which, therefore, tells its own story, is distinctively significant in that it clearly shows that, from the very beginning, King's scheme was to secure authority from both the vendor and vendees to effect a sale and purchase of the mine, from which fact the inference is clear that thus he desired to place himself in a position by which he could himself entirely control the situation and so manage the deal as to insure the receipt by him of the compensation which both the vendor and vendees might promise to pay him. This construction of the letter is clearly confirmed by his subsequent conversations with Reed in which he declared to him that he (Reed) asked too great a sum for the mine and suggested that he reduce the price to a reasonable figure—a figure at which he had considerable reason for believing that he could sell it to Hickey and Lamb. But the letter in question is particularly important because it emphasizes the wisdom of the rule which puts the stamp of disapproval upon the act of a broker in accepting employment as such from both the vendor and the vendee in the same transaction, in which, at one and the same time, in consideration of a promise of compensation by each, he is to negotiate for the seller the sale and for the buyer the purchase of the property involved. Under such circumstances, a broker cannot ordinarily be fair and faithful to either of his principals. Indeed, he thus places himself in a position in which the temptation to subordinate the interests of at least one or the other of his principals in the transaction to his own is so very great that it is not easy even if possible to resist it. As before declared, under the rule announced in the cases above referred to, the mere fact of the double employment in a transaction involving adversary or conflicting interests itself vitiates or renders void and nonenforceable such a contract as the one here, regardless of the consequences flowing therefrom in a given or particular case, and, under the admitted facts in this case, the contract upon which the plaintiff has sued comes clearly within the bar of the doctrine so announced, and cannot for that reason legally be enforced.

As to the money already paid to the plaintiff by the defendant, our conclusion is that the latter should, under the circumstances disclosed by the evidence and the findings, be held to have waived, to the extent of said payment only, the rule proscribing the enforcement of such a contract. In other words, since the court finds, upon sufficient evidence, that the defendant, at all times pending the existence of the transaction here, knew of the double employment of the plaintiff, the voluntary payment by the former to the latter of a portion of the stipulated commission should be regarded and treated as the equivalent of an express waiver by the defendant of the right, otherwise available to him, to claim the invalidity of so much of the contract as has been voluntarily executed by him. This is merely to apply the rule that, where a contract is, for certain reasons, void ab initio, and a party thereto voluntarily performs its terms when fully cognizant of the circumstances which render it invalid, he will not where, as here, he has in point of fact received some benefit from such contract, be aided by the law in setting it aside and having restored to him the thing with which he has parted in the performance of the same. In this case, as seen, only part of the contract was executed by the defendant under the indicated circumstances, and, while this partial performance cannot render valid the part unexecuted, it certainly must, upon every consideration of justice, have that effect upon the part so executed.

For the reasons set forth herein, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

BURNETT, J. In this cause a rehearing was granted by this court for the purpose of giving further consideration to the question whether the plaintiff acted as an agent for both parties or only as a mere middleman in the transaction involving the sale of the mine referred to in the complaint. A general view of the case may be presented by the following quotation from the opinion filed herein, September 29, 1913:

"This is an action to recover the sum of $1,950, alleged to be due the plaintiff from the defendant for services in negotiating and consummating for the latter a sale of a gravel placer mine.

"The complaint alleges that, on the 29th day of April, 1907, the defendant entered into a written contract with the plaintiff, whereby the first named promised to pay the plaintiff 10 per cent. of the selling price of the gavel placer mine known as 'Reed Drift Mine,' in the event that plaintiff should sell said mine in accordance with the terms of a bond or agreement for the sale of the same, entered into by and between the plaintiff and the defendant on the 29th day of April, 1907; that the plaintiff thereafter, in pursuance of the terms of said agreement, succeeded in effecting a sale of said mine to J. J. Hickey and Charley Lamb for the sum of $36,000, 'out of which amount, and under and in pursuance to the terms of said commission agreement, dated April 29, 1907, between the plaintiff and the defendant herein, there was due to plaintiff the sum of $3,600, being the said 10 per cent. of said selling price.' It is alleged that the defendant paid to the plaintiff, on account of the compensation due him under said commission agreement for so effecting the sale of said mine, the sum of $1,650, but no more than said sum, and that there is therefore a balance due the plaintiff on the commission which the defendant agreed to pay him for the services referred to the sum of $1,950, for which, together with interest thereon from the date that the same became due, judgment is prayed.

"The theory of the defense, as disclosed by the answer, is that the plaintiff, having accepted employment from both the vendor and the vendees to negotiate for the one the sale and the others the purchase of the property involved, cannot recover upon the pleaded contract for reasons which will hereafter be made to appear.

"The answer declares that the plaintiff, in the negotiations with the defendant for the purchase of the mine, in pursuance of the terms of his employment by Hickey and Lamb, induced the defendant to execute, on the 21st day of April, 1907, writings in the words and figures following, to wit:

"'It is hereby understood that if on or before next Friday, April 26th, 1907, Joseph E. King with a Mr. Lamb will visit the Reed mine that I agree to sell the latter the said property at the agreed purchase price of thirty-six thousand dollars and this offer to sell is to hold good for ten days after said Lamb appears on the ground.

"'Apr. 21st, 1907.

"'[Signed] Ira Hill Reed.'

"'In the event of a sale of the Reed mine to a Mr. Lamb under an agreement of even date given to Joseph E. King fixing the purchase price at thirty-six thousand dollars it is understood that said King is entitled to a commission of ten per cent. pro rata on payments of said purchase price as made.

"'April 21, 1907.

"'[Signed] Ira Hill Reed.'

"Said negotiations, proceeds the answer, resulted, on or about the 29th day of April, 1907, 'in the execution by the defendant of a contract and agreement for the sale of said premises by the defendant to the said Hickey and Lamb, the said contract having been made on behalf of said Hickey and Lamb in the name of plaintiff, J. E. King; that the purchase price of said premises provided in said contract and agreement was the sum of $36,000; that, on said 29th day of April, 1907, the plaintiff procured the defendant to make a further writing which was and is in the words and figures following, to-wit:

"'It is understood and agreed that in the event of a sale of the Reed mine under a bond made this day to Joseph E. King at the stated price of thirty-six thousand dollars or at any other sum he is entitled to a commission of ten per cent. pro rata on payments as made.

"'April 29th, 1907.

"'[Signed] Ira Hill Reed.'

"The answer then avers that, during all said negotiations, the defendant believed that the plaintiff was acting solely for him, and was wholly ignorant of the fact that the plaintiff was acting for Hickey and Lamb therein; that the plaintiff never at any time disclosed to the defendant that he was representing Hickey and Lamb as their agent in said negotiations, but led the defendant to believe that he was acting therein for him alone; that the writings executed by the defendant and quoted above were executed by him with the understanding and belief that the plaintiff was solely representing him (defendant) in said transaction; 'that defendant would not have executed said writings aforesaid if he had known or had notice before the execution thereof that the plaintiff was so acting as the agent and representative of said Hickey and Lamb.'

"It is alleged that Hickey and Lamb entered into a contract with the plaintiff whereby they agreed to pay him for effecting the purchase of said mine the sum of $1,800, and that plaintiff has been paid said amount by Hickey and Lamb. The payment of $1,650 by the defendant to the plaintiff, on account of the contract entered into by them, was made, so the answer alleges, before the defendant was made aware of the fact that the plaintiff conducted the negotiations referred to solely as the agent of Hickey and Lamb.

"The defendant sets up a counterclaim against the plaintiff based upon the money received by the latter from the defendant under the circumstances above set forth.

"The court found all the material allegations of the complaint to be true, and, as to the defense set up in the answer, found that: 'It is not a fact, as alleged in paragraph 3, that plaintiff negotiated for the purchase of the mining claim or procured the defendant to execute the writings therein mentioned in pursuance only of his employment by Hickey and Lamb or solely as the agent or representative of said Hickey and Lamb.' The court further found that the plaintiff informed the defendant that Hickey and Lamb were to pay the plaintiff a compensation, either in money or an interest in the mine concerned here, to be thereafter fixed by them (Hickey and Lamb) for the services of the plaintiff in negotiating the purchase of said mine; that, upon April 29, 1907 (the date of the last commission agreement between the plaintiff and the defendant), and at all the times he paid the plaintiff said commission aggregating $1,650, and at all times subsequent to the 29th day of April, 1907, 'the defendant understood and well knew that in the negotiations for the purchase and sale of said mine plaintiff was acting both as the agent of Hickey and Lamb and of defendant, and plaintiff never represented to defendant that he was acting in any other capacity.'"

The judgment was in favor of plaintiff in the sum sued for, and the defendant has appealed therefrom and from an order denying his motion for a new trial.

In passing to the consideration of the question set forth at the outset, it may be incidentally stated that the evidence is sufficient to support the finding of the court that defendant was notified by plaintiff as to the employment by said Hickey and Lamb. The controlling question is the one suggested, however; that is, Can we uphold plaintiff's theory that he was a middleman, that he simply brought the parties together, and that they made the bargain and consummated the sale and purchase without the exercise of any discretion on the part of plaintiff?

[2] In such case it is not disputed, as stated in the former opinion herein, that if—

> "either party or both desire and agree to compensate him for his trouble in bringing them together upon a proposition, with either the making or the carrying out of which he has had nothing to do, there can be no legal or moral objection to the enforcement of such agreement."

The principle applicable to such capacity and which distinguishes it from the fiduciary relation of agency has been announced and illustrated in numerous decisions of the courts.

In Clark v. Allen, 125 Cal. 278, 57 Pac. 985, it is said:

> "If the duty of the broker is simply to bring together two men who desire to exchange their lands, and the broker's entire duty is performed when he has brought the two men together, then we see nothing against good morals and a sound public policy in allowing compensation to the broker from each of the parties. In such a case, the broker is in no sense representing conflicting interests. He has nothing whatever to do with the trade. Under the contract his advice and assistance to either party is not called for. Upon the state of facts here assumed, the broker may be termed a middleman and not an agent in the strict sense of the term."

In discussing the legal and moral principle involved in the dual employment which is condemned by the law, it was said, by Judge De Haven, in McLure v. Luke, 154 Fed. 650, 84 C. C. A. 4, 24 L. R. A. (N. S.) 659, that:

> "It will be found upon examination that this principle of law is only applied in cases where the agent is clothed with some discretion in the matter of advising or negotiating the sale or purchase of property, when the duty which he owes to one principal is inconsistent with that which he owes to the other."

Among the cases cited therein is Knauss v. Krueger Brewing Co., 142 N. Y. 70, 36 N. E. 867, in which the opinion was written by Judge Peckham, afterwards Associate Justice of the United States Supreme Court. The property involved was a brewery, which was sold for $1,822,000. The plaintiff was employed to bring the possible buyer and seller together and in case of sale he was to be compensated by defendant. The plaintiff testified that he was to have nothing to do with fixing the price or terms of sale, that being left to the principals. The defense was that plaintiff, without the knowledge of defendant, was in the employment of the proposed purchaser. The court, in its opinion, said:

> "The whole matter depends upon the character of his employment. If A. is employed by B. to find him a purchaser for his house upon terms and conditions to be determined by B. when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B. for A. to accept an employment from C. to find one who will sell his house to C. upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other."

The term "middleman" is defined by the Supreme Court of South Dakota, in Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889, as follows:

> "A middleman is a broker whose duties are limited by his contract to finding and procuring a purchaser able, willing, and ready to accept his client's terms, or to effect a transaction with his client on any terms satisfactory to both, the term 'middleman' being merely descriptive of the nature of the contract of employment, he being in no fiduciary relation to his principal nor under any obligation not to receive compensation from the opposite party to the transaction, while a broker, in addition to the duties of a middleman,' is employed to use discretionary authority for the benefit of his employer and to act for his best interests, and therefore may not accept a secret double employment or commissions from both parties."

The whole subject is exhaustively reviewed in the note to Leathers v. Canfield, as reported in 45 L. R. A. 33, to which we refer, contenting ourselves with this quotation to which is appended by the author a long list of authorities:

> "Where there is an agreement to pay a middleman for services of value rendered, honestly entered into, it cannot be avoided on the ground that another person with distinct and independent interest has agreed by a separate contract to pay for the same services, and if the broker only undertakes to bring the parties together so that they may make a trade if they choose without his interference in the contract itself as the agent of either party, he is entitled to compensation from both on an arrangement from each."

[3] The record before us, scrutinized with a view of finding support for the conclusion of the trial court, brings the case clearly within the purview of the foregoing declared characteristics of a "middleman." We are justified in asserting that plaintiff had for a long time been authorized to sell the property for defendant, the original price being for $60,000 and then being reduced to $40,000; defendant having executed to plaintiff a bond for the sale at these respective figures. Efforts were made by plaintiff to secure a purchaser, but without avail; plaintiff testifying that he brought four different parties to the mine before bringing Hickey and Lamb. Plaintiff then had a conversation with defendant in which the latter asked the former what he could do for him "on this mine," and the reply was that he thought his price was too high. Thereupon the defendant fixed the price at $36,000. Plaintiff had in view Hickey and Lamb as probable purchasers, having, it seems, succeeded in getting Mr. Lamb interested in the property. This was made known to defendant, and he executed said contracts of April 21st set out in his answer. Hickey and Lamb came to the mine, and in connection with King personally ex-

amined and prospected the property, with the knowledge of Reed, it being known to Hickey and Lamb that King had the option for the sale. The contract of sale was prepared and executed by defendant on April 29th, and after certain changes were made therein, on suggestion of Mr. Hickey, said contract was delivered to King. The price of the property and all the terms of the contract were determined by the parties themselves and King had no discretion whatever in the premises. The whole service performed by him, in brief, consisted in directing the attention of Lamb and Hickey to the mine and in bringing the vendor and vendees together, whereby, through their own negotiations, resulted the sale and purchase of the property. There was not present, therefore, the confidential relation which renders a dual capacity obnoxious to equitable and moral principles.

Indeed, viewing the evidence as the rule requires, we must conclude that there was no taint of fraud or duplicity in the transaction from beginning to end, that no misrepresentations were made and no deceit was practiced by King, and that the respective parties to the sale were informed of the fact that King was to receive compensation from the other.

There is, however, one circumstance that might seem at first blush somewhat irreconcilable with the theory of honorable conduct on the part of respondent. This pertains to a letter written by plaintiff to one Richard Russell Smith, on the 20th day of April, 1907. The letter, though, is rather indicative of the usual broker's "puffing" of property than of downright cunning or dishonesty. It presents also an amusing revelation of the illiteracy and prattling simplicity of the author. Its general tenor may be shown by the concluding portion as follows:

> "I am not one of Solomans profits or wise men but I know a good thing in gravel when I see it & that mine would be cheap at $50,000.00 but I am going to do my best to make the old man believe it would be well sold at $30,000. Well you and Mr. Lam will hear from me in a day or to be sure to show Mr. Lam the gold I send that mine is OK. * * *
>
> "Notice I have written this letter so as to get Lam intersted so you can just let on as if you dont know whether I wanted you to expose my letter or Not but let him read it just the same; the mine is OK Dick."

But whatever may be thought of the letter it cannot be regarded as a factor in the case. There is nothing to show that it was ever seen by Lamb or Hickey, nor is there any ground for the inference that King induced Reed to believe that the mine was worth no more than the actual selling price. In fact, no one had better knowledge of the mine than the owner, who was anxious to sell, and who therefore fixed the price at a sum which he and King agreed might be realized.

That Reed was abundantly satisfied with the sale is disclosed by the circumstance that after receiving $10,000 as a part of the purchase price, rather than retain that as a profit together with the mine, he brought suit to recover the balance due under the contract. It may be said, also, that it is declared by respondent and not denied that the mine proved to be valueless.

After a careful examination of the record and of the authorities, we are satisfied that the evidence is sufficient to support the findings, that they support the judgment, and that no prejudicial error was committed by the trial court. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

24 Cal. App. 303

McGINN v. WILLEY. (Civ. 1147.)

(District Court of Appeal, Third District, California. April 9, 1914. Rehearing Denied by Supreme Court June 5, 1914.)

1. SPECIFIC PERFORMANCE (§ 114*) — CONTRACTS—COMPLAINT—SUFFICIENCY.

A complaint for specific performance of a contract to sell real estate, which sets forth the terms of the contract, tender by the purchaser of the balance due, a demand for a deed, and the vendor's refusal to comply, and that the contract was fair and equitable, is sufficient; it being presumed, if necessary, that the contract was in writing, in the absence of anything indicating the contrary.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

2. FRAUDS, STATUTE OF (§ 129*)—SALE OF LAND — PAROL CONTRACT — PARTIAL PERFORMANCE.

A complaint for specific performance of a parol contract to sell real estate, which alleges payment of the price by the purchaser, and that the vendor had delivered possession to the purchaser, who went into possession by virtue of the contract and performed work on the property, enhancing its value, and remained in possession, states facts to take the case out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 310–312, 314, 318–320, 322, 323, 325, 326; Dec. Dig. § 129.*]

3. VENDOR AND PURCHASER (§ 54*) — CONTRACTS—PERFORMANCE BY PURCHASER — TITLE ACQUIRED.

Where a purchaser of land performs his part of the contract, he acquires the equitable title, and the vendor holds the legal title only in trust, and must account to the purchaser for any money received while acting as trustee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

4. SPECIFIC PERFORMANCE (§ 129*)—PURCHASE OF LAND—RELIEF.

A purchaser of land suing for the specific performance of the contract which he has performed is entitled, not only to a decree of specific performance, but to a decree for any moneys realized by the vendor while holding the legal title in trust for him.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420–423; Dec. Dig. § 129.*]

5. SPECIFIC PERFORMANCE (§ 121*) — CONTRACTS—PERFORMANCE—EVIDENCE.

Evidence *held* to support a finding of a valid parol contract for the sale of real estate followed by part performance by the purchaser, who tendered the balance due and demanded a deed, justifying relief, in view of Code Civ. Proc. §§ 1971, 1972, requiring every transfer of real property to be in writing, without abridging the power of any court to compel the performance of an agreement in case of part performance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

6. APPEAL AND ERROR (§ 941*)—SPECIFIC PERFORMANCE (§ 8*)—GRANTING OF RELIEF—DISCRETION OF TRIAL COURT—REVIEW.

The trial court has wide discretion in granting specific performance, and, where there has been a part performance of a parol contract to convey real estate, and the trial court has decreed specific performance, an appellate court will not interfere, unless the decision is inequitable and unjust.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3807; Dec. Dig. § 941;* Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

7. FRAUDS, STATUTE OF (§ 129*)—PAROL CONTRACT TO CONVEY REAL ESTATE—PART PERFORMANCE.

Where a vendor was only a tenant in common, the possession of the purchaser as an element of part performance to take the parol contract out of the statute of frauds need only be exclusive of the vendor.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 310–312, 314, 318–320, 322, 323, 325, 326; Dec. Dig. § 129.*]

8. SPECIFIC PERFORMANCE (§ 13*)—CONTRACTS ENFORCEABLE.

A decree for specific performance of a contract to sell land will be rendered, though it is impossible for the vendor to perform by reason of a subsequent contract of sale to third persons, where he has not entirely divested himself of the legal title, and as to that the decree will operate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30–32; Dec. Dig. § 13.*]

9. SPECIFIC PERFORMANCE (§ 121*) — CONTRACTS—EVIDENCE.

In a suit for specific performance of a contract to sell an undivided interest in real estate, evidence *held* to sustain a finding that a subsequent agreement was not intended as a substitute for the original, and that the original agreement remained in force, authorizing relief.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

10. SPECIFIC PERFORMANCE (§ 117*)—PLEADING—NEW MATTER.

In a suit for the specific performance of a contract to convey real estate, a new contract alleged to have been substituted for that sued on cannot be relied on, unless pleaded.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 377–381; Dec. Dig. § 117.*]

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Edward McGinn against Charles F. Willey. From a judgment for plaintiff, defendant appeals. Affirmed.

J. B. Curtin and F. P. Otis, both of Sonora, for appellant. J. C. Webster, of Sonora, for respondent.

BURNETT, J. [1] We can perceive no valid objection to the sufficiency of the complaint in this action for the specific performance of an agreement to sell one-sixth interest in a certain mine in Mariposa county. The terms of the contract are set out, the tender of the balance due, and a demand for a deed, and defendant's refusal to comply with the demand appear, and it is further alleged:

> "That the said agreement of purchase and sale between plaintiff and defendant was in every respect fair and equitable, and no advantage of any kind was taken of defendant, and the said consideration so to be paid was a fair consideration for the said interest in said property, and the said sum of $265 was the value of said interest in said property at the time of said agreement of sale between plaintiff and defendant and the full amount asked by defendant therefor."

[2] In support of the complaint it would be presumed, if necessary, that said contract to sell and purchase was in writing; nothing appearing to the contrary. However, upon the supposition that it was a parol agreement, which it was shown to be by the evidence, there is sufficient to take the case out of the statute of frauds by reason of the allegation of certain payments, and that "defendant then and there delivered possession of the said property to plaintiff, and plaintiff went into possession thereof under and by virtue of said contract of purchase and performed work and labor on the said property, and has ever since remained in possession thereof," and that said work and labor in the development and improvement thereof enhanced the value of said property.

[3] Another element, somewhat unusual in this class of cases, is injected by the allegation that, after plaintiff had gone into possession of the property under said agreement of sale, the defendant and the owners of the other interests in the mine entered into an executory contract to sell it to other parties for $30,000, a portion of which had been paid to defendant, and that the executory contract was executed by defendant "under the express agreement and understanding that he was acting as the trustee of the plaintiff herein in executing the same, and that he would account to the plaintiff for all moneys realized by virtue thereof by the said defendant, but the said defendant has failed and refused to account to plaintiff for the said money or any part thereof, and has failed and refused, and still continues to refuse, to pay the same to plaintiff, or any part thereof, though demanded so to do."

[4] It is clear that, if the contract of sale between plaintiff and defendant was executed as alleged in the complaint, plaintiff became the equitable owner of the property upon compliance with its terms, defendant holding the legal title in trust for the benefit of plaintiff, and it would necessarily follow that the latter would be entitled to whatever was

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

paid by another for that interest; but we have the additional consideration that defendant promised to account therefor to plaintiff, and we can discover no reason why the latter should be required to resort to another action to recover it.

The principle is analogous to that set forth in the case of Heinlen v. Martin, 53 Cal. 341, wherein it is said:

> "If the plaintiff holds only the equitable title, and is forced to go into a court of equity to compel a conveyance of the legal title, it is well settled that he cannot afterwards maintain an action at law for the mesne profits, for the reasons already indicated; and, if he cannot recover rents and profits in the action in equity, he is without remedy. But fortunately a court of equity will not permit so great a wrong, and will afford complete relief in such a case. 'If there is a trust estate, and the cestui que trust comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits.' 1 Story, Eq. Jur. 512; 3 Atk. R. 124."

In the opinion is cited, with approval, Worrall v. Munn, 38 N. Y. 137, wherein the facts were similar to those herein, except that the third party had taken possession; the New York Court of Appeals declaring:

> "The general rule on this subject, as laid down by the elementary writers, and in the adjudged cases, is that the court of equity will, so far as possible, place the parties in the same situation as they would have been if the contract had been performed according to its terms; and, to that end, the vendor will be regarded as trustee * * * for the benefit of the purchaser, and liable to account to him for the rents and profits, and the purchaser will be treated as trustee of the purchase money, if not paid, and will be charged with interest thereon, * * * and, when the vendor is himself in the actual occupation of the premises, he is charged with the value of the use and occupation."

See, also, Swain v. Burnette, 76 Cal. 303, 18 Pac. 394.

Here, as we have seen, it appears that plaintiff was entitled to a conveyance at the time of the execution of said contract of sale with said third parties, and therefore, in equity, he was deemed the owner and a just claimant of the consideration received by defendant.

An additional assurance of the soundness of respondent's position is found, of course, in the allegation of defendant's agreement to account to plaintiff.

[5] There can be no doubt as to the sufficiency of the evidence to support the finding as to a valid sale of the premises to plaintiff. This is demonstrated by his own testimony, which, in material respects, is corroborated by the testimony of other witnesses. As to this point we deem it unnecessary to do more than quote the following from plaintiff's statements on the witness stand:

> "Willey told me that he wanted to sell his one-sixth interest in that mine, and that he would take $264 for the same, and I accepted his offer. I wanted to take it all then; but I didn't have the money to pay for it, and he said I could pay one half cash and the other half within one year, and I paid the half, and he accepted it. I had a lot of mining supplies and materials at Stent, and I loaded those tools and cars and blacksmith shop tools, all of which was about the value of $400, and I put them on two wagons and pulled the wagons to the top of the hill and started for the mine the next morning. I told Willey at that time, if I took out a pocket of $10,000, he would be sorry he sold me the mine; but he said it was all right, and whatever I took out of the mine belonged to me, that all he wanted out of it was the amount he had put into it, that he was glad to get out of it, and everything I made out of it I was welcome to. Two hundred sixty-five dollars was a reasonable price for his interest in the mine at that time. It was the value of that interest. After I took possession of the property I worked on the mine timbering the same. We were trying to make a showing to sell the mine. We worked there five months from August, 1907, my brother, William, and myself, and then I came back, and I brought Pete Strike with me; that was about the last of January or in February, 1908, and he worked two months. We were drilling and blasting and looking for pay ore, drifting and opening up the mine, left the quartz and ore right on the property for the purpose of opening it up to get a purchaser. From July, 1907, the work I did enhanced the value of the property. Before the payment of $132.50 was due before the end of that first year, I asked for further time, and Willey extended the time. He told me it would be all right, I could take plenty of time; and he extended the time to September, 1909. About September 1, 1909, I had the balance of $132.50 and took the same to the defendant, Mr. Willey, and offered it to him in payment of the balance due, but I wanted to use $32.50, and Mr. Willey said I could use the $32.50 as long as I wanted it; I could pay him when it suited my convenience. I went into possession under that agreement of purchase."

As to the bond to sell the property he testified:

> "That agreement was entered into on November 13, 1909. I negotiated with James McGinn about the sale of that mine. The defendant, Mr. Willey, had nothing whatever to do with any agreement relative to the sale of the mine, except to sign the papers when they were ready. We had an understanding at the time that I bought that interest from him that he was to sign all papers for the sale of the mine, if we sold it up to the time I got the deed from him; he was to sign any papers I wanted. It was understood and agreed between Willey and me that after July 1, 1907, when I bought him out, everything that came out of the mine belonging to that one-sixth interest would belong to me; that it was my property, and he had no further interest in it, except for the balance of the purchase price; that I was entitled to all that interest would bring. Willey said all he wanted was his money back, and that he hoped I would do well with it; that I was welcome to all I could make out of it. Ever since I bought Willey out in July, 1907, I have done all the assessment work and paid the taxes on that interest."

To the foregoing, it may be added that the testimony shows, also, a formal tender of the balance due and a demand for the deed with defendant's refusal as alleged in the complaint.

This brings the case clearly within the well-recognized rule of equity set forth in such cases as Day v. Cohn, 65 Cal. 508, 4 Pac. 511:

> "Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in the improvement thereof, and par-

tial payments of the price stipulated to be paid for it, constitute part performance of the contract, which takes it out of the statute of frauds, * * * and entitles the vendee to a specific performance of the contract."

And furthermore, in answer to appellant's contention that the agreement was too indefinite as to the time for the payment of the $32.50, we may quote from the syllabus, as follows:

> "No definite time was stated in the agreement for the payment of the purchase money; but, by the terms of the agreement, payments were to be made from time to time as the money should be earned by the vendee. Held, that time was not of the essence of the agreement, and that a failure to make payments as the money was earned did not affect the rights of the vendee; the vendor having acquiesced in the delay."

Additional citation is not required, as the principle is familiar. Indeed, express statutory authority for its application is found in section 1972 of the Code of Civil Procedure, which, in referring to section 1971, requiring every "transfer of real property to be in writing," provides:

> "The preceding section must not be construed * * * to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof."

[6] We deem it unnecessary to notice specifically the cases cited by appellant, as they are not at all inconsistent with the position of respondent. Of course the trial judge is clothed with wide discretion in according or withholding specific performance. This necessarily follows, as the judgment must depend upon the impression made by the particular circumstances of the case upon his sense of justice and equity. We naturally expect and find, therefore, opposite conclusions reached in some cases involving apparently slight differences as to the facts. But where there has been a part performance, and the lower court has decreed the complete execution of the agreement, an appellate court should not interfere, unless it appears clearly that the decision is inequitable and unjust. In the case at bar we cannot say that the court below was not entirely warranted in exacting of defendant a compliance with his contract.

[7] In this connection it may be said that appellant is in error in his position as to the significance of plaintiff's possession of the premises. The contention seems to be that defendant must have delivered *exclusive* possession of the mine to render it an effective circumstance in decreeing specific performance. This would be impossible, since defendant was only a tenant in common, and he could not destroy the right of his cotenants to enjoy their respective interests. The rule requires no more than that the possession of the vendee shall be exclusive of the vendor, that the former, in the use and occupancy of the property, shall be substituted for the latter. That equity should require the vendee of an undivided interest to unlawfully exclude his cotenants from the possession of the property as a condition precedent to the maintenance of "part performance" would be rather a startling doctrine to proclaim.

In Peek v. Peek, 77 Cal. 108, 19 Pac. 228, 1 L. R. A. 185, 11 Am. St. Rep. 244, it is said:

> "The reason assigned for holding possession to be part performance is that, unless validity be given to the agreement, the vendee would be a trespasser. * * * The possession which is referred to by the cases which hold it to be sufficient part performance is a possession exclusive of the vendor."

It is manifest that herein plaintiff would have been a trespasser if effect were not given to his agreement with defendant, and it is equally plain that his possession of the mine was exclusive of the vendor.

[8] There is no more merit in the contention that defendant should not be required to perform the contract since it became impossible by reason of the contract of sale to said third parties. However, this would not apply to said payment received by defendant. It is also clear that he had not entirely divested himself of the legal title to the undivided one-sixth, and as to this the decree would operate.

In Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166, it is said:

> "It is no answer for a vendor to say, when specific performance is sought under his contract, that the interest or title, which the decree seeks to affect, is not as complete as he agreed to convey. If the vendee is willing to enforce the contract against a lesser interest or a less perfect title, it does not lie with the vendor to object on that account. It is only when the vendor has no title nor interest in the lands at all that such a decree will not be awarded, for the very good reason that courts will not attempt to require done what it is so impossible to do. If, however, the vendor has any interest in the property contracted to be conveyed, the vendee may enforce the contract as to whatever interest he may possess"—citing cases.

[9] Another contention is worthy of more serious consideration. It is insisted that according to plaintiff's own testimony the contract upon which he relies was superseded by another agreement subsequently made, and that any failure on the part of defendant to perform the second would not revive the first contract. Attention is called to plaintiff's testimony as follows:

> "Q. Now, Mr. McGinn, isn't it a fact, as you testified, you made a fair, square agreement with Mr. Willey that, if he would pay you back the $100 that you paid him on the second payment on that mine, that you and he would then share equally in that ownership and all moneys that would result from a sale of the mine? A. Yes. Q. Now, when he went back on that agreement, as you say, to divide equally, you went back on your agreement also? A. When he [Willey] went back on his agreement to divide equally, I went back on mine also. Q. You canceled the old agreement by agreeing to divide the $5,000, he have half and you half, and, when he went back on his agreement, you wanted to revive the old agreement? A. Yes; that is about the way it was."

It is therefore claimed that we have a case of novation, to wit: The "substitution of a new obligation between the same parties with intent to extinguish the old obligation." Sections 1530 and 1531, Civ. Code.

It is but fair, though, to say that this statement of the witness was qualified by his further declaration:

> "The old agreement was still in force. The old agreement was to remain the same as it was, but I was to take him back and divide the one-sixth interest with him when he gave back the $100; but he went back on this agreement and said he had concluded to keep all the property and the money I had paid him also. Then I offered him the $132.50, and he refused to take it, and I offered to deposit it in a bank for him; but he said, if I did so, it would be at my own risk."

This would justify the court in finding that the second agreement executed was not intended to constitute a novation, and, having been repudiated by defendant, it did not extinguish the first obligation. Besides, the defendant himself testified that there was no such second agreement, and the court might, of course, have adopted his version of the matter.

The trial judge, though, undoubtedly accepted the account given by plaintiff, as, among the findings, we discover the following:

> "That thereafter, to wit, about August 1, 1910, plaintiff requested of defendant the use of $100, and defendant returned to plaintiff the sum of $100, and it was then and there mutually agreed between plaintiff and defendant that in consideration of the return of said $100 that said plaintiff and defendant would share equally the said one-sixth interest in said mining property, but immediately thereafter, to wit, on or about two weeks after the 1st day of August, 1910, said defendant repudiated his agreement to share one-half of said interest with the plaintiff herein, and stated to plaintiff to the effect that he had concluded to retain all of the moneys paid on account of the purchase price of said property and the property itself, and would not deed to plaintiff any part thereof, and no longer recognized plaintiff as having any rights whatever in or to the said property, or any part thereof."

It is to be observed, however, that the finding is not broad enough to include a novation, since there is no declaration therein that the agreement was made with the intent to extinguish the old obligation.

[10] Besides, this finding is entirely without the issues, and will be disregarded. Marks v. Sayward, 50 Cal. 57. Indeed, defendant did not rely upon a novation, but, to the contrary, disclaimed it, and this, no doubt, is the reason that he did not plead it in his answer. It is held to be new matter of defense in the nature of release or discharge which must be specially pleaded. Piercy v. Sabin, 10 Cal. 30, 70 Am. Dec. 692; Coles v. Soulsby, 21 Cal. 50; Temple v. Teller Lumber Co., 46 Colo. 497, 106 Pac. 8.

Some other questions of minor importance are discussed by counsel, but a consideration of all the points made leaves us satisfied that the judgment and order denying the motion for a new trial should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 238

HALL v. E. W. WELLS & SON. (Civ. 1185.)

(District Court of Appeal, Third District, California. April 2, 1914.)

1. BILLS AND NOTES (§ 497*)—VALIDITY—BURDEN OF PROOF—GOOD FAITH.

Upon proof of fraud in the inception of a note, the burden is cast upon the indorsee to show that he is an innocent holder, as by showing a purchase before maturity or from an innocent indorser for value in the due course of business.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675–1681, 1683–1687; Dec. Dig. § 497.*]

2. BILLS AND NOTES (§ 351*) — BONA FIDE PURCHASER—NOTICE.

The indorsee of overdue paper takes it with notice that it is subject to some defense, and is subject to the defense that it was affected in its inception by fraud, illegality, duress, want of consideration, payment, or some other equitable defense arising out of the transaction in which it was given.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 878–881, 882½–885; Dec. Dig. § 351.*]

3. BILLS AND NOTES (§ 344*) — BONA FIDE PURCHASER—TAKING AFTER ONE INSTALLMENT DUE—NOTICE.

A purchaser or indorsee of a note payable in installments after one installment is due and unpaid is chargeable with notice of the dishonor of the entire note and of the maker's equities, which infirmity affects every installment alike.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 866–868; Dec. Dig. § 344.*]

4. BILLS AND NOTES (§ 517*)—ACTION—SUFFICIENCY OF EVIDENCE—EXECUTION.

Evidence, in an action by the indorsee of a note after maturity, *held* to show that it was signed without the maker's authority, induced by the false and fraudulent representations of the payee's agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807–1815; Dec. Dig. § 517.*]

5. BILLS AND NOTES (§ 517*)—SUFFICIENCY OF EVIDENCE—RATIFICATION.

Evidence, in an action by the indorsee of a note signed without the maker's authority, induced by the false and fraudulent representations of the payee, *held* not to show a ratification of its unauthorized execution.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1807–1815; Dec. Dig. § 517.*]

6. PRINCIPAL AND AGENT (§ 166*) — UNAUTHORIZED ACTS — RATIFICATION — KNOWLEDGE.

A ratification of an agent's unauthorized act in signing a note in the name of his principal can only operate after full knowledge of how it was signed, or that the contract signed included a note.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627–633; Dec. Dig. § 166.*]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by John F. Hall against E. W. Wells & Son. Judgment for defendants, and plaintiff appeals. Affirmed.

Ernest Walling, of Eureka, for appellant. Mahan & Mahan, of Eureka, for respondents.

CHIPMAN, P. J. This is an action on a promissory note of which the following is a copy:

"P. O. Eureka, State of Calif., Aug. 3, 1911. For value received we promise to pay to the order of American Manufacturing Company, fifteen hundred dollars ($1,500) at Chicago, Ill., in installments payable as follows: One month after date $150.00; (then follow nine other installments of $150.00 each, payable in 2, 3, 4, 5, 6, 7, 8, 9 and 10 months after date respectively). Default in the payment of any installment shall at the option of the payee herein, render the unpaid balance immediately due and payable.
"[Signed] E. W. Wells & Son,
"Per E. P. Correll."

It is alleged in the complaint that "defendant by its agent, duly authorized thereto, made and signed" said promissory note; that, prior to the commencement of the suit and before the maturity of said note, the payee, for a valuable consideration, sold, assigned, and transferred said note to the Commercial Security Company, a corporation duly incorporated under the laws of the state of Illinois; that, prior to the commencement of the suit, said last-named company, for a valuable consideration, sold, assigned, and transferred said promissory note to plaintiff, who ever since has been and now is the owner and holder thereof.

In its answer defendant denies the execution of said promissory note; denies that by its duly authorized agent or any agent of defendant it executed the same; denies the alleged transfers of said promissory note and the payment of a valuable or any consideration therefor. It is further alleged, on information and belief, that said E. P. Correll (who executed said note) "signed the name of E. W. Wells & Son to a certain contract of which the following is a copy": Then follows a somewhat lengthy and complicated document which is an order for "1 touring car, described on reverse side; 16-42 piece dinner sets"; and sundry articles apparently to be used in conducting some sort of a contest by which the manufacturing company was to bring about an increase of defendants' sales of merchandise from $45,000 per annum to $65,000. For the property ordered and other considerations the defendant was to pay $1,500. The promissory note in question was appended to the contract and was part of it, but was detachable without interfering with other parts of the contract. It is alleged that Correll was induced to sign said contract through the false and fraudulent representations of the payee's agent, one W. W. Gray, the particulars of which are set out, that said company failed to keep and perform the covenants by it agreed to be performed, in certain respects, which are set out.

The cause was tried by the court without a jury. Findings of fact were waived and defendant had judgment. Plaintiff appeals from the judgment and order denying his motion for a new trial.

The American Manufacturing Company is a Tennessee corporation and, we infer, has its place of business in Lexington, Tenn., and has a sales' house in Chicago. The Commercial Security Company is an Illinois corporation doing business in Chicago. Plaintiff is an attorney residing in Lexington, Tenn. The testimony submitted by plaintiff consists of his deposition and the depositions of the officers of the two corporations.

The secretary of the manufacturing company testified that the contract or "order for one of its automobile advertising deals" was procured by its agent, W. W. Gray; that "E. W. Wells & Son never claimed at any time or in any way that they did not execute the order or note referred to in the order, or that they did not authorize any one to execute the same for them. The order was received by the American Manufacturing Company on August 8, 1911."

One of the claims made by plaintiff is that, even conceding Correll's lack of authority, defendant ratified the act of signing its name to the contract and note. This contention rests largely on the correspondence between the parties, and hence it becomes necessary to set it out. Witness testified:

"On August 21st, 1911, the American Manufacturing Company received the following telegram from E. W. Wells & Son: 'Eureka, California, Aug. 21, 1911. American Mfg. Co., 150 So. Lasalle St., Chicago. Do not ship automobile till you receive our letter. Conditions of your contract not entirely satisfactory. E. W. Wells & Son.'

"The letter referred to by the telegram and received by the American Manufacturing Company, is as follows: 'Eureka, California, Aug. 22, 1911. American Manfg. Co.—Gentlemen: Confirming our telegram of yesterday we wish to state that your Mr. Gray first called upon the writer (our Willard Wells) and outlined in a general way your proposition; having made all arrangements to take my vacation at this time, could not go into details as I should have done, but turned the matter over to our head clerk, Mr. E. P. Correll. Now the most serious objections we have to this contract is that about 35 per cent. of our entire business is kodak goods. Our contract with the Eastman Kodak Company will not permit us to enter this proposition of yours as you call for each cent purchased at our stores, so you will see that if we eliminate this part of our business your contract cannot be fulfilled. Now we do not want to ask too much, but is there not some way that will be agreeable to you to cancel same? If necessary we think we can transfer the contract to another line of business. Please advise us at once. Yours very truly, E. W. Wells & Son.'

"Telegram marked 'D' Exhibit 'D' and letter Exhibit 'E.'

"In reply to this letter, Exhibit 'E,' the American Mfg. Co. wrote the defendant as follows: 'Sep. 6, 1911. W. W. Wells & Son, Eureka, Cal.—Dear Sirs: Replying to your letter of recent date in reference to order given our representative for automobile to be used in a voting contest, for which you signed note and contract, wish to state that it is difficult for us to cancel an order of this kind, as we immediately passed on your order and ordered the printing matter, and got the machine ready for shipment. We are also obliged to pay the commission to our salesman for taking the order and it would be quite an expense to you if the contest did not go through. In regard to the kodak part of the business will say that if you desire, you need not count them in the sales, that is not give out any votes for kodaks sold and we will make you the same percentage of increase eliminating the sales of Eastman's goods. Our customers are all having marked success with the contest, many of them doubling their sales, and we are sure you would be much pleased and benefited by it. We enclose you two letters showing what success others have had. Awaiting your immediate reply, we are very truly yours, American Manufacturing Company.'"

The manufacturing company again wrote defendant, on September 29, 1911, calling for certain information, and stating:

"Your automobile has been ordered shipped to you and your printed matter will come forward in a few days."

In reply, defendant wrote, on October 6th:

"Your letter dated September 29, 1911, received. We are unable as we have stated before to accept this proposition. See our letter dated August 22, 1911."

Witness testified that on October 4, 1911, the company wrote defendant "offering to cancel the order if the defendant would pay what the company was out on the transaction, to wit, the salesman's commission of $185, the amount paid for discounting the defendant's note, $100, and printed matter $50." There is no copy of this letter in the record. Whether it was received by the defendant does not appear.

Witness Hall testified: "Defendant never offered to accept these terms of settlement"; that "the American Manufacturing Company complied with all the terms of their contract with defendant on their part. The American Manufacturing Company was not the owner and holder of the defendant's note at the time the last letter was written. They had previously discounted it with the Commercial Security Company of Chicago." Witness further testified that the manufacturing company secured $1,380 as consideration for the transfer of said note; that the company "had nothing to do with placing the note in the hands of the plaintiff for collection and have had no control over said note since they sold it."

Witness Crandall, president of the security company, testified that his company purchased the note in question on September 29, 1911, and paid $1,380 for it, and about the middle of August, 1912, transferred it to plaintiff; that, to witness' knowledge, his company "was never informed, either before or after they had purchased said note, as to what the consideration was for it between the original parties to it."

Plaintiff Hall testified:

"Said note was due when it was delivered to me in August, 1912, and I do not claim to be a holder of said note in due course before maturity and for value. The rights I claim under said note are those of a purchaser for value after maturity, and I only claim such rights as the Commercial Security Company had therein. I first saw the note some time during the month of January, 1912, when it was placed in my hands for collection by said Commercial Security Company, and about that time I sent the note to C. P. Cutten, an attorney of Eureka, Cal., for collection. He returned the note to me, and I afterwards sent it to Mr. Ernest Walling of Eureka, Cal., for collection. I did not know what the consideration was that passed between the parties for the making of this note, when the same was delivered to me in January, 1912. I first learned what the consideration was for the making of said note after January 15, 1912. I purchased the note because I was assured by the Commercial Security Company, then my clients, that they were the holders of said note in due course of trade, before maturity, of all installments but the first of $150, due September 3, 1911, and upon which no demand had been made, for a cash consideration, and thereupon I purchased the note, as they said they would rather sell than litigate."

It appeared that Willard Wells and his father, E. W. Wells, constituted the defendant partnership. The members were also interested in the Red Cross Pharmacy, doing business in Eureka, of which E. P. Correll was a member and the manager. The two firms were entirely separate and distinct from each other. Correll had nothing to do with the defendant and had no authority to act for it in any capacity. Willard Wells managed the defendant partnership, his father living in San Francisco. On August 2, 1911, Gray, the agent of the manufacturing company called on Willard Wells and explained the automobile contest scheme being promoted by the manufacturing company. Wells seemed to think favorably of it, but objected that it involved too much for his firm alone and suggested that the two firms in which he was interested might take it up and told him to see Correll. He, shortly after, about noon, met Correll and told him of this scheme and that Gray would call upon him and explain. He testified:

"My purpose in speaking to Mr. Correll was to make a joint matter of it between the two stores, provided anything was done. The next day I left for San Francisco. I was gone twelve days and then returned to Eureka. On my return I had a talk with Mr. Correll within a day or two, and asked him what he had done with the automobile contest, if he had gone into it, and he said, 'I thought we had better take it up, and I have entered into an agreement with him.' He had no copy of the agreement and I did not see any copy until the month of September, 1911, or October, 1911, possibly 60 days after the date of its signing. A copy of it was then sent through the mail to E. W. Wells & Son. Immediately after having the talk with Mr. Correll on my return, I wired the American Manufacturing Company, and also wrote them. The telegram and letter have already been read in evidence. At the time I wrote the letters read in evidence and at the time I sent the telegram, I did not have any copy of the contract. I was relying at that time in regard to the terms of the contract upon the information I had received from Mr. Gray."

He testified that he did not know there was a note signed by Correll until the automobile arrived when the company was immediately notified by telegraph that it would not be received and "was held at their disposal." The bond which was to have been given by the company was sent to the Humboldt County Bank, in October, 1911, but neither defendant nor Correll had notice that it was there. Witness testified:

"The American Manufacturing Company never furnished any 1912 Howard automobile under this contract as called for by it. The automobile that was sent was a 1909 'Crow' machine. I employed an expert to examine the machine sent, and his report to us was that it was not according to the specifications in any sense of the word. It was a very inferior car to the one called for by the contract. I refused to accept the car, and the American Manufacturing Company were notified by my attorneys to that effect by wire, and also that the car was held at their disposal. I know from their letters that they received that telegram. I never authorized E. P. Correll at any time to sign the name of E. W. Wells & Son to this note, nor to any instrument. When I sent the first telegram, I knew that Mr. Correll had signed a contract because he told me so, but I did not know anything about any note being signed. I know the gist of the contract and knew that it took in the sale of kodaks. I have no recollection of ever hearing that there was a note signed until the automobile arrived and I put the matter in the hands of my attorneys Mahan & Mahan. The telegram notifying the American Manufacturing Company that we would not accept the automobile was sent November 29, 1911. I received a copy of the contract before that, some time in October."

On cross-examination he was asked to explain what he meant by his letter of August 22, 1911, and answered:

"I wanted Mr. Correll to determine whether he wanted to take it up or not, and whether he thought it was a good proposition as between the red Cross Pharmacy and E. W. Wells & Son's stores. I intended if we handled the proposition at all to handle it between the two stores. At the time I came back from the city and at the time I wrote the letters introduced in evidence, I did not know that Mr. Correll had signed the contract 'E. W. Wells & Son' alone. I had not the slightest idea how he had signed it, whether he signed it Red Cross Pharmacy or E. W. Wells & Son, although I naturally supposed that he would sign it E. W. Wells & Son. The first I knew it was signed E. W. Wells & Son was when I received the copy of the contract. Mr. Gray understood at the time I was talking to him that I was to see Mr. Correll and see what could be done between the two stores. I did not tell Mr. Gray that I would turn the matter over to Mr. Correll to handle. The matter was turned over to him because he made this contract. I did not communicate to Mr. Gray my intention of having Mr. Correll act for us in the matter, but he went to see Mr. Correll because I told him to. Q. Did you intend for Correll to act for you in the matter if he saw fit to go into the proposition at all? A. In one sense of the word I did; I told Correll if he thought it was a good proposition that we would take it up. Q. That was what your intention was when you talked with Mr. Gray, too, wasn't it? A. In one sense of the word, yes. In my conversation with Mr. Correll after my return he told me he had taken the matter up with Mr. Gray and signed the contract with him. * * * In turning the matter over to Mr. Correll my idea was that unless he saw fit to take the matter up for the Red Cross Pharmacy the thing was ended. It was for him to say what he thought about it and then confer with me for further dealings; if it was agreeable for the Red Cross Pharmacy, then I would consider it for E. W. Wells & Son. * * * That is what I had in mind when I wrote the letter marked Exhibit E, stating that I had turned the matter over to Mr. Correll."

Witness Correll testified that, soon after he met Mr. Wells, Gray called on him and said that Wells had told him to call and have witness look into the automobile proposition. Later in the afternoon Gray returned and explained the scheme fully. Witness testified:

"I told him to go and see Willard Wells and get his final approval of the thing and then come back again and I could close the matter up. That was in the afternoon of August 2d. Willard Wells was in town then. Mr. Gray went away and came back the next day in the afternoon, and he told me he saw Mr. Wells, and that he was very well satisfied with the whole proposition, and that he was willing to go in with his store, and that we could go in together on that proposition. That was on the 3d he told me this. Then I told Mr. Gray to go ahead and fix the matter up. He fixed the papers up and I looked at them, but to tell the truth I looked more at the automobile than anything else. I asked him all kinds of questions about the automobile, and he gave me a full detailed account about what kind of a machine it was and what a good grade of machine it was. He said it was a 1912 Howard car, and the same kind of a car as is represented on the contract. After he got the paper made out he handed it to me and wanted me to sign it. I told him that I would sign the paper only with the understanding that it was satisfactory to Mr. Willard Wells. I was going to sign it Red Cross Pharmacy first, then I told him that we had no rating, and I don't know whether to sign it E. W. Wells & Son or not. He said: 'Yes, go ahead; sign it E. W. Wells & Son.' I told him then it must have the absolute approval of E. W. Wells & Son. I would only sign it on that condition. He said he saw Mr. Wells and it would take a month to fix everything up satisfactorily. At that time Willard Wells was gone. At the time I signed it, I did not know that I was signing a promissory note. I did not know that until Willard Wells called my attention to it, after one of the Mr. Mahans had called his attention to it; that was after the machine arrived, about the 25th of November. I talked with Willard Wells after he returned. I don't know whether I told him I had signed it or not, but I did not tell him I had signed the name of E. W. Wells & Son and I did not tell him I had signed a promissory note. The first conversation I had with Mr. Wells about signing the name of E. W. Wells & Son to it was when the contract came back, about the 3d or 4th or 5th of October. Willard Wells in the first conversation I had with him never in any way authorized me to sign the name of E. W. Wells & Son to this paper. I simply signed it that way because the Red Cross Pharmacy had no rating, and I never imagined I was signing a serious paper of that kind, and I signed it on the condition that it should have the approval of Willard Wells."

He was asked, on cross-examination, why he signed the name of E. W. Wells & Son to the note and not the names of the two stores. He answered:

"I didn't know it was a note, I was going to sign Red Cross Pharmacy, and I told him that we had no rating, and it was a kind of mutual agreement that I should sign 'E. W. Wells & Son,' and I only signed that on condition that it would be absolutely satisfactory to E. W. Wells & Son. I did not know this was a note. I did not read it before I signed it because I was very busy that day and did not have time to go into the matter thoroughly, and in fact I never signed a paper like this before in my life. * * * Mr. Gray came back a second time and told me he had seen Mr. Wells and told him that I was satisfied with it, and he told me that it was satisfactory to Mr. Wells to take the matter up. That was the day I signed the contract. The last time I talked with Mr. Gray, Mr. Wells had gone away."

[1] Plaintiff testified that he did not claim to be the holder "in due course before maturity and for value," but solely under "such rights as the Commercial Security Company had therein" and that he knew what the consideration of the note was. It was held by us, in Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322, that upon proof of fraud in the inception of the note the burden is cast upon the indorsee to show that he is an innocent holder, which he may do by showing that he purchased the note before maturity or from an innocent indorser for value in the usual course of business. See, also, cases there cited.

[2] The indorsee of overdue paper takes it with notice that it is subject to some defense, for he takes it at a time when in due course it should have been paid. He is therefore subject to the defense that it was affected in its inception with some inherent vice, as, for example, fraud, illegality, duress, want of consideration, payment, or some equitable defense arising out of the transaction in which the paper was given. 1 Daniel on Negotiable Instruments, § 725a.

[3] The evidence was that the security company purchased the note after the maturity of the first installment. This raises the question whether a purchaser or indorsee of a promissory note, payable in installments, after one installment is due and unpaid, must be charged with notice of the dishonor of the entire note and of the maker's equities; and does such an infirmity affect every installment alike?

Mr. Daniels, in his Negotiable Instruments (volume 1, § 787), says:

> "If the note be payable by installments, it is dishonored when the first installment becomes overdue and unpaid, and he who takes it afterward takes it subject to all equities between the original parties."

Vinton v. King, 4 Allen, 562, Fued v. Tibbetts, 57 Mo. 359, and Hart v. Stickney, 41 Wis. 630, are cited and fully support the text. The reason for the rule is given in Vinton v. King, and seems to us entirely satisfactory. Said the court, by Mr. Justice Metcalf:

> "The note is a single contract to pay $212 in four half-yearly installments, and the plaintiff took it with notice on its face that, as to the first installment, the defendant might have a justifiable cause for withholding payment, whatever that cause might be; whether a cause which affected that installment only—as a release thereof by the payee, or a legal set-off against him to the amount thereof—or a cause which between him and the payee, vitiated the whole note, as want of failure of consideration, unlawful consideration, fraud, or duress. And if the payee had sued for the recovery of the first installment, before the second was payable, the defendant might have defeated the action, by showing that the note was wholly void; and a judgment for him, on such ground of defense, would have been conclusive against the maintenance, by the payee, of a subsequent action to recover the other installments."

It remains to determine whether defendant supported its defense by sufficient evidence.

[4] There is, in our opinion, sufficient evidence to show that the contract and note, purporting to have been executed by defendant, was signed without its authority induced by the false and fraudulent representation of the agent of the manufacturing company. This is fully shown by the testimony of witness Wells and witness Correll and is undisputed. The only question as to which there might be two different opinions is: Was the court authorized to find from the evidence that defendant did not ratify the act of Correll in signing its name to the so-called order and promissory note?

We have given the evidence very fully and need not enter upon an extended comment as to what inferences may justly be drawn from it. The payee of the note is answerable for the acts of its duly authorized agent, Gray, among which were his false representations that defendant had agreed to enter into the contract and that Correll might sign for it; that Gray prepared the papers and directed how they should be signed; that he left no copy with Correll, in the absence of which Willard Wells, who represented the defendant, had no means of knowing what were the provisions of the contract. Correll testified that he did not know he was signing a promissory note, and Wells testified that he did not know this fact until his attention was called to it by his attorneys after he had written the letter of August 22, 1911. No copy of the contract was sent to defendant until some time in October. This letter, of August 22, 1911, relied upon by plaintiff as a ratification of the contract, was written in ignorance of its details and especially in ignorance that it had attached to it a promissory note signed by defendant. There was no correspondence between the parties except this letter of August 22d and the reply of September 6th, until September 29th, when the manufacturing company wrote the letter hereinabove set out, to which defendant repeated its statement that it would not accept the proposition, calling attention to its letter of August 22d. It was on September 29, 1911, that the note was assigned to the security company, but it did not get into the hands of plaintiff as owner until about a year later, although he had it for collection in January, 1912.

[5, 6] Turning to the letter of August 22d, we cannot see how it can by its terms be regarded as in any sense a ratification; it distinctly states that the contract is not satisfactory. When the telegram of the 21st of August and the letter of the 22d were sent, defendant had but an imperfect knowledge of the contract and none whatever as to how it was signed or that it embraced a promissory note signed by defendant. If Correll may be said to have been defendant's agent, which in fact he was not, he could not exceed his authority as such agent and a ratification of

his unauthorized acts can only operate after full knowledge of those facts. Davidson v. Dallas, 8 Cal. 227. "The * * * essence either of an election or ratification is that it is done advisedly, with full knowledge of the party's rights" (King v. Lagrange, 50 Cal. 328); the party to be charged "must have fully known what he was doing" (Brown v. Rouse, 104 Cal. 672, 38 Pac. 507). We can discover no intention of defendant to ratify the contract relied upon, either in the correspondence or anything that took place between the parties. Some printed matter was sent defendant in October which it refused to receive. The automobile was not sent until in November, more than two months after defendant had written that the contract was not satisfactory, and it was not such a machine as was promised but an inferior one. The manufacturing company was promptly notified that it would not be accepted and that it was held subject to the shipper's order.

Plaintiff alleges in his complaint that:

> "The said defendant by its agent, duly authorized thereto, made and signed its promissory note of which the following is a copy."

We do not think he has established this issue either by showing the direct authority of defendant given to its agent or by its subsequent ratification of the act of the alleged agent of defendant.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(167 Cal. 727)

In re DAVIDSON. (Sac. 2233.)

(Supreme Court of California. May 20, 1914.)

1. Courts (§ 212*)—Jurisdiction—District Courts of Appeal—Mandamus.

The provisions of the Constitution giving jurisdiction in mandamus to the District Courts of Appeal being identical with those conferring similar jurisdiction upon the Supreme Court, the jurisdiction of the Court of Appeal is coequal with that of the Supreme Court, and it may compel the superior court to enter a default in an action which is appealable only to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515; Dec. Dig. § 212.*]

2. Courts (§ 212*)—Jurisdiction—Supreme Court — Transfer of Cause by District Court of Appeal.

The order of the District Court of Appeal transferring such case to the Supreme Court under rule 32 (119 Pac. xv), providing for the transfer of cases appealed to the wrong court, does not give the Supreme Court jurisdiction, and the papers will be returned to the District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515; Dec. Dig. § 212.*]

In Bank. Original application to the District Court of Appeal by Mattie E. Davidson for a writ of mandamus against Eugene D. Graham, County Clerk of San Joaquin County. Cause transferred to the Supreme Court by the District Court of Appeal, and returned to the District Court of Appeal by the Supreme Court.

For subsequent opinion in District Court of Appeal, see 141 Pac. 834.

Webster, Webster & Blewett, of Stockton, for petitioner. A. H. Carpenter and Walter F. Lynch, both of Stockton, for respondent.

PER CURIAM. This is an original proceeding by mandamus begun in the District Court of Appeal of the Third District to compel the county clerk of San Joaquin county to enter the default of the defendant in a cause pending in the superior court. It appears that the action in which the entry of default is sought is an action in which the appellate jurisdiction is in the Supreme Court. Because of this fact, the justices of the District Court of Appeal were of the opinion that that court had no jurisdiction of the mandamus proceeding, and accordingly an order was made in that court purporting to transfer the cause to the Supreme Court for hearing and decision, and the court forwarded the papers to the clerk of the Supreme Court, believing that it had power to do so under rule 32 (119 Pac. xv).

[1, 2] In this the District Court was in error. The Constitution gives the District Court of Appeal original jurisdiction of proceedings in mandamus, in language identical with that giving such jurisdiction to the Supreme Court. Its jurisdiction in such matters is therefore coequal with our own, and does not depend upon the existence of appellate jurisdiction over the case to which the manda-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mus relates. Hyatt v. Allen, 54 Cal. 355. Rule 32 (119 Pac. xv) does not apply to such a case; consequently the District Court had no authority to forward the papers to the Supreme Court, or to transfer the cause, and its order to that effect does not give this court jurisdiction of the proceeding. We disapprove of Rickey v. Glader, 6 Cal. App. 114, 91 Pac. 414, on this point. The clerk of this court will return the papers in the cause to the clerk of the District Court of Appeal of the Third District. The jurisdiction is with that court, and it must proceed to a decision of the cause, as in other cases.

(167 Cal. 719)

BLANC v. CONNOR et al. (S. F. 6425.)

(Supreme Court of California. May 12, 1914.)

1. Appeal and Error (§ 994*) — Review — Weight and Credibility of Evidence.

It being within the province of the trial court to determine the credit and weight to be given testimony, its finding, disregarding testimony not directly contradicted, will not be disturbed unless it appears there are no matters or circumstances which at all impair accuracy of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901–3906; Dec. Dig. § 994.*]

2. Specific Performance (§ 121*)—Contract to Make Will—Sufficiency of Proof

That a contract of deceased, resting in parol, to will property to plaintiff may be enforced, proof thereof must be definite and distinct.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

3. Specific Performance (§ 121*)—Contract to Make Will—Evidence

Evidence, in an action for specific performance of a contract of deceased to will certain property to plaintiff, *held* to authorize a finding that there was no such contract, but that plaintiff's execution of a quitclaim to deceased, and her statement that she would will the property, were voluntary and parts of no contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

4. Wills (§ 59*)—Contract to Make—Necessity of Consideration.

That a contract to will property may be sustained, it must be found, not merely that it was deliberately made by deceased, but that it was founded on a valuable consideration.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 166; Dec. Dig. § 59.*]

5. Appeal and Error (§ 1048*)—Harmless Error—Admission of Evidence.

Cross-examination of plaintiff to bring out his belief, at the time of an alleged contract, that he had no interest in or claim against his uncle's estate, even if error, was harmless; he having testified that he was always under the impression that he was cut off entirely from participating in the estate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

6. Witnesses (§ 275*)—Cross-Examination.

As tending to rebut the inference from the allegation of the complaint that at the time of making the alleged contract with his aunt, whereby she was to will property to him, he was "first" informed by her that his expected portion in his uncle's estate was forfeited, cross-examination of him to show that previously, from independent sources, he had obtained the information was proper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

7. Evidence (§ 271*)—Self-Serving Declaration—Belief.

The question to plaintiff whether, at the time of his conversation with his aunt, he believed he was entering into a contract with her is objectionable as seeking to elicit a self-serving declaration as to his belief.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. § 271.*]

8. Appeal and Error (§ 171*)—Theory of Case Below

The theory of the pleadings and proof in the trial court having been that a contract was made, the theory of there having been a resulting trust may not be advanced for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063, 1066, 1067, 1161–1165; Dec. Dig. § 171.*]

9. Trusts (§ 110*) — Constructive Trust — Violation of Fiduciary Relation—Evidence

Evidence *held* to show no violation by plaintiff's aunt, with whom he was living, of any fiduciary relation, whereby he was induced to execute a quitclaim deed to her, so as to entitle him to relief as on a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 160; Dec. Dig. § 110.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Stewart Blanc against Ida E. Connor, administratrix of Susan Blanc, deceased, and others. From an adverse judgment and order, plaintiff appeals. Affirmed.

William M. Cannon, of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for appellant. Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for respondents.

MELVIN, J. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The action was one in which a nephew sought to obtain specific performance of an alleged oral contract by which the aunt, according to his declaration, agreed to devise to him a certain parcel of land located in the city and county of San Francisco. The court found that there was no such contract, and the appeal is based largely upon the alleged errors in the making of findings to that effect.

Nearly all of the facts are undisputed. Indeed, many of them are settled by stipulation. Alexander Blanc and his wife, Susan Blanc, a childless couple, resided for many years in San Francisco. Alexander's brother, Stewart Blanc, had married Susan's sister, and that couple had three children; the plaintiff herein being one of them. Stewart

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Blanc, the father, for some reason did not support these little children, and about the year 1872 they were taken into the home of the uncle and aunt, Alexander Blanc and his wife. The plaintiff, who was but one year of age in 1872, remained with his uncle and aunt until the death of Alexander in 1891 and afterwards for several years with the aunt. The boy was sent to school and was treated with affection by his kinsfolk. His mother died in 1876, but it does not appear definitely when his father died. Two days before the death of Alexander (which took place on June 14, 1891) he executed a will by the terms of which all of the estate was to go to his wife, except a parcel of land on Jackson street, which was to go to her for life with remainder to the plaintiff in case he should survive her, and in case of his death prior to hers she was to take in fee simple absolute. The plaintiff was a witness to this will. It was filed for probate and was sustained by the court after a contest in which the plaintiff assisted his aunt in making a defense. At the proper time a petition for final distribution was filed by the widow (who was also the executrix), in which it was alleged that Stewart Blanc had been deprived of the devise to him by reason of his action in becoming a witness to the will (citing section 1282 of the Civil Code). The petition contained the statement that "the said devisee, Stewart Blanc, under the provisions of section 1283 of the Civil Code of the state of California, is entitled to succeed as the nephew of said testator to a share of the estate of said decedent equal to the share he would have been entitled to receive if the will of said testator had not been established, but that such share shall not exceed the devise or bequest made to him in the will," and that since the devise to Stewart was a contingent one, solely dependent upon his surviving his aunt, he was entitled to have distributed to him no present interest in the property. The report accompanying the final account and signed by the executrix described her as the "sole devisee and legatee under the will." Whether this view of the law was correct or not we need not here determine, but it is important, in view of some of appellant's contentions, to know what the belief of Mrs. Blanc was at the time when the alleged verbal contract was made. Plaintiff was of the opinion that he had no interest in the estate by reason of his act in becoming a witness to the will. At his aunt's suggestion he made an assignment to her of any interest which he might have or assert. This assignment was filed with the probate court, and distribution was thereupon had to Mrs. Blanc of the entire estate.

Plaintiff asserts that, at the time the assignment was executed, his aunt proposed to him that if he would sign it, thus simplifying distribution under the will of his uncle, she would make a will in which she would devise to him the Jackson street property. It is the belief of plaintiff that a contract then and there arose between him and his aunt, and that the evidence of such contract is ample, unimpeached, and sufficient in law, and that there was no basis for the court's finding that no such agreement existed. Susan Blanc died intestate October 6, 1900; and her estate was in course of probate when this action was commenced 14 months after her death.

[1-4] It is asserted by counsel for plaintiff that, unless the court is prepared to impute perjury to four uncontradicted witnesses, it cannot uphold the finding of the trial court that no contract was made whereby, in consideration of the execution of the quitclaim by plaintiff, his aunt agreed to devise the Jackson street land to him. The position of counsel for respondents is this: There is no witness to the alleged contract save the plaintiff himself; the other witnesses did not say there was a contract or that Mrs. Blanc admitted the existence of an agreement to devise property to Stewart Blanc, but they did say merely that she expressed an intention of leaving him her property on Jackson street by will; by section 1847 of the Code of Civil Procedure the presumption that a witness speaks the truth may be repelled by the character of his testimony; and the character of plaintiff's testimony was of a sort that justified the court in rejecting his statement regarding the details of the alleged agreement. It is asserted that this is a class of cases sometimes arising in fraud and abounding in perjury, and, although disclaiming any thought that the instant case is so tainted, counsel contend that the court was justified in scrutinizing the testimony very carefully and refusing to accept it as proof of the contract unless it presented a very strong showing that the agreement was made substantially as alleged. It is true that courts are very slow to overturn findings of fact made by a jury and a fortiori those made by a court acting without a jury, even when contrary statements which are uncontradicted appear in the testimony of witnesses. The rule was thus stated in Davis v. Judson, 159 Cal. 128, 113 Pac. 150, in which Mr. Justice Lorigan, delivering the opinion of this department, said:

> "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact; and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court can-

not control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

In many jurisdictions such contracts as that here asserted are scrutinized with the greatest care, and they are only sustained upon the most convincing proof. It is unnecessary to review the many authorities upon this subject from other jurisdictions. In this state the rule is well established and has been ever since the decision of Owens v. McNally, 113 Cal. 451, 45 Pac. 712, 33 L. R. A. 369, which has been reaffirmed every time a similar case has come to this court on appeal. In the opinion in that case, Mr. Justice Henshaw said:

> "Where a contract such as this, resting in parol and sought to be enforced after the death of the other party to it, comes before a court of equity for review, it is scrutinized, and should be scrutinized, with particular care, and only upon a satisfactory showing that it is definite and certain and just will it be enforced. The proofs of the contract should be clear, and the acts of the claimant referable alone to the contract. Ackerman v. Ackerman, 24 N. J. Eq. 587."

That case has been reaffirmed in the late case of Rogers v. Schlotterback, 138 Pac. 732. The rule that proof of the contract to make a certain kind of will must be definite and distinct before a chancellor will enforce specific performance was emphasized in the case of Baumann v. Kusian, 164 Cal. 583, 129 Pac. 986, 44 L. R. A. (N. S.) 756, in which a demurrer to the complaint was held to have been properly sustained, although the contract pleaded was to the effect that the decedent, Mrs. Fisher, had promised to treat plaintiffs as her own children "in every respect." Viewing the testimony of the plaintiff under this rule, we cannot say that the chancellor was in error when he held that there was no proof of a contract to make a will. Plaintiff said that, when his aunt presented to him for his signature the form of assignment to her of his interest in his uncle's estate, she told him that the purpose of obtaining such a document was to get the estate out of litigation, and that, if he signed, she would make a will giving him the Jackson street property as his uncle had wished. The most succinct account of the conversation between plaintiff and his aunt occurred during the cross-examination of Stewart Blanc. Asked to repeat the whole of the conversation in the order in which it occurred, he said:

> "Well, I don't know; it may have been I came into the room, and she may have called me in, I don't know. I could not say positively. And she said, 'Now, here is something more about the case,' and I said, 'What is it now?' She said, 'Here is a paper for you to sign.' I said, 'What is it?' She said, 'Well, it is to close up the estate.' I said, 'Close it up? I thought it was settled.' She said, 'No, this has to be signed before we can get it outside the courts; otherwise, why, it will stay in there for years, probably, and be et up.' She said, 'I want you to sign it.' I said, 'All right, what is it?' So I kind of looked it over, and I said, 'Gee, I will do that all right for you.' She said, 'Everything will be just the same as when the uncle left it.' I started in to sign it, and she said, 'I will make a will and see that you get it.'"

Such a conversation comports as well or better with the theory that plaintiff was impelled by gratitude towards his aunt than with the hypothesis that he was bargaining with her. Each thought that he had forfeited his interest under the will. If he possessed any right to share in his uncle's estate after failure to take under the devise, it was vague and shadowy. Indeed, it does not definitely appear that his father was dead and that he was an heir at law of his uncle, entitled to the benefits, if any, arising under section 1283 of the Civil Code. The whole transaction was such as to justify the conclusion that out of gratitude to the aunt, who had reared and educated him, he was willing to remove any technical obstacle to the settlement of his uncle's estate, and that her declared intention to will the property on Jackson street to him was a similar manifestation of affectionate regard and not part of a contract. In order that such a contract may be sustained, the court must find that it was founded upon a valuable consideration and deliberately made by the decedent. Schaadt v. Mutual Life Ins. Co., 2 Cal. App. 718, 84 Pac. 249. The court may well have decided, in view of the evidence, that Mrs. Blanc, believing the interest of Stewart Blanc in her husband's estate to have been utterly defeated, did not deliberately enter into a contract to devise the property on Jackson street to her nephew in return for a quitclaim which she believed would pass no real interest but would be useful only in hastening distribution of her husband's estate by removing all possible claim by Stewart or his heirs or assigns to some shadowy interest possibly conferred by section 1283 of the Civil Code.

The so-called corroborating testimony need not be reviewed at length. It established statements by Mrs. Blanc that she intended to devise the property to Stewart Blanc, but not that she had an agreement with him so to do.

[5, 6] The appellant's counsel insists that Stewart Blanc and his aunt were bargaining, not for an interest, but for a document, the execution of which was a consideration which should sustain the promise to devise, and that therefore it was error to permit the counsel for defendants to cross-examine plaintiff for the purpose of bringing out his belief that he had no interest or claim against his uncle's estate. Such cross-examination, even if erroneous, could have done no harm, because plaintiff testified, without objection, that he was always under the impression that he was "cut off entirely" from participation in his uncle's estate. It was justified, however, because it tended to rebut the inference arising from the allegations in the complaint that he was first informed by his

aunt, at the time of the making of the alleged contract, that his expected portion was forfeited. By cross-examination it was developed that not from his aunt, but from independent sources, one of them a lawyer whom he consulted more than a year previous to the execution of the quitclaim, he obtained the information that he could enjoy no part of his uncle's estate. This was matter which the court was entitled to consider in the process of interpreting the conversation between the aunt and the nephew.

[7] On redirect examination the witness was asked whether or not he believed he was entering into a contract with his aunt at the time of the conversation which he had undertaken to narrate. Objection to this question was properly sustained, for it sought to elicit a self-serving declaration as to his belief. Murray v. Bethune, 1 Wend. (N. Y.) 191. Since the consent to the contract must be communicated by each of the parties to the other (section 1565, Civ. Code), the undisclosed intention of the plaintiff respecting his wish to contract with his aunt was clearly inadmissible.

It is earnestly contended that the execution of the paper and its delivery amounted to a consideration, no matter what may have been the real interest in the property possessed by the plaintiff, and that such consideration supports the contract. It is unnecessary to examine the arguments in this behalf, because, in view of the court's finding that there was no promise, the consideration which it is asserted might have supported a promise, if one were made, need not be discussed.

Error is predicated on the insufficiency of the evidence to support the finding that Alexander Blanc had two sisters, Ann Howe and Jane Wiley. It appeared from the proceedings in the estate of Alexander Blanc that he had two sisters named Ann Howe and Jane Wiley. The court found in accordance with that showing, but also found as follows:

> "The court is unable to find from the evidence whether Ann Howe or Jane Wiley or either of them survived Alexander Blanc, or whether either of them left any descendants her surviving who themselves survived the said Alexander Blanc."

In view of this finding, we cannot see how appellant could be injured by any insufficiency of proof of their existence.

[8, 9] It is finally contended that either a resulting trust or a constructive trust in favor of plaintiff should be impressed upon the Jackson street property because plaintiff transferred some interest to his aunt by the quitclaim. In support of the doctrine of resulting trusts, Russ v. Mebius, 16 Cal. 355, is cited. In that case there was a promise to devise which turned out to be void. In this case the court found that there was no promise to devise; but we need not discuss the authorities which appellant cites in support of either trust theory, because the pleadings and proof below were based on the proposition that a contract had been made; and another theory may not be advanced in this court for the first time. Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 24, 82 Pac. 374. In any event, if there was a resulting trust in plaintiff's favor, it arose in 1892, and an action thereon was barred by the statute of limitations which was pleaded in the answer.

The theory of a constructive trust is based upon the confidential relations between the aunt and the nephew; his alleged implicit reliance in and obedience to her commands; his ignorance of and her knowledge of the fact that he still had an interest under the law in his uncle's estate, whereby she was enabled to obtain an undue advantage over him. In the first place, there is no allegation in the complaint that plaintiff had any interest in the estate of Alexander Blanc which was passed by assignment. There is a statement that he was a nephew of Alexander Blanc, but no pleading that he became an heir at law by reason of his father's death before that of his uncle. Nor is it shown that he relied on any representation made by his aunt. He testified that he took independent advice of his right to share in his uncle's estate, and believed he had forfeited all right. He entertained this belief from August 8, 1891, up to his aunt's death. The account of the conference with his aunt, given by plaintiff, falls far short of showing violation by her of any fiduciary relation, and under the authority of Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137, he is entitled to no relief as upon a constructive trust.

No other alleged errors require consideration.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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24 Cal. App. 345

Ex parte PRENTICE. (Cr. 248.)

(District Court of Appeal, Third District, California. April 14, 1914.)

LICENSES (§ 7*)—REGULATIONS OF OCCUPATIONS AND EMPLOYMENTS—ORDINANCE—VALIDITY—"MUNICIPAL AFFAIRS."

Under Stockton City Charter (St. 1889, p. 577), as amended by St. 1905, pp. 832, 859, giving the council power to regulate the issuing and granting of municipal licenses, etc., and as amended by St. 1911, pp. 274, 279, giving the city power to license, for regulation and revenue, every kind of business transacted within the city, an ordinance of the city requiring master plumbers to secure a license from the city clerk before engaging in business was not invalid as in conflict with Act March 3, 1885 (St. 1885, p. 12), as amended by Act March 9, 1887 (St. 1887, p. 58), granting to boards of health or health officers in cities the power to regulate the plumbing, etc., and provide for the regulation of plumbers, since, the charter being a freeholders' charter, under Const. art. 11,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

§ 6, the city has power to legislate uncontrolled by general law concerning municipal affairs, and the power to impose a license tax is a "municipal affair."

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

Application by J. B. Prentice for a writ of habeas corpus. Writ denied.

C. M. Gill, of Stockton, for petitioner. De Witt Clary, of Stockton, for respondent.

CHIPMAN, P. J. Petitioner was convicted of the crime of conducting a business as master plumber in the city of Stockton, without first having obtained a license therefor from the tax collector of said city, in violation of the provisions of ordinance numbered 516 of said city.

It is claimed that said ordinance is unconstitutional and void because in conflict with the act of March 3, 1885 (Stats. 1885, p. 12), as amended by act of March 9, 1887 (Stats. 1887, p. 58), an act entitled:

> "An act to grant to boards of health, or health officers, in cities, and cities and counties, the power to regulate the plumbing and drainage of buildings, and to provide for the registration of plumbers."

Sections 42, 43, and 44 of the ordinance in question provide that:

> "No person, firm or corporation shall in the city of Stockton engage in or work at the business of plumbing as a master plumber unless such person * * * shall have first obtained a license therefor from the city clerk and license collector * * * as hereinafter provided."

Section 41: The application for license must be accompanied by an affidavit showing—

> "the name, age and place of business of said applicant and also stating the number of years during which said applicant has carried on business as a master plumber or journeyman plumber."

All licenses shall show the name, age, and place of business of the applicant, and it is made the duty of the city clerk to keep a record of all licenses. Section 42. No license shall be for a period longer than one year, and, when the license has expired, application shall be made for the renewal. Section 44. It is made unlawful for any plumber (except a licensed master plumber or his employé) to engage in the business of plumbing in the city of Stockton, or "to make any connection with sewers, drain, soil or waste pipes or any pipes connected therewith in said city" (section 46), and section 47 requires the payment of $10 annually for such license.

It is claimed that the statute law provides a complete procedure for obtaining plumbers' licenses, and that the ordinance endeavors to provide a different procedure; that the statute requires an applicant for license to take an examination before the board of health of the city, while the city ordinance delegates the power to the city clerk and license clerk of the city; that section 43 of the ordinance provides "for an informal examination in the form of an affidavit" which, it is contended, is in conflict with the statute; furthermore, that the ordinance permits master plumbers to engage in their business or trade on terms declared to be unlawful by the general law.

Reliance is placed upon Ex parte Grey, 11 Cal. App. 125, 104 Pac. 476. In that case the city of San Jose by an ordinance undertook to confer power on the board of police and fire commissioners to appoint a board of plumbing examiners to examine and issue licenses to plumbers. It was held that the city had no power to delegate such power to another body or person, and hence the ordinance was void as in conflict with general law.

By section 30 of the charter of the city of Stockton, act of March 2, 1889 (Stats. 1889, p. 577), as amended (Stats. 1905, pp. 832, 859), the council is given power—

> "to establish and regulate the issuing and granting of municipal licenses and the collecting of license taxes." Subdivision 35.

By an amendment, section 72, subd. 31, the city is given power—

> "to license for purposes of regulation and revenue all and every kind of business transacted * * * in the city; to fix the rates of licenses upon the same and to provide for the collection thereof by suit or otherwise." Extra Session, Stats. 1911, pp. 274, 279.

The city of Stockton is conducting its government under a freeholders' charter. Concerning "municipal affairs," it has power to legislate uncontrolled by general law. Section 6, art. 11, Const. A municipal affair is one which refers to the internal business affairs of the municipality. Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923. Where the power to impose a license tax for revenue is conferred upon a municipality, the power becomes a municipal affair within the meaning of those words in the Constitution (Ex parte Braun, 141 Cal. 204, 74 Pac. 780); and ordinances passed for the purposes of revenue are valid exercise of power, if the municipality by its charter has been given such power (Ex parte Helm, 143 Cal. 553, 77 Pac. 453; Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946).

We think that subdivision 35, § 30, supra, of the Stockton charter confers the power, and it is expressly given by the amendment of 1911.

The writ is denied.

We concur: HART, J.; BURNETT, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24 Cal. App. 315

PEOPLE v. BREMER. (Cr. 316.)

(District Court of Appeal, Second District, California. April 10, 1914.)

1. Criminal Law (§ 311*)—Evidence—Presumptions—Mania a Potu.

As there is no presumption of continuance of mania a potu induced by excessive use of intoxicants, as in the case of general insanity, accused, who claimed that he killed while suffering from such mania, cannot introduce evidence of previous attacks, and expert testimony as to the symptoms of such mania is properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742–744; Dec. Dig. § 311.*]

2. Criminal Law (§ 57*)—Defenses—Temporary Insanity—Intoxication.

Temporary insanity from voluntary intoxication does not free the person afflicted from responsibility for his acts, as in the case of general insanity or permanent insanity from long-continued, excessive use of intoxicants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 65, 69, 70; Dec. Dig. § 57.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

William Bremer was convicted of murder in the first degree, and he appeals. Affirmed.

Shreve & Shreve and J. T. Reed, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of murder in the first degree, and, upon recommendation of the jury, his punishment fixed at imprisonment for life. He appeals from the judgment and from an order of court denying his motion for a new trial.

One of the defenses interposed by defendant was that at the time of the homicide he was suffering from that form of insanity known as mania a potu. The homicide occurred at about 6 o'clock in the evening of August 27, 1913. Defendant testified that for years he had indulged in the use of alcoholic liquors; that sometimes he would go for months without drinking and then get intoxicated. He was then asked whether he had ever had delirium tremens, whether after he had been drinking he was possessed of the belief that he saw snakes or animals, followed by other questions whereby it was sought to show that on one occasion some twelve years before the homicide, and on another occasion one or two years prior thereto, and again on the night before the killing of deceased, he suffered from certain designated hallucinations, delusions, and illusions, such as usually manifest themselves in cases of mania a potu. Defendant then made an offer to prove by the witness the facts sought to be elicited by the questions, and that a night or two before the homicide, after defendant had been drinking more or less for a month, he awakened and imagined he saw near his bed a monster or dragon, which vanished, returned, and disappeared. To all of these questions and offer an objection that the same were incompetent, irrelevant, and immaterial was sustained. These rulings are assigned as error.

[1, 2] When the existence of general insanity is established, it is presumed to continue. This presumption, however, does not apply to that form of the disease known as delirium tremens brought on by one's own procurement and passing away with the removal of the exciting cause. State v. Potts, 100 N. C. 457, 6 S. E. 657; Goodwin v. State, 96 Ind. 551. Hence, since there is no presumption of its continuance or recurrence, the fact that during a period of twelve years defendant had had attacks of delirium tremens, the last one "a night or two before the killing," would not tend to prove "the existence of a paroxysm of the disorder * * * at the very time of the act" with the commission of which he was charged. Volume 2, p. 780, Clevenger on Medical Jurisprudence. For this reason we are constrained to hold that the evidence sought to be elicited, if *otherwise competent*, was wholly immaterial. Moreover, defendant's normal condition was that of a sane man. His alleged mental derangement was not only transient in character, but such condition was the result of his voluntary acts in the use of alcoholic liquors. Under such circumstances, one prosecuted for the commission of a crime cannot urge such condition as a defense thereto. In People v. Fellows, 122 Cal. 233, 54 Pac. 830, the Supreme Court, in discussing a like question, said:

> "No act committed by a person while in a state of voluntary intoxication is less criminal for this reason, saving that, when the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any specific species or degree of crime, the circumstance of voluntary intoxication may be considered by the jury in determining the fact whether or not that particular purpose, motive, or intent was present. Pen. Code, § 22. But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, mania a potu, or insanity produced by and consequent upon his own voluntary act. Such is the import of the instruction in People v. Lewis, 36 Cal. 531, and it is that form of insanity, if insanity it may be called (for we do not think the word happily chosen), to which the instruction has reference. A sane man, therefore, who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, impair his perceptions, derange his normal faculties, and lead him to the commission of an act which in his sober senses he would have avoided. Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then, and in such case, he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain."

This language was quoted with approval in People v. Hower, 151 Cal. 643, 91 Pac. 507.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

What is said upon this point is equally applicable to the ruling of the court in excluding expert testimony as to the symptoms or manner in which mania a potu manifests itself. It follows that no error was committed by the court in excluding the evidence.

The court instructed the jury that:

> "Settled insanity produced by long-continued intoxication affects responsibility in the same way as insanity produced by any other cause, but it must be settled insanity, and not merely a temporary mental condition produced by recent use of intoxicating liquor."

Authority for this instruction is found in People v. Travers, 88 Cal. 233, 26 Pac. 88, and the principle there enunciated reiterated with approval in People v. Hower, supra. Appellant, in support of his attack upon the instruction, cites People v. Ford, 138 Cal. 141, 70 Pac. 1075, where the court said:

> "Temporary insanity as a defense to crime is as fully recognized by law as is permanent insanity."

What was there said, however, had no reference to that form of so-called insanity designated mania a potu, where, as stated, the condition is due to the voluntary act of the party.

The defendant requested 26 instructions, 10 of which were by the court given as requested, and 16 assignments of error are predicated upon the rulings of the court in refusing to give the remainder of those requested. As to nearly all of these assignments no argument is made in support of the alleged erroneous rulings; appellant contenting himself merely by setting out in hæc verba the instructions refused. A careful examination of the record discloses that the charge of the court, when taken in connection with the instructions given at the request of defendant, fully and fairly covered every phase of the case presented, and embodied a correct statement of the law applicable thereto, save in one or two minor matters which in no event could have been prejudicial to the rights of defendant.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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24 Cal. App. 313

LAPIQUE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 1488.)

(District Court of Appeal, Second District, California. April 9, 1914. Rehearing Denied by Supreme Court June 8, 1914.)

1. Mandamus (§ 51*)—Subjects of Relief—Courts and Judicial Officers.

When the lower court from the bench stated that he thought petitioner entitled to a certain order, and directed petitioner's attorney to draft the order, and then later refused to sign it, petitioner was not entitled to a writ of mandate to compel him to do so, since the statements from the bench were no part of the record or entitled to consideration.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98–100; Dec. Dig. § 51.*]

2. Mandamus (§ 26*)—Subjects of Relief—Courts.

It is not a function of a writ of mandate to review error.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 62; Dec. Dig. § 26.*]

Petition by John Lapique against the Superior Court of the County of Los Angeles, Fred H. Taft, Judge, for a writ of mandate. Denied.

John Lapique, of Orange, in pro. per. Percy V. Hammon, of Los Angeles, for respondent.

SHAW, J. It appears from the petition that in December, 1913, Lapique, as the assignee of an unsatisfied judgment rendered in favor of his assignor in 1905, applied to the superior court of Los Angeles county, pursuant to the provisions of section 685, Code of Civil Procedure, for an order directing the issuance of an execution for the enforcement of the judgment. Upon the hearing of the motion, the judge from the bench expressed the view that the application so made by plaintiff should be granted, and directed plaintiff's attorney to prepare and submit an order for the issuance of an execution, stating that he would sign the same. Thereafter the court refused to make such order, but, instead, on January 8, 1914, as shown by the return of respondent, made its order denying the application.

[1] The petition for the writ must be denied. The views of the judge expressed from the bench as to plaintiff's rights cannot be construed as an order granting the motion. It appears to be petitioner's contention that, since the judge announced from the bench that, in his opinion, plaintiff was entitled to the order asked for, he should have adhered to the opinion so expressed. What the judge said from the bench, since it did not constitute the order of the court, was immaterial. We have repeatedly held that the opinion of a judge filed in a case, where inconsistent with the findings or other action of the court, is not part of the record or entitled to consideration in determining questions brought up on appeal. So here, until the order was, in fact, made, there was no action on the part of the court, and the expressed views of the judge were as much subject to change as though they had remained unuttered.

[2] By making the order denying plaintiff's application the court acted upon the same. Whether the ruling be erroneous is immaterial, for, since it is not the function of a writ of mandate to review error (Gesford v. Superior Court, 114 Cal. 466, 46 Pac. 383), conceding its existence, no relief can be had in this proceeding.

The application is denied.

We concur: CONREY, P. J.; JAMES, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24 Cal. App. 251

OTTEN v. SPRECKELS. (Civ. 1183.)

(District Court of Appeal, Third District, California. April 2, 1914. Rehearing Denied by Supreme Court June 1, 1914.)

1. Appeal and Error (§ 979*) — Review — Order Granting New Trial—Conflicting Evidence.

Where the evidence is conflicting, an order granting a new trial on the ground of insufficiency of the evidence is entirely within the legal discretion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873, 3877; Dec. Dig. § 979.*]

2. Trial (§ 139*) — Weight of Evidence — Question for Jury.

While plaintiff in a civil action is bound to establish his case by a preponderance of the proof, the fact that many witnesses may testify directly in his favor, and no opposing testimony is directly given, does not make the question one of law or authorize the court to withdraw it from the jury in the first instance; the court, on an application for a new trial, being only then authorized to determine whether the probative value of the evidence furnishes the required degree of proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

3. Damages (§ 189*)—Breach of Contract—Evidence.

In an action for breach of the contract for the maintenance of a newspaper route, evidence *held* to warrant a finding that the value of the route did not exceed $5,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 288, 512; Dec. Dig. § 189.*]

4. Evidence (§ 142*)—Value—Materiality.

In an action for breach of a contract to maintain a newspaper route, the fact that plaintiff was offered certain sums for certain subdivisions of the route, while admissible as some evidence of value, did not furnish the true, or even an approximately satisfactory, test of its true value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416–423; Dec. Dig. § 142.*]

5. Evidence (§ 113*)—Question of Value.

In an action for breach of a contract to maintain a newspaper route, evidence that the newspaper procured a purchaser of the territory willing to pay plaintiff $5,000, a sum which the defendant estimated to be the actual value of the route, while admissible on the question of value, was only of equal evidentiary force with plaintiff's evidence of offers of specified sums for subdivisions of the route, and was not a satisfactory test of actual value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259–296; Dec. Dig. § 113.*]

6. Evidence (§ 113*)—Question of Value.

In an action for breach of contract to maintain a newspaper route, evidence of what plaintiff earned therefrom with approximate uniformity and the sums actually paid therefor were admissible on the question of value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259–296; Dec. Dig. § 113.*]

7. Evidence (§ 418*)—Parol Evidence—Real Parties to Contract.

Where a written contract for a newspaper route was signed by O. as the party of the second part, plaintiff was entitled to show by parol that O., in signing the contract, acted as plaintiff's agent or attorney in fact, and that plaintiff was the real party in interest, and, having proven such fact, the written contract was admissible as the basis of plaintiff's cause of action for its breach.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906–1911; Dec. Dig. § 418.*]

8. Pleading (§ 122*)—Breach of Contract—Denial of Execution.

Where, in an action for breach of a contract, the defendant, on information and belief, denied the execution and delivery of the contract, but positively denied that it was signed by O. as a matter of convenience, acting for plaintiff, who claimed to be the real party in interest, such denial was not tantamount to an admission of due execution.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. § 122.*]

9. Appeal and Error (§ 1039*)—Review—Variance—Prejudice.

Where, in an action for breach of a contract to maintain a newspaper route, there was no material or substantial difference in terms and conditions between the oral agreement on which plaintiff was permitted to recover and the written contract alleged in the complaint, and defendant in his answer, in effect, admitted that plaintiff was vested with a right to distribute and deliver the paper in a specified district described in the complaint, but denied the value of the route as alleged, and in a cross-complaint admitted that plaintiff, under an agreement with defendant, had been engaged in distributing the paper in the district referred to, defendant was not prejudiced by an alleged variance, in that the contract sued on was alleged to have been in writing, while plaintiff was permitted to recover on an oral one.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. H. Otten against John D. Spreckels. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. Bourdette & Bacon, of San Francisco, for respondent.

HART, J. The plaintiff brought this action to recover damages in the sum of $10,750, for the alleged breach by the defendant of the terms of a certain contract, which is set out in hæc verba in the complaint.

A jury was called to try the questions of fact, and a verdict returned in favor of the plaintiff, assessing his damages at the sum of $8,000. In due time a motion for a new trial was submitted by the defendant upon the grounds of newly discovered evidence, etc., excessive damages appearing to have been awarded under the influence of passion and prejudice, insufficiency of the evidence to justify the verdict, and errors in law occurring at the trial and excepted to by the defendant. Upon hearing said motion, the court made the following order:

"* * * It is ordered that the motion will be granted, unless the plaintiff within 20 days from the date of entry hereof remits from the amount of the verdict and judgment herein the sum of three thousand ($3,000.00) dollars. If said amount will be remitted, an order will be entered denying defendant's motion for a new trial."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The plaintiff having refused or failed to remit the amount so specified by the court, the motion for a new trial stood as having been granted. This appeal is prosecuted by the plaintiff from the order granting said motion.

The contract set out in the complaint is in writing, and purports to have been made on the 30th day of September, 1903. Although, in the preliminary part of the instrument, technically called the "premises," the name of the plaintiff appears as "the party of the second part," the instrument thus purporting to be that of the defendant and the San Francisco Call, as the parties of the first part, and the plaintiff as the party of the second part, the agreement was signed by one Nicholas Ohlandt as the second party, or in the place and stead of the plaintiff.

The agreement constitutes the written evidence of a sale and transfer by the first parties to the second party, in consideration of the sum of $3,000, paid by the latter to the former, of "the agency of and for the said San Francisco Call, and of and for that certain newspaper route of the said * * * Call, lying and being in and about the city of Berkeley, state of California, and more particularly described as follows, to wit," and here follows a minute description of the boundaries of the route so sold.

The contract provides that the parties of the first part will, at a certain specified price per week, or at such other price as may thereafter be mutually agreed upon by the parties, furnish the second party with a sufficient number of the daily issues of said newspaper to supply said newspaper route. It further provides that the second party "shall manage, control, and conduct the said newspaper route in such manner, and with such efficiency, as shall be for the best interests of the said San Francisco Call newspaper, and shall maintain and preserve the extent and value of said newspaper route to the satisfaction of said parties of the first part. * * * And the said parties of the first part * * * further reserve the right to give their written consent before any legal transfer of this contract shall be made."

The complaint alleges that:

> "Although said contract was signed by Nicholas Ohlandt, the real party in interest was and still is this plaintiff; that said contract was signed by said Nicholas Ohlandt only for convenience; and that said facts were, at the time of entering into said contract, and ever since, well known to defendant."

It is further alleged that, on the 1st day of January, 1909, the defendant "ceased to supply the daily or any issues of said San Francisco Call to this plaintiff, and ever since has refused and neglected, and still refuses, to supply any thereof to plaintiff."

The defendant filed an answer to the complaint and also a cross-complaint.

By the answer, the defendant alleges that "he has no knowledge, information or belief as to whether the contract alleged in said complaint between the said plaintiff and this defendant was ever executed or delivered as alleged in paragraph 1 thereof, and, basing his denial upon that ground, denies that the plaintiff and defendant herein did, on the 30th day of September, 1903, or at any other time, or at all, enter into the contract set out" in said complaint, "or ever entered into any contract of any kind or character," or that he ever entered into the contract set out in the complaint with Nicholas Ohlandt as a party thereto. The answer positively denies that the real party in interest to said contract was or is the plaintiff, and likewise denies that said Ohlandt signed said contract for convenience only, or that, at the time the same was executed, the defendant knew that the plaintiff herein was the real party in interest to the said contract.

The cross-complaint avers that, for more than two years prior to the commencement of this action, which was April 21, 1909, the plaintiff was engaged in distributing the Call in a certain district in the town of Berkeley, under an agreement whereby the plaintiff paid the defendant for such newspapers as were delivered to him for distribution in said district, and collected from the subscribers payments for the papers so delivered monthly, in the name of the Call, for the defendant, "and at all times conducted the business of distributing the said newspapers and collecting therefor, as the business of the said San Francisco Call"; that said agreement further provided that the plaintiff should so manage the distribution and delivery of the said newspapers and make such collections as to maintain and preserve the extent and value of the business done by the said Call in said district, and to the satisfaction of the said defendant.

It is charged in the cross-complaint that the plaintiff failed properly to manage and conduct said business, in that he frequently failed to deliver said newspapers to subscribers at the proper hour in the morning; that in rainy weather he caused the same to be thrown into the yards of the subscribers, instead of delivering them upon the porches, so that said papers would lie in the rain and become wet; and that he failed to present or collect the accounts for said newspapers promptly, and would allow the same to run for months at a time uncollected. It is alleged that, by reason of the plaintiff's aforesaid carelessness and negligence in properly managing said business and promptly collecting the accounts for the newspapers supplied to him by the defendant for distribution and delivery in said district, the business of the said defendant in the said district was reduced and decreased in extent, and its value greatly depreciated. The defendant, so the cross-complaint further alleges, often called the plaintiff's attention to his remissness in attending to and managing the business in the manner exacted by the agreement, but that the plaintiff paid no attention to the remonstrances of the defendant in that regard; that the business of the defendant was thereby threatened with extinction; and that thereupon, and on the 1st day of January, 1909, the defendant did refuse to deliver to the plaintiff any newspapers to be used by him and distributed in the said district, and commenced the distribution thereof upon his own account.

The plaintiff, answering the cross-complaint, specifically denies the averments thereof. The plaintiff contends that the evidence is sufficient to support the verdict in all respects, and that therefore the court was without legal justification for ordering him, as a condition precedent to the denial of the defendant's motion for a new trial, to remit or consent to the reduction in the sum of $3,000, or in any other sum, of the amount of damages awarded him by the jury.

It will not, of course, be doubted that the order from which this appeal is prosecuted, although expressing the judgment of the court that the evidence is sufficient to justify a verdict for the certain amount of damages specified therein, is nevertheless one granting a new trial upon the ground that the evidence is insufficient to support the verdict as rendered and returned. Indeed, the order is, in legal effect, nothing less than one based upon the ground that the evidence is insufficient to justify the verdict.

[1] While counsel for the defendant insist (whether correctly or incorrectly, it is not necessary to determine here) that the order appealed from, by reason of its peculiar phraseology, may be upheld upon any of the grounds stated in the notice of motion for a new trial, assuming all said grounds to be legally tenable, we are of the opinion that the only question submitted by this appeal to which attention need be given is whether it may reasonably be held that the record discloses any evidence from which the jury might have justly found that the plaintiff suffered no greater damage than that represented by the sum to which the court required the plaintiff, on pain of granting the motion for a new trial, to consent to a reduction of the amount of damages awarded by the jury. If there is such evidence, then it is not for this court to declare that the order appealed from is erroneous; for it is well settled that, where there is a conflict in the evidence, an order granting a new trial upon the ground of the insufficiency of the evidence to support the verdict is entirely within the legal discretion of the trial court. Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024; Mills v. Oregon Ry. & Navigation Co., 102 Cal. 357, 36 Pac. 772; Warner v. Thomas Dyeing & Cleaning Works, 105 Cal. 409, 38 Pac. 960; In re Martin, 113 Cal. 480, 45 Pac. 813; Green v. Soule, 145 Cal. 96, 102, 78 Pac. 337; Cutten v. Pearsall, 146 Cal. 690, 81 Pac. 25; McCarthy v. Morris, 17 Cal. App. 723, 121 Pac. 696; Shea-Bocqueraz Co. v. Hartman, 20 Cal. App. 534, 536, 129 Pac. 807. Indeed, it has repeatedly been said in the cases that the action of a trial court in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision "is so far a matter within its discretion that, if there is *any appreciable conflict* in the evidence, it is not open to review." Newman v. Overland Pac. Ry. Co., 132 Cal. 74, 64 Pac. 110, and cases therein cited.

It is true, as is said in Harrison v. Sutter St. Ry. Co., 116 Cal. 161, 47 Pac. 1020:

> "That such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but it is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. * * * The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former, where there appears any reasonable room for difference."

Moreover, even in cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to the one or the other of the parties litigant, the question as to the probative force or evidentiary value of the testimony, in a proceeding on a motion for a new trial based upon the ground that the evidence is insufficient to justify the verdict, is one whose determination is with the trial court.

[2] The rule (elementary and commonly familiar in our system of jurisprudence) is that the plaintiff in a civil action must establish his case by a preponderance of proof, but, although many witnesses may testify directly in favor of his position, and no adversary testimony directly adduced, it is still with the jury, in the first instance, and finally with the trial court, where a new trial is asked on the ground stated, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact. Of course, as has frequently been asserted, neither the jury nor the judge, in such a case, can arbitrarily reject testimony received in proof of the ultimate fact, or thus declare it to be unworthy of credence, but it is the duty of both, when exercising their respective functions with reference thereto, to consider and dispose of it by the light of the surrounding circumstances of the transaction constituting the subject-matter of the litigation, and their action in that regard will not be disturbed on appeal, where there appears to flow from the general surrounding circumstances of the case probable justification for discrediting or giving no weight to

testimony which, on its face, may bear all the earmarks of probability.

Now, as before stated, from the nature of the order complained of here, it is manifest that the question with which this court is mainly concerned has reference to the evidence bearing upon the question of the value of the route over which this controversy has arisen; such value obviously constituting the measure of damages for the alleged breach of the agreement, which is the foundation of the plaintiff's right to a recovery, if any he has.

[3] An examination of the record before us will show that the testimony—both that produced by the plaintiff and that presented by the defendant—addressed to the question of value is not of a very satisfactory character; yet, testing the evidence upon that element of the case by the principles above stated, we do not feel that we are thus placed in a position to say that the court, in making the order from which this appeal is prosecuted, transcended the bounds of a sound judicial discretion.

It appears that, when the plaintiff offered the pleaded contract in evidence, objection by counsel for the defendant to its admission was sustained by the court. The record does not reveal the particular ground upon which the objection was interposed or sustained, but it appears from the briefs that the theory upon which the contract was excluded was that, from the fact that the instrument appeared upon its face to have been signed and executed by said Ohlandt, it was not the contract of the plaintiff, and that the latter was not, therefore, the real party in interest thereto. However, the court permitted the plaintiff, over objection by the defendant, to prove an oral agreement, between which and the contract pleaded in the complaint we perceive no substantial difference in terms, conditions, etc., whereby the plaintiff was vested with the agency of the Call in the territory described in the contract as set out in the complaint for the distribution and delivery therein of the said newspaper.

The evidence addressed to the proof of the value of said route showed these facts: That in the year 1903 the plaintiff's net income from the route amounted to the sum of $110 per month; that by the month of November, 1906, he had increased the number of subscribers in his route from 470 to 900, and that the expense in serving each subscriber remained the same as it had always been during the period preceding that time; that in the month of November, 1906, the plaintiff delivered papers to about 500 subscribers, and netted therefrom the sum of $131; that in August, 1908, the plaintiff leased to one Mills a portion of the route, in which portion there were 500 subscribers, and for which the latter paid to the plaintiff the sum of $50 per month, or 10 cents per subscriber; that thereafter (in the month of September, 1908) the same territory leased to Mills was leased to one Hanna, the monthly rental therefor being $50; that, after the plaintiff had leased to Mills as above explained, he had left 662 subscribers to whom he delivered the Call, and that his net profits from the delivery to said subscribers and the rentals received for other portions of his territory totaled a sum exceeding $200 per month. It further appears that the plaintiff had been offered $3,250 for a certain one-third of the territory, $3,750 for another third thereof, and $3,750 for the remaining third, totaling for the entire territory the sum of $10,750, which constitutes the amount for which he has sued.

Ohlandt, testifying for the plaintiff, was permitted to say, against the objection by the defendant, that he bought the route for the plaintiff, Otten, and one Cordes, who were his friends, and that his "best recollection" was that he paid therefor between $8,000 and $9,000. This testimony undoubtedly referred to the transaction involving and culminating in the written contract set out in the complaint, and parenthetically, it may be observed that there is a wide variance between said testimony and said contract as to the sum paid by Ohlandt for the route under that instrument, which declares that its consideration or the amount paid for said route was the sum of $3,000.

The foregoing represents a statement, in substance, of all the testimony adduced by the plaintiff in support of his estimate of the value of the route.

The defendant showed that, having become dissatisfied with the plaintiff's management of the business of distributing the Call in the territory involved in this controversy, he decided to terminate the agreement whereby the latter became his agent in said territory, and to that end procured a purchaser of said route, who agreed to pay therefor the sum of $5,000, the same to be paid to the plaintiff, and that said proposed purchaser deposited with the Call the sum of $500 on the purchase price. The plaintiff refused to accept this offer, declaring it to be inadequate to the value of the route. The defendant, however, further showed, by the production of copies of letters addressed, from time to time, by the Call to the plaintiff, that the latter's management of the business of distributing and delivering that newspaper in his territory was inefficient, and consequently unsatisfactory to said newspaper and its patrons, and that, as a result of such mismanagement, the business of said publication was rapidly falling off, and its future prospect in said territory thereby seriously menaced; that, to avert such result, or to counteract the effect of the plaintiff's mismanagement of, and asserted inattention to, the business, the Call, at extra expense, sent a man to said territory with instructions to assist the plaintiff in properly handling the work, and with authority to take such course as might be deemed essential to a rehabilitation of the business of the Call within said territory. This constitutes an epitomized statement of about all the testimony presented by the defendant.

It is manifest, from a review of all the testimony in the case, that, as declared, the showing upon the question of the value of the newspaper route involved herein is exceedingly meager and therefore unsatisfactory.

[4, 5] The fact that the plaintiff was offered certain sums for certain subdivisions of the route, while, perhaps, constituting some testimony of the value thereof which should be considered, is not the true, or even an approximately satisfactory, test of its actual value. Indeed, such testimony involves nothing more than the mere opinion upon the question of the value of the route of those expressing willingness to give therefor the prices offered by them, and even as opinion testimony it does not carry the weight as proof of value that may ordinarily be justly accorded expert testimony, since there is disclosed no standard or basis by which the witnesses were governed in offering the prices named, or, in other words, no reasons given why the prices named represented a fair valuation of the route. The same observations are, of course, applicable to the testimony presented by the defendant that the Call had procured a purchaser of the territory willing to pay therefor the sum of $5,000—a sum at which evidently the Call estimated the actual value of the route to be. Upon the question of value, however, this opinion testimony of the defendant is, to all appearances, equal, in evidentiary force, to that adduced by the plaintiff. Whatever force, then, that character of testimony may be deemed to possess as tending to establish the value of the route, it may be assumed, in support of the order appealed from, that the court, in considering the question of value, on the motion for a new trial, conceived and determined that the defendant's opinion testimony upon that subject was more reliable, or, under all the circumstances of the case, the more reasonable, estimate of the actual worth of the route than that of the same general character presented by the plaintiff.

[6] But, as the plaintiff well asserts, it was proper to consider, in determining the value of the route, the net sum that he, with approximate uniformity, earned therefrom. It was likewise proper to consider the sum actually paid therefor, if there was evidence thereof. Unquestionably these constituted important factors in the determination of value in this case. But they are by no means conclusive upon the question of value. The element of uncertainty as to the period of time during which the agreement might exist is of equal importance in testing the value of the territory. Or, as the proposition may thus be stated: The element of net earnings and that of the money actually paid for the right to deliver the newspaper in the route should be considered, as the trial court undoubtedly considered them, in the light of the nature of the agreement or the terms and conditions thereof and the character of the right vested in the plaintiff.

It is obviously true that the fact that a certain sum may be paid for a certain business or piece of property does not itself necessarily establish the actual value of such business or property. The buyer may have made, as is often the case, an improvident purchase; that is, paid far more for the thing bought than it is actually worth as an income producer.

As to the net earnings of the plaintiff, in their bearing on the question of value, it must be kept in mind that they are not to be regarded, strictly speaking, in the light of returns on the investment of money. As stated, it is true that the amount paid by the plaintiff for the exclusive right to distribute the Call within the designated territory must be considered; yet the success of the business is not, as in the ordinary or usual investments of capital, dependent upon the money paid for the route, but upon the plaintiff's personal services, from which his income is directly derived. It is, in other words, himself, and not the money paid for the right, that is working and earning the returns. But unquestionably he acquired, by virtue of the agreement, a right of property in said territory—the exclusive right to distribute and deliver the Call therein—of which he cannot be divested without just compensation; yet the right so acquired is little, if, indeed, in any degree, superior to a qualified right of property, since, as the testimony shows, the transferee of said right reserved to itself the authority and the power of terminating the agreement by requiring the plaintiff to transfer the route to some other person, satisfactory to the Call, whenever the plaintiff's management of the business became inefficient or in any substantial manner unsatisfactory to said newspaper. In other words the right remained absolute only so long as the plaintiff rendered efficient service. Therefore the value of the right to the plaintiff rested largely upon whether he did or did not manage the route according to the requirements of his contract. Manifestly, then, the value of said route would be much greater when efficient service is rendered than when the service is not efficient, and (as there is evidence tending to show occurred before the commencement of this action) the plaintiff is, for that reason, required to transfer his right to another. In any event, this element of uncertainty, although capable of being removed by the conduct of the plaintiff himself, constituted, in view of the evidence presented by the defendant, tending to disclose an unsatisfactory management of the business of the plaintiff, an important factor entering into the question of value.

Thus undoubtedly the trial court, on the motion for a new trial, considered and weighed the exceedingly unsatisfactory evidence upon the question of value, and so reached the conclusion that the Call's estimate of the value of the route was, under all the circumstances, fair and just. At all events, as stated in the outset of this opinion, this court cannot, after a painstaking review of the record, declare that the court abused its discretion in making the order appealed from.

In view of a future trial of this action, it is believed to be proper to express our views on some of the other points made here.

[7] In our judgment, the trial court should have permitted the plaintiff to prove the written contract pleaded in his complaint, upon a showing that, as the complaint alleges, the same was entered into by the parties of the first part and the plaintiff; that the latter was therefore the real party in interest to said contract; that Ohlandt signed it as a mere matter of convenience only, or as the agent of the plaintiff; and that the defendant was, at the time of the execution of the agreement, familiar with those facts, or, in other words, knew that the plaintiff was the real party in interest thereto. We can conceive of no rule or principle of law which may justly preclude proof dehors a written contract of the fact that one of the named parties thereto is only an ostensible, and not the real, party in interest to the instrument—that is, that the party whose name is subscribed to the instrument signed it for and as the agent or attorney in fact of the real party in interest—particularly where, as here, it is alleged that that fact and the reason for it were known and acquiesced in by all the parties at the time of the execution of the agreement. Indeed, the contract declares that it was made and entered into between the first parties and the plaintiff, and, as stated, no reason in principle is discernible why a parol explanation of the fact that a third party signed it as the agent of the plaintiff would not be perfectly proper.

[8] The point made by the plaintiff that the denial of the execution of the contract as pleaded on information and belief is tantamount to an admission of its due execution (Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844) is, in view of other denials of the answer in that connection, only in part sustainable. While it is true that the answer, on information and belief, denies the execution and delivery of the contract, it positively denies that it was signed by Ohlandt as a matter of convenience only; that the plaintiff is the real party in interest thereto; and that such signing by Ohlandt and the interest of plaintiff in the contract were known to the defendant at the time of the execution of the instrument. Thus upon those points a direct issue is tendered, and it will therefore rest upon the plaintiff, as above intimated, if, on the retrial of the case, he relies on the contract as alleged by him to support by proof the last-mentioned allegations of the complaint; otherwise the instrument cannot be admitted as evidence of the agreement of the parties.

[9] It is also perhaps well to notice the point, urged by the defendant in support of the order, that there is a variance between the contract pleaded by the plaintiff and the evidence. The action, as seen, is for the breach of a written contract, and the proof shows an oral agreement. It would perhaps have been more regular had the plaintiff amended his complaint by setting up the oral agreement when he was driven to the proof thereof by the ruling excluding the contract alleged by him. But it cannot be said that the allowance of proof of the oral agreement was prejudicial to the defendant, for these reasons: (1) There is, as before stated, no material or substantial difference in terms and conditions between the oral agreement and the written contract. The only difference between the two lies in the fact that one is in writing and the other not. (2) The defendant, in his answer, in effect, admits that the plaintiff was vested with the right to distribute and deliver the daily issues of the Call in the district or territory described in the complaint, but denies that the route is of the value of $10,750, and alleges that it is not of value exceeding $1,000. The cross-complaint also admits that the plaintiff, under an agreement with the defendant, was engaged in distributing the Call in the district referred to. But, if there is any force in the objection under consideration, the ground therefor may readily be removed at a future trial of the case.

There are many alleged errors pointed out by the defendant in the rulings of the court on the admission of evidence which we do not deem it requisite to notice at this time.

For the reasons herein given, the order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

24 Cal. App. 319

DONLEAVEY v. JOHNSTON et al.

(Civ. 1213.)

(District Court of Appeal, Third District, California. April 11, 1914.)

1. Partnership (§ 9*) — Relation — Agreement.

Plaintiff and defendant entered into an agreement to conduct a grocery business, whereby plaintiff was to furnish all the money to conduct the business, purchase merchandise and equipment of the store, lease the premises used for the business in his own name, and the title to all the property was to be in plaintiff; both parties to give their efforts to the best advantage of the business, each to receive a salary of $85 monthly and divide the profits, one-fourth to defendant and three-fourths to plaintiff, etc. *Held* that, under the agreement, there was a partnership; the conditions and restrictions contained therein not making defendant a mere clerk or hired man.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 23, 24; Dec. Dig. § 9.*]

2. Good Will (§ 5*)—Nature of Property.

The good will of a business, the expectation of continued public patronage, is property transferable like any other property, and its loss may be the subject of damages.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 4, pp. 3128–3130; vol. 8, p. 7673.]

3. Partnership (§ 229*)—Rights of Partners—Good Will of Business.

Where a partnership agreement provided that plaintiff was to continue the business in his own name, if defendant, his partner, did not desire to exercise the option given him therein of remaining in the business, plaintiff was entitled to the good will of the business after defendant ceased to be a partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 477; Dec. Dig. § 229.*]

4. Partnership (§ 96*)—Mutual Rights of Partners — Acquiring Title Adverse to Firm.

The partnership relation being one of trust and confidence, and every partner being bound to act in the highest good faith towards his copartners, where one partner secretly makes a purchase of premises occupied by the firm, while the other partner with his concurrence is negotiating with the owner to obtain the property for the firm, the purchaser will be declared a trustee for the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 144; Dec. Dig. § 96.*]

5. Partnership (§ 242*)—Mutual Rights of Partners—Individual Transactions.

Where defendant, a partner with plaintiff in the grocery business, secretly, with others, purchased the leased premises in which the business was conducted and, dissolving with plaintiff, ousted him from the premises and, with the others, started another grocery firm, plaintiff, though having no enforceable interest in the title held by defendant, could maintain an action for damages for the loss of the good will of the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 500–508, 663; Dec. Dig. § 242.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. F. Donleavey against F. H. Johnston and others. Judgment for defendants, and plaintiff appeals. Reversed.

U. Grant Hayden, of Fresno, for appellant. Ernest Klette, of Fresno, for respondents.

CHIPMAN, P. J. This is an action commenced by plaintiff, as copartner of defendant Johnston, for an accounting, for a decree adjudging that plaintiff has an interest in certain real estate in the city of Fresno, claimed to be partnership property, and for damages. A demurrer to the complaint as first filed was sustained, the grounds of the demurrer being insufficiency of fact; that two or more causes of action are improperly joined, namely, for an accounting, for damages, and to establish a trust; that the complaint is ambiguous and uncertain, in that it cannot be determined from it how plaintiff has been or is damaged or of what such damage consists, nor can it be determined therefrom when defendants entered into the alleged agreement to purchase a certain grocery stock referred to in the complaint, nor when such agreement is to take effect. A demurrer to the amendment to the complaint on like grounds was sustained, and, plaintiff declining to further amend, judgment passed that plaintiff take nothing by his action.

The action grows out of the alleged breach by defendant Johnston of two certain written contracts, one entered into November 29, 1909, designated Exhibit A, and the other entered into as a continuation of Exhibit A, dated July 20, 1911, designated Exhibit B. By the contract, Exhibit A, the parties bind themselves "to become copartners, under the firm name of 'Donleavey & Johnston,' for the purpose of conducting a grocery business at the corner of O and Merced streets, in the city of Fresno, California, for a period of time extending from the 20th day of November, 1909, to the 1st day of January, 1911, upon the terms and conditions as follows:" Summarizing these conditions: First party (plaintiff) was to furnish all the money to conduct the business (limited to $3,000), purchase merchandise and equipment of the store, lease the premises used for the business, "in his own individual name," and "title of all property acquired for the use and conduct of the business" was to remain in first party; both parties were to give their efforts to the best advantage of the business; each was to receive "from the proceeds of sales" the sum of $85, monthly, and was to have the right to buy goods from the firm at retail prices less 10 per cent.; all goods, merchandise, and appliances were to be purchased only by first party when the price exceeded $20, and first party "shall have the sole right to draw checks upon the funds of said copartnership"; at the termination of the contract there was to be an accounting and settlement, the contract pointing out the manner of adjusting the interests of the parties. As a settlement was had for the period ending December 31, 1911, as is shown by Exhibit B, it is not necessary to state the details of such settlement; the contract declared that "it is the intention of the parties hereto that said business shall be conducted after the termination of this agreement," and the terms on which second party (defendant Johnston) "shall have the right to purchase a half or a quarter interest in said business and all the property and assets thereof" are set forth; neither party was to sign any note nor bond by way of accommodation without the consent of the other party, and a complete set of account books was to be kept recording all transactions, which should at all times be open to the inspection of both parties; upon a breach of any of the covenants, the party aggrieved may, upon 20 days' notice to the other party, terminate the agreement and have an accounting as provided in paragraph 5 of the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Exhibit B purports to be "an agreement of settlement and continuation of a certain partnership agreement entered into the 29th day of November, 1909." Exhibit A. It recites that "said agreement by its terms expired on the 1st day of January, 1911," and a "settlement and adjustment of the business of said partnership was had on said 1st day of January, 1911." The details of the settlement are set forth, showing, when summed up, that the interest of plaintiff in the business was $4,077.17 and of the defendant $454.38. It is then stated that the parties desire to continue the business in accordance with the agreement (Exhibit A) for one year from January 1, 1911, to January 1, 1912, and the agreement (Exhibit A) is referred to and made part of Exhibit B. It is then stated that inasmuch as the title to the property is in first party, who is also to furnish the money to conduct the business, "the said first party (plaintiff) has at the time of the execution of this agreement executed and delivered unto said F. H. Johnston his certain promissory note dated January 1, 1911, for the said sum of $454.38, payable January 1, 1912; * * * said note is given unto said second party in lieu of the profits belonging to said second party to the date January 1, 1912." (The date 1912 is doubtless error and should read January 1, 1911, which was the date of the settlement.)

It is alleged in the complaint that said agreements were entered into on the days of their dates, and that defendant Johnston has no claim on said business "excepting a stipulated salary and to one-fourth of the net profits of said business and property"; that defendant Johnston has elected not to purchase any interest in said business and so notified plaintiff, on November 20, 1911, and the whole thereof will vest in plaintiff on January 1, 1912, except Johnston's claim for the one-fourth part of the net profits for the year ending December 31, 1911; that said defendant Johnston, "in violation of his implied and express covenants of said partnership agreement," is endeavoring to secure the good will of said business and secure the location in which said business is conducted, in this: That during the summer of 1911 plaintiff and defendant discussed the proposition of buying the premises occupied by them, the price being $8,000, but defendant Johnston discouraged it, stating that "he had no money to buy with; that he did not think there was any danger of any one else buying the property," while at the same time he was planning to purchase said premises, and to that end disclosed to defendants Green and Elbow the profits of said business and induced them "to enter into a conspiracy to subvert the terms of said partnership agreement and to secure the said business away from plaintiff without paying plaintiff anything therefor," pursuant to which said purpose defendants "are now endeavoring to accomplish the same by purchasing" the premises in which said business is being conducted. It is then alleged that defendants, on November 1, 1911, entered into a written agreement with the owners of said premises for the purchase thereof at the price of $7,500, on terms stated in the complaint, agreeing to pay $500 cash and the balance on installments, to wit, $1,500 January 1, 1912, and the balance in annual installments of $1,000; that said efforts of defendant were without plaintiff's knowledge and contrary to his interests and were for the sole purpose "of taking plaintiff's business away from him"; that defendants have served plaintiff and defendant Johnston with notice to surrender the possession of said premises on January 1, 1912, and defendants and E. M. Wilson (owner of the premises) have served notice on plaintiff to quit possession on January 6, 1912; and that plaintiff is by the terms of his lease entitled to possession, said lease being from month to month payable on the 6th day of each month. It is next alleged that defendants have agreed to purchase the grocery stock of Wakefield & Walton; said agreement being entered into by defendant Johnston while a partner with plaintiff. It is further alleged that defendant Johnston tried to induce plaintiff to sell their stock of goods and business to said defendants Green and Elbow for less than plaintiff thought it worth, while defendant Johnston was himself interested with said other defendants. It is also alleged that plaintiff elects to adopt the acts of defendant Johnston in the purchase of said premises and "to accept the same as having been done for the benefit of plaintiff, and offers to reimburse defendant Johnston for any money advanced by him in said purchase, and is ready, able, and willing to do the same, and does hereby offer to do" anything necessary to the consummation of the purchase of said premises under said agreement to purchase by said defendants; that plaintiff has kept and performed all covenants by him to be performed; that at all times prior to November 20, 1911, "plaintiff supposed that it was the intention of said Johnston to continue as a partner with plaintiff in said business," a supposition founded upon the conduct and actions of said Johnston; that "plaintiff and defendant Johnston are now conducting said grocery business jointly as copartners and have joint possession thereof"; that "plaintiff is ready and willing to have an accounting with said defendant at any time prior to January 1, 1912, has heretofore, and since learning of defendant's having interests contrary and adverse to the interests of said partnership, offered to have an accounting and settlement with said Johnston, but defendant has refused to have an accounting; that plaintiff is entitled to an accounting and requests that an accounting be had not later than January 1, 1912; that on the 1st day of January, 1912, plaintiff is entitled to full possession and control of the whole of said business, together with the stock and fixtures and appliances used therein, and the said premises upon which said business is conducted"; that, by the said acts of said Johnston, plaintiff has been damaged in the sum of $1,500; that the defendant Modern Grocery Company is a corporation "organized within the past week" by defendants other than said company to take legal title to said premises and conduct a grocery business thereon, and plaintiff is informed and believes that some "interest in said property has been or is about to be transferred to said corporation, and for that reason it is made party defendant." The complaint was filed prior to the date for the termination of Exhibit A, to wit, December 20, 1911. The amendment to the complaint was filed February 10, 1912, and it states that plaintiff confines his claims as made in the complaint and its amendment to claims against defendant Johnston alone "as the sole defendant in the action." Paragraph 14 is added to the complaint as an amendment, in which it is alleged that said defendant Johnston and said defendants Green and Elbow took possession of the stock and business of said Wakefield & Walton, and ever since have been and now are conducting said business under the name of Modern Grocery Company; that on January 1, 1912, in accordance with said partnership agreement between plaintiff and defendant, a settlement was reached as to the value of the stock and fixtures of said firm of Donleavey & Johnston, and plaintiff took possession and control of the same " and endeavored to continue the said business on the premises described in paragraph 1 of plaintiff's complaint, but that, in accordance with the notice requiring plaintiff to vacate said premises January 6, 1912, * * * plaintiff was by the said parties serving said notice, forced to vacate said premises on the 7th day of January, 1912," and said defendants entered into possession and ever since have been and now are conducting a grocery business on said premises under the name of Modern Grocery Company; that "the fee title to said premises," in accordance "with the agreement to purchase alleged in the complaint," has been by deed of grant conveyed to said defendants Johnston, Green, and Elbow as tenants in common, "share and share alike"; that, "on account of said acts of defendant secretly and fraudulently purchasing the said premises and compelling plaintiff to vacate the same, plaintiff lost the business and good will of said business which, by the terms of said partnership agreement, defendant had agreed should belong to plaintiff; that defendant refuses to account to plaintiff for the said good will of said business."

The issues in the controversy are between plaintiff and defendant Johnston and are narrowed down to two: (1) Has plaintiff any enforceable interest in the title to the real property now held by Johnston? (2) Do the facts alleged entitle plaintiff to an accounting, or to an action for damages, to determine his interest in the lease of said property and in the good will of the business which he alleges was lost to him by Johnston's said wrongful acts and conduct?

[1] We think the agreements sufficiently show that plaintiff and defendant Johnston were partners. They were associated "for the purpose of carrying on business together and dividing its profits between them" (Civ. Code, § 2395); and also impliedly dividing its losses (Civ. Code, § 2405).

> "While, of course, the question whether or not a partnership exists is to be determined from the nature of the relation agreed upon, rather than the name which the parties have given to it, some weight must be allowed to the language of the parties themselves." Title Ins. & Trust Co. v. Grider, 152 Cal. 746, 752, 94 Pac. 601, 603.

We do not think that the relation of defendant Johnston to plaintiff created by the agreements is changed from that of a partner to that of a mere clerk or hired man, as is contended by Johnston, by the "restrictions, prohibitions, and conditions" found in the agreements. The provision that Johnston might draw out monthly $85 also included plaintiff and is not an unusual provision in partnership agreements, for partners must live. Nor does the provision that plaintiff, who put up the money necessary to carry on the business, should have the right to dictate as to purchases of a value greater than $20, or that he should make purchases in his own name, or that after the termination of the agreements plaintiff should conduct the business in his own name, necessarily show that they were not partners during the existence of the agreements. Notwithstanding these safeguards for plaintiff's benefit, defendant was to share in the profits and was chargeable with losses in the business carried on as it was under the firm name of Donleavey & Johnston.

[2] "The good will of a business is the expectation of continued public patronage" (Civ. Code, §§ 992, 993), and is property transferable like any other property. Its loss may be the subject of damages. Snow v. Holmes, 71 Cal. 142, 148, 11 Pac. 856. In Bell v. Ellis, 33 Cal. 620, 624, the court quotes approvingly from Story on Partnership, § 99, as follows:

> Good will has been defined "to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices."

The court, in its opinion, said:

> It is "an element of strength and permanency which adds very much to the value of the premises and stock when decreed to be sold

and will accompany the sale. According to Lord Eldon * * * it is the probability that the business will continue in the future as in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in."

[3] This good will attached itself to the business, and plaintiff was entitled to enjoy it after defendant ceased to be a partner, for it was expressly provided that he was to continue the business in his own name if his partner did not exercise the option given him to remain in the firm. The intention of the parties was to buid up a business which was to continue after the agreements terminated. The partnership was formed to conduct its business at a particular street corner, and, as we have seen, the place where it is conducted may be of great value. To be compelled to remove from the place where the trade of the firm has been built up may seriously affect the success of the enterprise.

[4, 5] It was held in Anderson v. Lemon, 8 N. Y. 236, that where one partner secretly makes a purchase of premises occupied by the firm, while the other party with his concurrence is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee for the firm. There can be no doubt of the soundness of the principle upon which this case was decided, that the partnership relation is one of confidence and trust, and every partner is bound to act in the highest good faith toward his copartners and may not obtain any advantage over them in the partnership affairs by misrepresentation, concealment, or adverse pressure of any kind; and this is but the doctrine of our Civil Code found in sections 2410 and 2411. The principle is more frequently invoked in renewals of leases, as merchants and tradesmen seldom own the property occupied for their business. Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252, is an instructive case of this character. The authorities as to the right of trustees and partners to take renewal leases for their own benefit are there collated and discussed. It was held that one member of a copartnership cannot, during its existence, take a renewal for his own benefit of premises leased by the firm, upon which it has made valuable improvements, and by the joint efforts of the members made the good will valuable and enhanced the value of the premises, and this although the term of the renewal lease did not begin until after the copartnership had expired by its own limitations; that a lease so taken by one partner in his own name inures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value; and it is not material that the landlord would not have granted the new lease to the other partners of the firm. Syllabi. Speaking of Struthers v. Pearce, 51 N. Y. 357, the court, by Earle, C., said:

"The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled."

In a note to Moody v. Mathews, 17 Ves. 185, the learned editor says, as a deduction from adjudged cases, that:

"With a possible exception in favor of a bona fide purchaser, it seems an universal rule that no one who is in possession of a lease with any sort of equity in behalf of third persons can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock."

After reviewing the cases, the learned judge says:

"I therefore conclude that it makes no difference that the leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm owned the good will for a renewal, which ordinarily attaches to the possession. By his occupancy, and the payment of rent, he was brought into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position, during the partnership, secretly to obtain the new leases. He must hold them for the firm."

Dwight, C., reviews the cases more fully. Quoting at length from the leading case of Lee v. Vernon, 5 Brown's Parl. Cases, 10 (Eng. Ed. 1803), Judge Dwight said:

"The cestui que trust has a right to the chance of renewal. Though this is termed a 'tenant right' as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is, the trustee shall not take it to himself, but, if it results in any substantial benefit, he shall hold for his beneficiary. [Citing cases.] * * * The sound rule is that he cannot make any profit to himself from a secret transaction initiated while the relation of trustee and cestui que trust exists, no matter when it springs into actual operation."

Among other of the conclusions reached by the learned judge it is stated that:

"This doctrine extends to commercial partnerships, and one of several partners cannot, while the partnership continues, take a renewal lease clandestinely, or 'behind the backs' of his associates, for his own benefit; it is not material that the landlord would not have granted the new lease to the other partners, or to the firm."

Furthermore that:

"It is of no consequence whether the partnership is for a definite or indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership. * * * Common justice and due regard to rules of public policy demand that the renewal leases should be declared to belong to the firm, and that the defendant should be required to account to the plaintiff for his portion of its value."

The doctrine here announced is summarized by Mr. Pomeroy as sound at the present time, although defendant suggests that the rules enunciated in Anderson v. Lemon, supra, and Mitchell v. Reed, supra, by reason of their antiquity, have become obsolete. 3 Pomeroy, Equity Juris. § 1050. In Knapp v. Reed, 88 Neb. 754, 13 N. W. 430, 32 L. R. A. (N. S.) 869, Ann. Cas. 1912B, 1095 (Neb. 1911), it was held that, in a partnership carrying on business in premises which it holds under a lease, neither partner can, without the consent of the other, take a renewal of the lease in his own name and so exclude the other partner and secure the good will of the business for himself; and, where this is attempted, the lease will inure to the benefit of both partners; and where dissolution of the partnership, without an adjustment by the partners of their rights in the good will of the business and in the premises which they hold under the lease, it is the province of a court of equity to adjust such differences. Among the cases cited in support of the doctrine is Mitchell v. Reed, supra. Warren v. Schainwald, 62 Cal. 56, was a case where one member of a firm composed of several parties, after the death of one of them, falsely, and with the intent to prevent a proper settlement, represented to his surviving copartners that he had become the owner of the interest of the deceased and thus prevented a purchase by them of such interest. It was held that the purchase was made for the benefit of plaintiff and defendants. It appeared in the case that the interest of the deceased partner would have been purchased by the surviving partners for their mutual benefit if the plaintiff, Warren, had not prevented such purchase by misrepresentations, and under such circumstances he was justly held to have purchased for the benefit of himself and the defendants, his copartners. So in Anderson v. Lemon, supra, the partners were negotiating with the owner for the purchase of the property, showing an unmistakable intention to purchase, when one of the partners thwarted this design by himself becoming the purchaser. While the equitable doctrine of these cases, as of the cases involving leases, is sound, we are unable to see that plaintiff has shown a clear right to share as tenant in common of the fee now held by defendant Johnston and his cotenants. He discussed with his partner, at one time, the propriety of purchasing the property and was discouraged by him from making the purchase. It does not appear, however, that he really desired to purchase nor that he would have done so had he not been dissuaded by his partner from doing it. Furthermore, in view of the provisions of the agreements, we are unable to see how the quantity of interest in the land to which plaintiff would be entitled could be definitely ascertained. By the terms of the partnership agreements, he owned all the property of the partnership, and Johnston's interest was a share in the net profits only. The fee ownership of the situs or land on which the business was conducted was not contemplated, and nothing more than a leasehold interest in it was necessary to the business. But it is because plaintiff has been deprived of this leasehold interest, or a right to acquire it, by the acts of Johnston in clandestinely purchasing the land, that plaintiff has been damaged. This damage consists in loss of the good will of the business and in being compelled to seek some other place to conduct it. In ascertaining the damage thus inflicted, some consideration should be given to the value of the lease to plaintiff as securing to him the enjoyment of the good will to which the location has in part contributed.

We are clearly of the opinion that a cause of action is sufficiently stated as the basis for a judgment for damages should the evidence warrant it, and that an accounting should be had to that end.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

(167 Cal. 711)

In re MacCRELLISH'S ESTATE.

HAMMITT et al. v. EDWARDES et al.

(S. F. 6546.)

(Supreme Court of California. May 12, 1914. Rehearing Denied June 11, 1914.)

1. WILLS (§ 316*) — EXECUTION — TESTAMENTARY CAPACITY.

In a will contest, evidence on an issue of testamentary capacity *held* insufficient to authorize a submission of testatrix's alleged unsoundness of mind to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 742–749; Dec. Dig. § 316.*]

2. WILLS (§ 52*)—TESTAMENTARY CAPACITY—SANITY—PRESUMPTION.

A presumption of sanity exists in favor of a testatrix, and the burden of proving unsoundness of mind in a will contest rests on the contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101–110; Dec. Dig. § 52.*]

3. WILLS (§ 55*)—TESTAMENTARY CAPACITY—MENTAL UNSOUNDNESS.

Evidence of mere imaginings by testatrix, a woman of advanced age, from which she believed there was a man in her room, and that she had received messages slipped under her door, and feared that she was being watched and was about to be robbed, did not indicate an impairment of normal testamentary capacity nor show a condition of general mental weakness sufficient to indicate testamentary incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161; Dec. Dig. § 55.*]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Proceeding by Jennie S. Hammitt and others, to contest the will of Mary P. MacCrellish, deceased, against William P. Edwardes, and another, proponents. From a judgment declaring the will invalid, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

McGowan & Westlake, of San Francisco, for appellants. Snook & Church, of Oakland, for respondents.

MELVIN, J. Certain of the heirs of Mary P. MacCrellish, deceased, successfully contested and secured judgment for revocation of the probate of a document which had been executed as her last will and testament. One of the grounds of contest was undue influence alleged to have been exerted by William P. Edwardes and Mary W. Edwardes, the appellants, but a nonsuit was granted in their favor regarding this ground. Upon the other ground, namely, the alleged incapacity of the testatrix, the jury found in favor of the contestants, and this appeal is by proponents from the judgment entered in accordance with said verdict and from the order denying a motion for a new trial.

Appellants specify several alleged errors, but we find it necessary to consider only their contention that the evidence was not sufficient to support the verdict.

The will was in due form and was properly witnessed by men who testified at the trial to their firm belief in the testamentary capacity of Mrs. MacCrellish at the time the instrument was executed. The will was a simple and by no means an unnatural one. The contestants were Mrs. MacCrellish's nieces and nephew of the half blood. They resided in Philadelphia and were not upon terms of close intimacy with Mrs. MacCrellish. By the will their mother was bequeathed the sum of $100 and a like amount was to go to each of them. To her husband's nephew, Dr. A. C. Peterson, she bequeathed $1,000, and to her business agent, H. M. Wooley, $500. Her "beloved sister Martha V. Woodward" was mentioned in the will but was left nothing on the ground that Mrs. Woodward was "already well provided for." The residue of the estate was to be divided as follows: To Mrs. Edwardes, her niece with whom she had lived for some years, one-half; to the grandnephew of testatrix, Vance P. Edwardes, one-tenth; to a grandniece, Helen Kaufman, one-tenth; to a nephew, Thomas B. Woodward, and a grandnephew, Robert S. Woodward, each one-twentieth; to a grandniece, Isabel Melsted, one-tenth, and to Ethel Glenn, another grandniece, one-tenth.

The witnesses to the will were Rod W. Church and H. F. Whitney. The former had not met Mrs. MacCrellish before the occasion when the will was signed, but he talked with her and asked her some questions regarding the will. Her demeanor and her answers convinced him that she was of sound mind. The other witness, Wm. P. Whitney, one of the appellants, had drawn the will from memoranda furnished by Mr. Edwardes, and had given the paper to Mr. Edwardes the day before it was signed. He had met Mrs. MacCrellish a few times before the 3d day of January, 1911, the date of the execution of her will. Like Mr. Church, he was of the opinion that she was of sound and disposing mind and memory on that day. Two other witnesses, not interested in the outcome of the contest, testified very strongly to Mrs. MacCrellish's sanity and capacity to make a will. Dr. John Kastendieck, who had known her well and had formerly been her medical adviser, saw her on the Christmas day before the execution of the will. His visit was of a social nature, and he found her in excellent health and spirits. Though an aged woman who had lived 82 years, she was strong mentally, and he considered her amply qualified to make a will. Mrs. Jessie Walker, who had known her well for years, last saw Mrs. MacCrellish in February, 1911. She testified most positively to the old lady's excellent mental condition. Mr. Edwardes, the only other witness for the proponents, was the executor of the estate. He was also of the opinion that the will was the deliberate product of a sound and disposing mind. Opposed to this testimony was that of Dr. Peterson, one of the legatees, who was a nephew of the deceased husband of the testatrix, and Mr. H. M. Wooley, another legatee, who had been Mrs. MacCrellish's business agent for some years. Dr. Peterson testified that he had noticed peculiarities and conduct out of the ordinary on the part of his aunt from time to time after the fire of 1906. His testimony, however, is descriptive of an old lady, wanting an acute memory, perhaps, and doubtless somewhat peculiar, but not altogether without testamentary capacity. Speaking of her condition at a time between 1906 and her death in 1911, he said:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"A great deal was due to her lack of memory and condition of mind at that time. For instance, I used to give her some straight talk when I first went there, and about an hour afterwards she would broach the same thing that evidently had passed entirely from her mind, forgotten all about it."

Mr. Wooley was the principal witness on behalf of the contestants. He said that before the fire Mrs. MacCrellish was a strong-minded, highly educated woman. Prior to 1906 he spoke to her about making a will, but she said she did not desire to make one at that time. In March, 1910, he submitted to her the skeleton of a will which gave to the Hammitts about the same amount which was assigned to them in the will which was afterwards probated, but there was no provision in the skeleton will showing the proportion which was to be bequeathed and devised to Mrs. Edwardes, Dr. Peterson, or Mr. Wooley. Regarding this memorandum witness testified as follows:

"At the time I submitted this pencil memorandum or skeleton of a will to Mrs. MacCrellish, we were alone. I told her that Mr. Edwardes had spoken to me, and that it was his wish and Mrs. Edwardes' wish, and my own advice, that she should do something to get her affairs straightened out, and she asked me what I thought she ought to do, and I told her I thought she ought to make a will, and then I told her of the talk I had had with Mr. Edwardes, and submitted this outline, that I have already referred to, to her. She looked through the will and said that the form of it did not suit her (that is, the disposition of the property did not suit her); that she wanted to add to the will a special bequest to Vance Edwardes, who is the son of Mr. and Mrs. Edwardes, as she was very fond of him. She also said that she wanted to leave a special bequest to Dr. Peterson and myself, and then to divide the balance of the estate into three parts, one part for Mrs. Edwardes, one part for Mr. Tom Woodward, and one part to be divided among the eastern heirs, and she said they were her half-brother's children and she wanted them to be so remembered. This conversation was held in the early part of March, 1910, and in my opinion her mind at that time was perfectly sound."

He also said that Mrs. MacCrellish had suffered from a cerebral congestion, resembling apoplexy, about the year 1905, but had entirely recovered. About the middle of 1910 Mr. Wooley noticed a change in Mrs. MacCrellish. Of this he said:

"That was along about the middle of 1910 that I first observed that condition. Aside from that I noticed that I would tell her something and she would in a little while after, maybe in the same day, or something I told her in the previous visit, she would forget that I ever told her anything about it. At that time she was living with the Edwardes at 412 Oakland avenue, in Oakland. From that time until the time this will is claimed to have been executed on the 3d day of January, 1911, what I have told you about covers anything out of the ordinary that I noticed in what she said, except on one or two occasions when I was there she claimed that there was a man in the room, and once or twice she had me go out in the hall to look for a man. There was no man there. It was somewhere between July and December, 1910, that this condition first manifested itself. From that time on I think that occurred in my presence, I think, twice. The second time that occurred right along there in that period. The instances I recollect particularly is we were sitting in the dining room, and she says, 'There is a man out there;' and she said, 'You listen and you will hear him.' And presently she said, 'Go out and see.' And I went out and looked all around the place, and there was no one there. I don't remember just who was present at that time, but some members of the Edwardes family, and on another occasion I think Vance did the same thing. On this particular occasion to which I have referred, it was about 6 o'clock in the evening. I don't know that at that time she also told me there was a man that was watching her that was trying to get in her room at night. She told me that several times, two or three times, during the last six months of her life. She also said she got messages slipped under her door and expressed fears of being watched and being robbed. I cannot remember her language, but that was the substance of what it was."

Nevertheless Mr. Wooley continued his efforts to get her to make a will, and on the 1st of January, 1911, at Mr. Edwardes' suggestion he went to see her for that purpose. She seemed to be dazed, he said, but was sitting up. The members of the family present told him that they did not think the old lady would recognize him. Of this visit he testified that, after she had been aroused out of a "sort of stupor," he went and sat by her and asked her how she was. At first she did not recognize him, but after a minute or two she brightened up and seemed to know him. They had a very brief conversation. On the following evening, Mr. Wooley returned to the home of the Edwardes' family. The best idea of this visit may be obtained from a quotation of the following portion of his testimony:

"I don't remember the preliminary conversation. What was talked of before—that is, immediately before I started to talk with Mrs. MacCrellish about the will. I had been—he asked me in the morning to come over there and get her to make the will, and that was my business there that night, and I sat down to talk with her about the will. I told her (Mrs. MacCrellish) that Mr. Edwardes had asked me to speak to her about it; that he thought she ought to get her affairs in shape; and I thought myself that if she wanted to make a will she ought to do so. She started to cry. She said: 'I can't make a will. I haven't got 25 cents. Here I haven't got the money to pay Mrs. Edwardes my board. Now I can't do anything about that until we get the money from Mr. Lewis.' Mr. Lewis is the man to whom the mining property had been bonded. She had property at that time; she had some flats in San Francisco and property in Marin and El Dorado counties, some vacant property in San Francisco, and property in Mariposa county. The flats in San Francisco were located at Jones and Bernard streets, and they were partly rented at that time. She had not been receiving much income from the property for quite awhile. They had been only partly rented, and there were a great many expenses during that year."

After some further conversation Mr. Wooley told Mr. Edwardes that there was no use talking to Mrs. MacCrellish any longer. Mr. Wooley then went away. On the following day Mrs. MacCrellish executed the will which has been attacked by contestants. Summing up his reasons for believing the testatrix was mentally incompetent at the time of making the will, Mr. Wooley said:

> "I base that opinion on the condition of her mind that I had observed; her actions and her talk that I had observed in the last six months of her life, during nearly all of that time; she was not fit to do business during the last six months. She could answer questions, but, so far as being able to do anything or make any plans or anything of that kind, she was not able to do it. When I speak of acts and talks that constitute a basis or in part a basis for my opinion as to her mental condition, I refer to the fact of her seeing men around that were not there. My other reasons for basing my opinion are the fact of her starting in to tell me something and dropping off in the middle of her talk and not being able to finish it; forgetting what she was talking about while she was talking; and the facts of my telling her something during the conversation and she asked me the same question several times in one conversation after having been answered; also the fact of her physical condition when I saw her—particularly speaking when I saw her on the 1st of January, she was in a dazed condition and she could barely recognize me, and when I saw her on the 2d of January, when I went there to get her to make a will, and asked her about it, she started in to cry like a child and said she didn't have anything and couldn't make a will until she got the money from Mr. Lewis."

Mr. Edwardes corroborated Mr. Wooley with reference to the old lady's hallucinations upon the subject of the supposed presence of men in the house and the desire of some one to rob her.

[1] From an examination of all of this evidence, we are convinced that the court should not have allowed the issue of unsoundness of mind to go to the jury.

[2] The presumption of sanity exists in favor of a testatrix, and upon the contestant rests the burden of proving unsoundness of mind. Estate of Dolbeer, 149 Cal. 230, 86 Pac. 695, 9 Ann. Cas. 795. This burden has not been sustained by the contestants. The most that can be said of the testimony of Dr. Peterson and Mr. Wooley, giving it, as we must, the interpretation most favorable to contestants (Estate of Arnold, 147 Cal. 583, 82 Pac. 252), is that Mrs. MacCrellish was suffering from some of the infirmities of old age, and that she was afflicted with certain hallucinations having no relation to the objects of her bounty.

[3] It has long been the rule in this state that proof of such imaginings which do not indicate an impairment of the normal testamentary capacity is not sufficient to overthrow a solemnly executed instrument such as the one we are now considering. Estate of Kendrick, 130 Cal. 364, 62 Pac. 605. Evidently the witness Wooley did not consider the old lady incompetent because of these ideas that men were hiding near her, spying on her, and wishing to rob her. He urged her to make a will after he had observed these idiosyncrasies. The fact that she seemed dazed for a few moments on the 1st day of January, 1911, when he spoke to her, did not convince him of her incapacity, because the next day he returned to the task of seeking to induce her to make a will. We do not say this in criticism of Mr. Wooley, nor do we assume to weigh his testimony. We merely mention his conduct as that of the normal individual and to illustrate the impression which such facts as he mentioned would naturally make upon one in his relation of intimacy and confidence with the old lady. Neither did her weeping and her declaration on January 2, 1911, that she had no money amount to a showing that she lacked the power to dispose of her property intelligently on the following day. Some mining property which she regarded as very valuable had been bonded by Mr. Lewis, and it was natural for her to be disappointed and to mourn because he had not felt justified in purchasing it. It is true that at that time her other property was not very remunerative, and well may it have been true that she spoke in a comparative sense when she said she had no property and could not make a will until she heard from Mr. Lewis. The evidence in this case is very much weaker than that held insufficient to justify the setting aside of wills in other cases decided by this court. It is unnecessary to do more than to cite the following authorities in support of this statement: Estate of Chevallier, 159 Cal. 167, 113 Pac. 130; Estate of Packer, 164 Cal. 528, 129 Pac. 778; Estate of Purcell, 164 Cal. 305, 128 Pac. 932; Estate of Kendrick, 130 Cal. 363, 62 Pac. 605.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

167 Cal. 729

In re MERRYFIELD'S ESTATE.

MERRYFIELD et al. v. FOX et al.
(L. A. 3739.)

(Supreme Court of California. May 22, 1914.)

1. Wills (§ 97*)—Olographic Will—What Constitutes—Several Sheets.

Where three sheets of note paper were found folded in sequence in a locked drawer belonging to testatrix, with other papers, each of the sheets containing testamentary writing entirely in testatrix's hand, all being of the same size, character of paper, and apparently torn from the same writing pad, the court properly found that the three sheets together constituted her last will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 232, 233; Dec. Dig. § 97.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. **Wills (§ 130*)—Form—Detached Pieces of Paper.**

Where testatrix's alleged olographic will appeared to have been written on three detached pieces of paper, it was not necessary to support a finding that the three papers constituted one instrument that they should have been fastened together.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 336, 338–340; Dec. Dig. § 130.*]

Department 2. Appeal from the Superior Court of Riverside County; F. Densmore, Judge.

Application by Gertrude E. Fox and another for the probate of the will of Emily M. Merryfield, deceased, contested by Clarence J. Merryfield and another. Judgment for proponents, and contestants appeal. Affirmed.

H. L. Carnahan, of Riverside, for appellants. Purington & Adair, of Riverside, for respondents.

HENSHAW, J. Emily M. Merryfield, a widow, died in 1913 leaving surviving her five sons and two daughters. For several years before her death she had been so blind that she could not recognize objects, and could only distinguish between light and dark. She was 68 years of age. On the day before her death her daughter Gertrude E. Fox found three sheets of paper folded together and placed in a locked drawer. In this drawer were other papers. Each of these three sheets contained writing entirely in the hand of the deceased. The three sheets were of the same size and character of paper, and apparently were torn from the same writing pad. The first of these sheets contained the following:

"Riverside, Cal. I write to certify that I am right and will name the property I have in my house which I give my girls, Gertrude Fox and Ethel Schofield. I give and bequeath all I have, all my property, my house and lot and things in the house."

The second sheet contained this:

"I want to have all my things in the house, the boys have got more than the girls and they won't get any more; this is my last will and is as I want it to be.

"Signed this —— of 1911, by Emily Merryfield."

On the third sheet was written:

"Riverside, Cal.

"This is my will. My mind is good and I want my girls, Gertrude and Ethel, to have all my belongings, my house and lot and the things in the house.

"This eleventh day of December, 1911.

"Mrs. Emily Merryfield."

These three sheets of paper were offered for probate as being the last will and testament of the deceased. Certain of the sons instituted a contest to the admission in probate of the three sheets, contending that the writing upon the third sheet alone constituted the will of the deceased. There was to the trial court presented no other ground of contest. That court after a hearing determined that the contents of the three sheets constituted one instrument, which was the last will and testament of the deceased. The soundness of this determination is here presented for review.

Appellants' position is that the first two sheets constituted an imperfectly executed olographic will; that the third sheet contains a perfect olographic will; that the evidence is not sufficient to support the court's finding that the first two sheets are to be read and construed as a part of a harmonious homogeneous olographic will; that the evidence is not sufficient to establish this relationship between the three sheets which the court found to exist, and that therefore the first two sheets must be denied probate.

[1, 2] The case thus presented is not that contemplated by section 1320 of the Civil Code, by which it is declared that "several testamentary instruments executed by the same testator are to be taken and construed together as one instrument," nor is it the case of the incorporation into a will of extrinsic writings where the evidence identifying such writings must be clear to justify such incorporation. Shillaber Estate, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; In re Young, 123 Cal. 337, 55 Pac. 1011. The case actually presented may be stated by the question whether the evidence upholds the finding of the court that the three sheets of paper form a single continuous instrument constituting the last will of the deceased. That the evidence is sufficient for this we think no doubt can be entertained. There was no other writing upon the sheets saving that of the testatrix. The sheets themselves were arranged and folded together in proper sequence. If testatrix had believed that the last page alone was her will, it is not probable that she would have preserved the first and second pages with such care, and would so have enfolded them as to evidence her belief that they were a part of and incorporated in her will. The omission of words and the repetition of ideas are not unusual in the writings of a person of advanced years and unskilled in the art of exact legal expression. The fact that the will is written upon more than one sheet of paper is immaterial. Estate of Taylor, 126 Cal. 97, 58 Pac. 454. Nor is it necessary to support the finding that the several detached pieces of paper constituted one instrument that these sheets should be fastened together by mechanical or other device. 40 Cyc. 1093; Sellards v. Kirby, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214; Schillinger v. Bawek, 135 Iowa, 131, 112 N. W. 210; Murrell v. Barnwall, 110 Ala. 668, 20 South. 1021.

It is concluded herefrom that the finding of the court is sustained by adequate evidence, and the order and decree appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24 Cal. App. 331

FINCH v. WESTERN NAT. BANK OF SAN FRANCISCO. (Civ. 1205.)

(District Court of Appeal, Third District, California. April 13, 1914.)

1. DAMAGES (§ 1*)—RIGHT OF RECOVERY IN GENERAL — WRONGFUL APPEAL BY GARNISHEE.

Where a garnishee declined to pay over sums due the principal debtor, and appealed from a judgment in favor of plaintiff, plaintiff's recovery, if an action for the garnishee's acts may be maintained, is not restricted to the amount due the principal debtor, as provided by Code Civ. Proc. § 544, but includes all damages occasioned by the garnishee's appeal; the action sounding in tort.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. TORTS (§ 13*)—WRONGFUL APPEAL BY GARNISHEE—"PARTY AGGRIEVED"—"WRONG."

As Code Civ. Proc. § 938, authorizes any party aggrieved by a judgment to appeal, and the "party aggrieved" is one against whom a judgment has been rendered, no action can be maintained against a garnishee who, after the superior court ordered it to turn over funds due the principal debtor, appealed from the judgment, and, upon affirmance, attempted to secure rehearing by the Supreme Court; for the loss to plaintiff by the delay is damnum absque injuria, and is not a wrong within Civ. Code, § 3523, declaring that there is no wrong without a remedy.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 14–17; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 1, pp. 273–278; vol. 8, pp. 7569, 7570; vol. 8, pp. 7547, 7548, 7838.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Helen M. Finch against the Western National Bank of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

J. L. Smith, of San Francisco, for appellant. Gavin McNab, Geo. W. Mordecai, and Nat Schmulowitz, all of San Francisco, for respondent.

HART, J. This is an action by the plaintiff to recover the total sum of $9,533 as damages alleged to have been suffered by her through certain acts of the defendant growing out of its alleged wrongful failure to turn over to her, or to the sheriff for her, a certain sum of money which was on deposit with it in the name of, and as belonging to, one Paul V. Finch, and which had been garnished in the hands of the defendant in an action in which said Helen M. Finch, as the plaintiff, sought to recover, and finally did recover from the said Paul V. Finch, as the defendant therein, a judgment for the sum of $5,500. Judgment passed in favor of the defendant, and this appeal is from said judgment on the judgment roll alone.

It appears that the above-mentioned action by Helen M. Finch against Paul V. Finch was begun in the superior court in and for the city and county of San Francisco on the 14th day of November, 1907. On December 3, 1907, a writ of attachment was duly issued in said action, and the defendant here (the Western National Bank) was garnished, the writ having been served by the sheriff. At the time of the service of the writ of attachment or garnishment on the bank, the latter failed to provide the sheriff with a memorandum or statement of the amount of any money held, or the nature or extent of any debt owed, by it to said Paul V. Finch, and at no time did it furnish that officer with any such memorandum or statement; wherefore the bank was, on the 17th day of December, 1907, cited to appear before the court, to be examined on oath respecting any debt owed by it or any credits or other personal property in its possession or under its control belonging to the said Paul V. Finch. In response to said citation, the bank appeared before the court at the time appointed, and declared and admitted that, at the time of the service of the writ of garnishment, it had in its possession and under its control the sum of $2,000 as a commercial account owned by or due to the said Paul V. Finch.

Helen M. Finch, on the 29th day of April, 1908, recovered a judgment against Paul V. Finch in said action, and thereupon a writ of execution was issued and served upon the bank, but the writ was returned unsatisfied, the answer of the bank thereto being that the money belonging to Paul V. Finch which it had had in its possession and under its control had been paid to the sheriff on the 26th day of December, 1907. Thereafter Helen M. Finch instituted proceedings under the authority of sections 717 and 719 of the Code of Civil Procedure, designated and known as "proceedings supplementary to execution," requiring the bank to appear before the court at a certain specified time and answer concerning the money belonging to Paul V. Finch which was in its possession and under its control at the time of the service of the writ of attachment. In this latter proceeding these facts were developed: That on the 24th day of December, 1907, one E. C. Moyes secured a judgment against said Paul V. Finch for a sum in excess of $2,000. Immediately upon the entry of the judgment in the last-mentioned action, execution issued, and, on the 26th day of December, 1907, the bank was served with said writ. Thereupon the bank paid to the sheriff the sum of $2,000 belonging to Paul V. Finch then in its possession, and the sheriff in his return of the writ acknowledged said payment.

Upon hearing the evidence thus adduced the court made and caused to be entered an order directing the bank to pay to the said Helen M. Finch the sum of $2,000 referred to. From this order the bank appealed, and this court, to which the appeal was transferred for decision, affirmed the order. Finch v. Finch, 12 Cal. App. 274, 107 Pac. 594, 598. Thereafter, and within due time, the bank petitioned the Supreme Court for a hearing of the appeal after decision by this court. The petition was denied; Chief Justice Beatty and Justice Angellotti dissenting from the order denying a hearing of the cause by the Supreme Court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

After the judgment of this court became final in said case of Finch v. Finch, a demand was made upon the bank for the payment of said sum of $2,000 toward the satisfaction of the judgment in favor of the plaintiff in said case, and the bank thereupon paid to said Helen M. Finch, and the latter accepted from the bank, on the 29th day of March, 1910, the said sum of $2,000, in accordance with the order as made by the superior court and affirmed by the appellate court.

Although the record does not disclose all the facts embraced in the foregoing statement, it is conceded by counsel on both sides in their briefs that it contains a faithful narrative of the history of the several transactions finally leading to the controversy involved in the present action.

The complaint in this action alleges that, by reason of the acts of the defendant in failing to pay over said money when ordered to do so by the superior court, and in taking the appeal from said order, and, after judgment against it was rendered by this court, petitioning the Supreme Court for a further hearing of said appeal, she was—

> "put to unnecessary expense, and was obliged to, and did, actually expend, for the purpose of enforcing said order of said superior court, * * * the sum of $1,000, as counsel fee, and for costs and expenses of said proceedings of said defendant, all of which money was necessary for plaintiff to expend in order to enforce said order requiring said bank to pay to plaintiff said sum of money, and that, had it not been for said defendant refusing to pay said order and taking said appeals and other proceedings hereinbefore mentioned, plaintiff would not have been required to have expended said sum of money, and that said plaintiff has been deprived of the use of the said sum of money since the 1st day of May, 1908."

The plaintiff further alleges, on information and belief, that the—

> "defendant's refusal to pay to the sheriff, on said 1st day of May, 1908, said sum of $2,000, and said denial of said defendant's liability to said plaintiff for said sum of money, was not made in good faith, but with full knowledge of defendant's liability, and said appeals and petitions thereafter taken in said cause by said defendant were not taken in good faith, but for the purpose of wrongfully delaying and harassing plaintiff until plaintiff abandoned said proceedings on account of the trouble involved, and the time consumed, and the expense entailed in contesting same, and plaintiff further alleges that plaintiff was, in consequence, put to unnecessary expense and trouble and annoyance in connection with said proceedings in contesting said proceedings as aforesaid."

The foregoing averments, which constitute the gist of the plaintiff's cause of action, were denied by the answer.

The court's findings, given in substance, are as follows: That, by reason of the appeal and other proceedings incidental thereto which the bank took from the order of the superior court requiring it to pay over the sum of $2,000 to Helen M. Finch, as the plaintiff and judgment creditor in the case against Paul V. Finch, she (the plaintiff) was compelled to, and did, in fact, expend the sum of $1,000 as counsel fees, costs, and expenses, and that, by reason of said appeal, etc., she was deprived of the use of the said sum of money from the 1st day of May, 1908, up to the 29th day of March, 1910; that the plaintiff had been—

> "damaged in the sum of $1,000, with interest thereon at the rate of 7 per cent. per annum from the 29th day of April, 1910, the day on which plaintiff was compelled to pay said sum of $1,000 for said counsel fee, costs, and expenses, and in the further sum of 7 per cent. interest on the sum of $2,000, from the 1st day of May, 1908, the date when said money was demanded from said defendant by the sheriff on execution, until the 29th day of April (March?), 1910, the date when plaintiff (defendant?) paid said order."

The court further found that the damages complained of in the complaint as occasioned by the acts of the defendant are governed by section 544 of the Code of Civil Procedure; that the refusal by the bank to pay the sum of $2,000 to the sheriff on the 1st day of May, 1908, and the denial of its liability for said sum was made in good faith; that the appeal to the appellate courts and the petition for a hearing of said appeal after decision of the same by the former court were taken and filed in good faith for the purpose of protecting what the defendant believed in good faith to be its legal rights, and not for the purpose of wrongfully so delaying and harassing plaintiff as to lead the latter, by reason of the trouble involved, the time consumed, and the expense entailed in contesting said proceedings, to abandon the same and cease further to contest them.

From the facts thus found, the court concluded that the plaintiff was not, as a matter of law, entitled to a judgment.

[1] Manifestly the action here is one for the recovery of damages for injury alleged to have been wrongfully inflicted upon the plaintiff by the defendant. It is no different, in principle, from any other action sounding in tort, and if, therefore, by the acts of the defendant, as charged in the complaint, the plaintiff suffered an injury cognizable in law, she would be entitled at least to such actual damages as would justly compensate her for the loss thus sustained. And, in estimating the damage, it would be proper to consider all the elements entering into or constituting the aggregate damage so suffered which may be allowed within the limits of the averments of her complaint or the fair-

and reasonable and legal import thereof. This would include any actual expense to which she might have necessarily or legitimately been put by reason of the acts of the defendant as charged in the complaint. It follows, then, that the court's finding, which, in truth, is a conclusion of law, that the "said damages complained of in plaintiff's complaint as occasioned by said defendant's acts as aforesaid are governed by the provisions of section 544 of the Code of Civil Procedure, limiting the defendant's liability to the amount of all credits, property, or debts in defendant's hands at the time the notice of garnishment hereinbefore mentioned was served on defendant," is erroneous. That section, referring to the case where any credits or other personal property belonging to the defendant are garnished or attached while in the possession and control of a third party (sections 542a and 543, Code Civ. Proc.), provides:

> "All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of the service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied."

The obvious purpose of said section is to preserve the integrity of the lien of the attachment or garnishment in such cases and thus render efficacious, to the extent of the value of the credits or other personal property attached, any judgment which the plaintiff may secure against the defendant. Clearly, for an obvious reason, the liability of the garnishee as such must, as the Code section directs, and could justly only direct, be measured and limited by the amount of the credits or property or debts which have been subjected to the lien of the garnishment or attachment. And manifestly, if the proceeding here were merely for the enforcement of such liability, as was the case in Finch v. Finch and the Western National Bank, supra, the plaintiff would be entitled to recover from the defendant nothing beyond or in excess of the amount of credits or property or debts upon which the attachment was levied. But, as is plainly true, this action, while growing out of proceedings authorized to be taken (sections 718 and 719, Code Civ. Proc.) for the purpose, among others, of enforcing, where they have been invoked, the provisions of section 544 of said Code, is not based upon said section, nor upon the proceedings inaugurated in the case of Finch v. Finch for its enforcement. The action is, as before stated, founded upon the alleged wrongful act of the defendant in delaying, to the alleged damage of the plaintiff, compliance with the order requiring it to turn over to the sheriff the money belonging to Paul V. Finch in its possession and under its control at the time of the service of the writ of garnishment, and the purpose of the action is not, nor would the effect of a judgment obtained by the plaintiff therein be, to extend the liability of the bank as a garnishee, but to compel it to compensate the plaintiff for the alleged damage suffered by her from the injury which she alleges was thus wrongfully inflicted upon her. Indeed, as an essential part or element of the cause of action attempted to be stated in the complaint, it is therein alleged that the liability of the defendant as a garnishee in Finch v. Finch et al., supra, had been conclusively adjudicated by the courts and discharged by the defendant by the payment by the latter to the sheriff of the money garnished in satisfaction of the execution, before this action was instituted.

But the judgment must nevertheless be affirmed, for a reason to which attention will now be given.

[2] It is frankly confessed that it is difficult to apprehend how an action of this sort may be held to be maintainable under any circumstances. Indeed, we do not think such an action can be maintained. The rule is that any party aggrieved by a judgment may appeal (section 938, Code Civ. Proc.), and "a party aggrieved" is one against whom a judgment has been given. Hayne on New Trial and Appeal (Rev. Ed.) p. 1064. Thus it appears that the defendant, in appealing from the order requiring it to pay over the money in satisfaction of the plaintiff's judgment, merely exercised a right expressly conferred upon it by law. And, of course, the same is true with respect to its effort to secure a hearing of the appeal in the Supreme Court after the judgment by the District Court of Appeal. This right it was entitled to exercise whether there proved to be merit in the appeal or not. Moreover, it had the right to challenge by appeal the propriety of the remedy invoked by the plaintiff for the purpose of obtaining the order from the superior court compelling it to pay the money, as well as to contest the right of the plaintiff to require it in any event to pay over said money in satisfaction of the judgment she had obtained against Paul V. Finch. The loss, then, suffered by the plaintiff as a consequence of the act of the defendant in prosecuting the appeal and thus delaying the payment of the money to which she was entitled (and, undoubtedly, she suffered a wrong thereby) is not a legal wrong or one of which the law will take cognizance. The loss she suffered is, in other words, of that class of losses or wrongs which comes within the doctrine of damnum absque injuria, and no action will lie for it. Am. & Eng. Ency. of Law, vol. 8, p. 677. The wholesome maxim of jurisprudence, invoked here by the plaintiff, "There is no wrong without a remedy" (section 3523, Civ. Code), can obviously have no application to any but legal wrongs or those wrongs for which the law authorizes or sanctions redress.

There are some other propositions discussed in the briefs which it is conceived possess no force either in the support of or against the conclusion to which we have here been persuaded.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(167 Cal. 748)

THOMPSON v. JONES et al. (S. F. 6271.)

(Supreme Court of California. May 28, 1914.)

GIFTS (§ 30*)—GIFTS INTER VIVOS—FUNDS IN BANK.

For several years prior to 1908 defendant J. and her husband had lived together in illicit relationship, representing themselves as husband and wife. She during this time had certain funds which she deposited in a bank to the credit of the joint account of both, so that either could check against it and draw out all or any part of the money. Both did check against it, and, both having purchased certain land in controversy, it was paid for by the husband by check drawn by him against such deposit. The parties were thereafter married and later divorced. *Held* that, when the money was so deposited, a tentative gift was created which remained uncompleted until the husband drew the money from the bank and devoted it to his own purposes, and that, he having so withdrawn the money and purchased the land in their joint names, they became tenants in common, each owning an undivided moiety thereof.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 52–57, 65; Dec. Dig. § 30.*]

Department 2. Appeal from Superior Court, Sonoma County; T. C. Denny, Judge.

Action by A. M. Thompson against Cora M. Jones and another. From an interlocutory decree in favor of plaintiff, defendant Cora M. Jones appeals. Affirmed.

T. J. Butts, of Santa Rosa, for appellant. Phil Ware and A. B. Ware, both of Santa Rosa, for respondent.

HENSHAW, J. This action was brought by plaintiff for the partition of certain land situated in the county of Sonoma. The complaint alleged that plaintiff is the owner in fee of an undivided one-half interest in the land and is a tenant in common with the defendants. The answer denied any interest or ownership of the plaintiff in the lands, and by cross-complaint defendant Cora M. Jones asserted ownership in herself of all of the land, and sought a decree so declaring. The court found in favor of the plaintiff upon all the material issues and decreed a partition. From this interlocutory decree defendant Cora M. Jones appeals.

The findings of the court may be thus summarized: For many years prior to the 8th day of October, 1908, Cora M. Jones and B. W. Jones (plaintiff's grantor) had been maintaining an illicit relationship, living together and representing themselves to be husband and wife. Cora M. Jones, prior to the 8th day of October, 1908, owned as her separate property some $6,000, which upon that date she deposited in the Bank of Napa, in the city of Napa, in the name of and to the joint account of B. W. Jones and Cora M. Jones. so that either the said B. W. Jones or the said Cora M. Jones could check against this account and draw out all or any part of the money. It was the declared intent of Cora M. Jones when she made this deposit to allow B. W. Jones to check against it and use it or any part of it as he saw fit. On the 8th day of October, 1908, B. W. Jones and Cora M. Jones purchased the land described in plaintiff's complaint. The land was paid for by check against the funds in the Napa Bank, which check was drawn by B. W. Jones. The deed to the land was taken in the name of B. W. Jones and Cora M. Jones, and by this deed the two became tenants in common of the land, each owning an undivided moiety thereof.

Subsequently, in June, 1909, B. W. Jones and Cora M. Jones intermarried. They continued to live upon the land, which was farming land, until 1911. This relationship ended in a divorce procured by Cora M. Jones. Following this Cora M. Jones brought an action in ejectment against B. W. Jones to recover the land. This action was commenced on the 31st day of May, 1911. Upon June 5th following a lis pendens was filed. Intermediate the commencement of the action and the filing of the lis pendens, B. W. Jones sold his undivided half interest to the plaintiff for the sum of $860, which the court finds was paid.

It will be noted that the findings of the court already outlined declare, in effect, a completed gift inter vivos of one-half of the money which paid for the land, and consequently full and complete title in B. W. Jones of an undivided one-half of the land. Further findings of the court declare an estoppel raised against the claim of Cora M. Jones upon the ground of an "understanding" between Cora M. Jones and B. W. Jones that he owned one-half of the property and his expenditure under this understanding of time, labor, and money in the improvement of the land and the construction of permanent buildings thereon. Another estoppel is found by the court to be raised against the claim of Cora M. Jones "by reason of the illicit and unlawful relationship existing between B. W. Jones and Cora M. Jones."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

These estoppels are against the contention of the appellant that the money was her separate property, that B. W. Jones was but her agent in the management of it and of her affairs, that it was still her money when the land was bought, that it was her money that paid the full purchase price and that, under well-settled principles, B. W. Jones, when he took title to an undivided one-half in himself, became her trustee. The further contention of the appellant vigorously urged is that plaintiff was not a bona fide purchaser, and that she is therefore entitled to establish her equitable title against him. Finally, certain rulings of the court are complained of, which rulings, it is declared, unduly limited the scope of the cross-examination of the plaintiff in defendant's effort to show the fact that he was not such a bona fide purchaser.

It is manifest, however, that, without regard to estoppels, if the findings of the court to the effect that B. W. Jones became the owner of an undivided one-half of the property by gift be sustained by the evidence, all other findings and rulings, however erroneous, are absolutely noninjurious. Therefore to this primary consideration we directly come.

While, as is to be expected, there is a conflict in the evidence upon this question, the testimony of B. W. Jones fully supports the court's finding. Jones testified that during the years in which he and Mrs. Jones maintained their relationship they "pooled their funds, forming a community fund to be used in the interests of each other. It was understood that whatever money one had was as much the other's. We both checked against the accounts. We were both sustained by the mutual fund." Cora M. Jones knew all about the purchase of the ranch and the taking of title in his name as well as in her own. She always recognized him as half owner, and never made any assertion that his title was held for her in trust. Indeed, she always insisted that half the money in the bank belonged to him.

The situation presented then is this: Cora M. Jones owned the money. It was deposited in the bank with the right to B. W. Jones to check against it and use the funds for his own purposes. So long as the money remained in the bank it was indubitably the money of Cora M. Jones. The tendered gift to B. W. Jones was incomplete, and remained uncompleted until he drew the money and devoted it to his own purposes. This is precisely what he did when he checked against it for the purchase of the land, taking title in his own name, as well as in that of Cora M. Jones. There was no concealment of his act and no attempted repudiation of it by Cora Jones until differences had arisen between the two which culminated in their divorce and in this subsequent litigation.

The judgment is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(167 Cal. 732)

LEWIS v. LEWIS. (L. A. 3356.)

(Supreme Court of California. May 26, 1914.)

1. Divorce (§ 141*)—Evidence—Relief.

The court may not deny a divorce, where the evidence of plaintiff, adequately corroborated, establishes a ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 474, 475; Dec. Dig. § 141.*]

2. Divorce (§ 184*)—Findings—Conclusiveness.

A finding of fact, in a divorce action in favor of a defaulting defendant, will not be disturbed on appeal, unless the finding cannot be supported on any rational view of the testimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570–573; Dec. Dig. § 184.*]

3. Divorce (§ 37*)—"Desertion"—Evidence.

Where husband and wife separated because of the inability of the husband to support the wife by reason of his age, and he was compelled to look to his relatives for support, and the wife acquiesced in her husband's belief that the only way for him was to live with his own people, the separation was with the wife's consent and was not desertion, within Civ. Code, § 99, declaring that separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107–134, 136–138; Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 3, pp. 2020–2024; vol. 8, p. 7635.]

4. Divorce (§ 37*)—Grounds—Desertion—Consent to Separation.

Consent to a separation, so as to prevent it from amounting to desertion, within the statute authorizing a divorce for desertion, may be implied from acquiescence or from other circumstances which show consent by the spouse suing for divorce, or that the separation was not against his or her will, and the consent need not be express.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107–134, 136–138; Dec. Dig. § 37.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mary C. Lewis against Henry C. Lewis. From a judgment denying relief, plaintiff appeals. Affirmed.

A. C. Lawson, of Long Beach, for appellant.

SLOSS, J. The plaintiff appeals from a judgment denying her prayer for divorce. The complaint was based on the ground of desertion. The defendant defaulted, and the court, after hearing plaintiff's proofs, concluded that she had failed to make out a case, and entered judgment accordingly.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The plaintiff testified that she and the defendant had been married on March 1, 1910. She was then 41 years old. His age was 81. They had been acquainted but a short while. After the marriage, the parties took up their abode at Long Beach, in a house owned by defendant. As a result of litigation then pending, this house was lost by defendant some 4½ months after the marriage. Thereupon the defendant "went away," stating that he was unable to support the plaintiff, and that he would have to go and live with his own people.

A witness on behalf of plaintiff testified that Lewis, the defendant, had told him, before the separation, that he could not support his wife, "and he could not live with the woman if he could not support her." He also said that "he never expected to live with her again; he could not support her." After the separation the defendant told this witness that he would never return to live with plaintiff.

A son of defendant testified that the defendant had told him, prior to his leaving Long Beach, that he "was going away, and that he would not return; could not stay under the circumstances; that he would soon be without means, and would not return."

[1] The court is not authorized to deny a divorce where the evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint. Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 Pac. 853; Benkert v. Benkert, 32 Cal. 467. A case having been made out, there is no arbitrary power to grant or refuse the relief. But, in every action for divorce, the court is called upon to determine whether the evidence before it does establish the truth of the charge made in the complaint.

[2] As in other cases, every intendment is in favor of the finding made. Such finding is not to be overthrown on appeal, unless it is very plain to the appellate court that the conclusion reached cannot be supported on any rational view of the testimony. In view of the care with which the law has sought to guard against collusive divorce proceedings, the rule just stated should be applied in its full force to a finding in favor of a defaulting defendant in a divorce suit.

[3] Under the evidence here given, we think the court was justified in deciding that a case of willful desertion had not been made out. It is true that plaintiff testified that defendant had gone from her, and that he had made statements indicating that he did not intend to return. The testimony of the corroborating witnesses, too, supported the contention that defendant left without the intention of returning. But it appeared that his departure was induced by his inability to support the plaintiff. The separation was apparently regarded by the defendant as necessary under the circumstances. At his age, it was, in all likelihood, impossible for him to earn a living for himself, much less for his wife. This being so, he was compelled to look to his relatives, or, perhaps, to his wife, for support. It is by no means an unreasonable inference from the testimony, particularly that of the plaintiff, that she recognized the necessities of the situation, and that she acquiesced in her husband's belief that the only way was for him to take up his abode with "his own people." In other words, the evidence justified the conclusion that the separation was with the plaintiff's consent, and consequently did not constitute a desertion. Civ. Code, § 99.

[4] Consent to a separation may be implied "from acquiescence * * * or from other circumstances which show the plaintiff's consent or that the separation was not against her will. The consent need not be express. It may be tacit, as where the plaintiff is willing and has made no objection." Nelson on Div. & Sep. § 67; McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(167 Cal. 735)

ROBINETT v. BROWN. (S. F. 6376.)

(Supreme Court of California. May 26, 1914.)

1. MECHANICS' LIENS (§ 157*)—CLAIM OF LIEN — AMOUNT DUE — UNTRUE STATEMENT — EFFECT.

Where a mechanic's lien statement alleged that the reasonable value of the labor and material for which a lien was sought to be established was $97.50, but the court found that the work was done and the material furnished under a contract providing for payment of $60 only, the lien was lost for claimant's failure to truly state the terms and conditions of the contract under which the work was done and materials furnished.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 268–274; Dec. Dig. § 157.*]

2. MECHANICS' LIENS (§ 303*)—JURISDICTION —AMOUNT IN CONTROVERSY.

Since an action to enforce a mechanic's lien is equitable in character, jurisdiction to foreclose does not depend on the amount secured by the lien, where suit was brought for such relief, the fact that the claim was for less than $300, and that the superior court found that the lien was void, did not deprive it of jurisdiction to render a personal judgment for the proper amount of claimant's debt.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 628–631; Dec. Dig. § 303.*]

3. COSTS (§ 42*)—TENDER.

Where, in a suit to foreclose a mechanic's lien, the court found that claimant was not entitled to a lien, and defendant filed an offer to permit judgment for the amount to which claimant was entitled, the latter was not entitled to costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 137–164; Dec. Dig. § 42.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Suit by Thomas Robinett against William Brown. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

W. C. Cavitt, of San Francisco, for appellant. J. S. Reid, of San Francisco, for respondent.

HENSHAW, J. This action was commenced to foreclose a mechanic's lien in the sum of $97.50 on property belonging to the defendant. The lien claim and the complaint both charged upon an oral contract to pay the reasonable market value of the work done and materials furnished, and alleged that this reasonable value was the sum of $97.50. The answer asserted a specific agreement on the part of the plaintiff to furnish the material and do the work in question for the sum of $60, and pleaded an offer in writing to allow judgment to be taken in that sum. Code Civ. Proc. § 997.

[1, 2] The court found the reasonable value of the labor and material to be $97.50, but further found that the work was done and the material furnished under the contract pleaded by the answer. It also and necessarily found that the claim of lien did not contain a true statement of the terms and conditions of the contract for which reason the right to a lien was lost. Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008; Buell v. Brown, 131 Cal. 158, 63 Pac. 167. It found in favor of the defendant upon the allegation of his written offer to permit judgment to be taken for the sum of $60, and finally found that plaintiff was entitled to a judgment for that amount only. The court concluded, however, that because the lien was lost the action became a simple action at law to recover a sum of money less than $300; that it had no jurisdiction over such action, and refused to render any other judgment than that declaring its lack of jurisdiction. In this the court erred. The action to enforce a mechanic's lien is equitable, and jurisdiction to foreclose the lien does not depend upon the amount of money secured by the lien; nor, when that amount is less than $300, does the court lose jurisdiction by reason of any fatal defect which destroyes the lien and prevents its foreclosure. It becomes the duty and the right of the court to retain the action and render a personal judgment in a proper amount even if that amount be less than $300. Mannix v. Tryon, 152 Cal. 35, 91 Pac. 983; Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689.

[3] It follows herefrom that the court should have given judgment for plaintiff in the amount to which he was justly entitled. That amount as fixed by the findings of the court was $60, but as defendant had made proper tender of this amount under section 997 of the Code of Civil Procedure plaintiff in recovering this judgment was not entitled to his costs of action.

It further necessarily follows that the judgment of the trial court should be and is hereby reversed, with directions to the court to enter upon the findings actually made judgment in favor of plaintiff, without costs. Appellant, however, will, as matter of course, be entitled to costs upon this appeal.

We concur: MELVIN, J.; LORIGAN, J.

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167 Cal. 737

In re PRAGER'S ESTATE. (L. A. 3502.)

(Supreme Court of California. May 26, 1914.)

COSTS (§ 233*) — AFFIRMANCE ON APPEAL — STATUTORY PROVISIONS.

Supreme Court rule 23 (119 Pac. xiii) requires the clerk to insert in the remittitur, where the judgment is reversed or modified, a judgment that the appellant recover the costs on appeal. At the time of the adoption of the rule, Code Civ. Proc. § 1027, provided that when a new trial was ordered or the judgment was modified the costs of appeal were in the discretion of the court, but there was no statutory definition of the items properly chargeable as costs. Under the rules and practice of the court, only the expenses of printing the transcript in both courts were chargeable as costs; none of these expenses being such as would be incurred by appellee. In 1913 (St. 1913, p. 1033) Code Civ. Proc. § 1027, was amended so as to provide that the prevailing party on appeal should be entitled to costs, and might recover all amounts actually paid in connection with the appeal in the preparation of the record, including the costs of printing briefs. *Held*, that the failure to amend rule 23 so as to conform to the new Code section could not deprive an appellee of the costs to which she was entitled, and the remittitur on affirmance should include a judgment for the costs of appeal in favor of the prevailing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 884–891, 929; Dec. Dig. § 233.*]

In Bank. Motion by Mary J. Prager to recall and correct, by the insertion of judgment for costs, the remittitur rendered upon the appeal of Fannie Prager Cohn (137 Pac. 37). Motion granted.

Trask, Norton & Brown, of Los Angeles, for appellant. O'Melveny, Stevens & Millikin and Oscar Lawler, all of Los Angeles, for respondent.

PER CURIAM. Upon an appeal by one of the devisees under the will of Charles Prager, deceased, from the decree of settlement of final account and of distribution, the decree was affirmed by this court. Estate of Prager, 137 Pac. 37. The opinion was filed December 3, 1913, and became final at the expiration of 30 days from that date. Thereupon the clerk of this court issued to the court below a remittitur. This document did not include any judgment in favor of respondent for her costs on the appeal. She now moves for the recall of the remittitur and for its correction by the insertion therein of a judgment for such costs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The action of the clerk was in accord with the rules of this court. Rule 23 (119 Pac. xiii) reads as follows:

> "In civil cases the clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal."

The rule, it will be observed, directs the incorporation of a judgment for costs only where this court has modified or reversed the judgment or order appealed from. The clerk is not directed to include judgment for costs where the appeal has resulted in an affirmance.

The latest revision of our rules became effective on March 18, 1912. At that time section 1027 of the Code of Civil Procedure read as follows:

> "In the following cases the costs of appeal is (are) in the discretion of the court:
> "1. When a new trial is ordered;
> "2. When a judgment is modified."

There was then no statutory definition of items properly chargeable as costs of appeal. Rule 13 (119 Pac. xii) of this court provided, as it does now, that the expense of printing transcripts or other papers constituting the record and required to be printed should be allowed as costs. The clerk of the court was, and is, required by section 752 of the Political Code to collect a fee for filing the transcript in a civil case, this fee being in full for all services rendered up to the rendering of the judgment or the issuing of the remittitur, when no petition for rehearing has been filed. There was, when the rules of this court were last revised, no provision of rule or statute authorizing the taxing as costs of the expense of printing briefs, and no fee was imposed for filing briefs. The settled practice was that the expense of printing briefs was not chargeable as costs. The taxable costs above enumerated, viz., the expense of printing transcript, and the fee for filing the transcript (as well as the fee of the clerk below for certifying the transcript, provided for in rule 11 [119 Pac. xii]), were all incurred in the first instance by the appellant. The respondent had not been put to any expense chargeable as costs, and for this reason there was no occasion to provide by rule for a judgment allowing costs on appeal to a respondent in case of affirmance.

But, in 1913 (St. 1913, p. 1033) section 1027 of the Code of Civil Procedure was amended, so as to read as follows:

> "The prevailing party on appeal shall be entitled to his costs excepting when judgment is modified, and in that event the matter of costs is within the discretion of the appellate court. The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of fifty dollars to any one party. The appellate court may reduce costs in case of the insertion of unnecessary matter in the record."

Since this enactment has been in force, the prevailing party has an absolute right to his costs, except in case of modification of the judgment, whereas, under the former section, the court had discretion to grant or deny costs where a new trial was ordered, as well as to where the judgment was modified. The respondent whose judgment had been affirmed would probably always have been entitled to costs, if any expense chargeable as costs had been incurred. Be that as it may, this right is now beyond question. Furthermore, the amendment allows the prevailing party to recover as costs "all amounts actually paid out by him in connection with the appeal." We shall not attempt, at this time, a definition of the items covered by this comprehensive language. Certain it is that, by the terms of the statute, the expense of printing briefs is included in the category of taxable costs. This expense, at least, within the limit fixed by the code section, a prevailing respondent has the right to recover. Rule 23 is therefore not in complete accord with the present state of the law. The omission to provide by rule for a judgment, to which the prevailing party is entitled under the statute, cannot, of course, take away his right. Rule 23 should be revised to meet the changed conditions presented by the code amendment. Until it is so revised, remittiturs on affirmance, as on reversal, should include a judgment for costs of appeal in favor of the prevailing party.

It is ordered that the remittitur heretofore issued be recalled, and that the clerk issue a new remittitur, inserting therein a judgment that the respondent recover her costs of appeal.

BEATTY, C. J., does not participate in the foregoing.

167 Cal. 740

BELDEN v. UNION CENTRAL LIFE INS. CO. (S. F. 5941.)

(Supreme Court of California. May 27, 1914. Rehearing Denied June 26, 1914.)

1. INSURANCE (§ 376*)—GENERAL AGENT—FORFEITURES—AUTHORITY TO WAIVE.

The fact that the general agent of an insurance company has general authority to waive forfeitures did not prevent the insurance company from inserting in the policy an express limitation that such agent should have no such authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952–955; Dec. Dig. § 376.*]

2. INSURANCE (§ 668*)—GENERAL AGENT—FORFEITURES—AUTHORITY TO WAIVE.

Where an insurance contract provided that none of its terms could be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president, vice president, secretary, or assistant secretary of the company, whose authority for that purpose should not be delegated, whether a general agent of the insurer had authority by virtue of his office to waive a forfeiture was for the jury, and hence an instruction that such general agent had authority to waive forfeitures and to accept money for premiums overdue was erroneous.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732–1770; Dec. Dig. § 668.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Helen Belden against the Union Central Life Insurance Company. From a judgment for plaintiff and from an order denying defendant's motion for a nonsuit, it appeals. Reversed.

W. S. Andrews and Pringle & Pringle, all of San Francisco, for appellant. A. M. Kidd, Frohman & Jacobs, Titus, Creed & Dall, and A. H. Brandt, all of San Francisco, for respondent.

PER CURIAM. This is an appeal by the defendant, a life insurance company, from a judgment against it and from the order denying its motion for a nonsuit. The plaintiff is the widow of Roy K. Belden, deceased. When his death occurred, there were five purported policies of insurance on his life, all issued by the defendant corporation. Two of these were paid, but the company denied liability upon the other three, being the one here in suit payable to his widow and two others upon which Georgeana Belden, Roy K. Belden's mother, is the claimant. The policy upon which Mrs. Helen Belden relies is numbered 312609 and is for the sum of $2,000; the other two upon which Mrs. Georgeana Belden sued are numbered 289416 and 312608, the former being a five-year term policy for $1,000 and the latter an ordinary life policy for $2,000. The two policies last mentioned are involved in a separate action, but the facts of the two cases are essentially the same.

Policy 312609 is of the type known as an "ordinary life" policy. It was issued November 30, 1905, and the annual premium payable November 30th of each year was $47.96. The first year's premium was paid on delivery of the policy, and, when the second year's premium became due, it was paid by a note dated November 30, 1906, and was renewed several times, but on December 26, 1907, it was returned to the company's principal office at Cincinnati as unpaid.

The insured, Roy K. Belden, resided in Germany and his brother Dan F. Belden held his power of attorney. On February 3, 1908, the latter called at the office of R. L. Stephenson in San Francisco for the purpose of paying all of the premiums due on the policies of his brother. At that time the premiums on all of the three policies mentioned above were past due. It is not disputed that Mr. Dan Belden offered to pay all that was due on the five policies, and that after the amounts were figured the aggregate was found by Mr. Stephenson to be $156.80, due on four of the policies, the premium on the fifth having been paid, so that it was kept in force until a later period in 1908. There is a conflict of testimony with reference to the conversation between Mr. Stephenson, Mr. Belden, and Mr. Maclay (the bookkeeper and cashier) at that time. Mr. Belden testified that he was asked about the condition of his brother's health, and that he truthfully answered that, so far as he knew, it was good. It appeared in evidence that his brother had been ill for many months and the insured died five days after the payment was made. Mr. Stephenson testified that he informed Mr. Dan Belden that a certificate of health would have to be filed before the reinstatement of at least one policy, and perhaps two besides, as he knew that one policy had lapsed and believed that to be the case with two others. This part of the conversation was denied by Mr. Belden, who said that no definite statement was made about any of the policies lapsing except that he was told that possibly a health certificate would be required for one of them—not the one in suit in this action. Of course the jurors were at liberty to accept either version of the conversation. We mention this conflict in view of one of the instructions which will be discussed later.

On February 4, 1908, Mr. Maclay for Mr. Stephenson wrote to the secretary of the defendant corporation a letter containing the following language:

> "I wish you would kindly look up policies Nos. 278278, 289416, 312608–9, Roy K. Belden, and inform us as to the standing of these policies. We have accepted settlement on account of the renewals and premiums due for the year 1907, together with interest due."

It was stipulated that this letter reached its destination on February 10th, and that if certain officers of the defendant were present at the trial they would testify that the letter was turned over to a clerk and never brought to the attention of the president, vice president, or secretary until February 17, 1908, when a letter from Mr. Stephenson announcing Dr. Roy K. Belden's death was received. On February 18th the home office telegraphed Stephenson that only two of the Belden policies were in force and that the others were canceled. He was instructed in the telegram to return immediately any payments made on canceled policies. This he promptly attempted to do, but Mr. Dan Belden refused to accept the return of the money.

An examination of the policy shows that upon it was a notice to the policy holder as follows:

> "All payments due on this policy for premium or notes or interest upon notes given to the company, are payable at the office of the company, in the city of Cincinnati, or to the au-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thorized agent of the company, on the production of the premium receipt (signed by the president, vice president, secretary, or assistant secretary) or the note given in payment of premium.

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same, and none of its terms can be modified, nor any forfeiture under it waived, save by an agreement in writing signed by the president, vice president, secretary, or assistant secretary of the company, whose authority for this purpose shall not be delegated."

There was a provision in the policy that failure to pay any of the premiums due during the first three years would avoid and nullify the policy "without action on the part of the company or notice to the insured or beneficiary." There was also a statement in the contract that notes given for premiums with their conditions were made a part of the agreement.

Appellant directs our attention to the following instruction, the giving of which is assigned as error:

"The evidence shows that Robert L. Stephenson was general agent for defendant in February, 1908. As such general agent he had the right to waive forfeitures and to accept money for premiums even if overdue."

[1] This instruction took from the jury the right to determine whether or not, from the facts presented, the assured and the insurance company were bound by the terms of the policy irrespective of the acts of the general agent. The question for us to determine according to appellant is this: Can a general agent of a life insurance company waive forfeitures in the face of a prohibition in the policy itself of which the assured has knowledge? It is argued that the quoted instruction did not amount to a statement that Stephenson did in fact waive forfeiture, but that as general agent he had authority to do so; the jury being left to determine whether or not his acts constituted such waiver. If we put this interpretation upon the instruction, the question of law arises: Did the status of "general agent" give Stephenson the right to waive forfeitures in spite of the inhibition expressed in the policy? It is admitted by appellant that waiving forfeitures and reinstating lapsed policies is within the apparent scope of a general agent's powers. But, say appellant, that does not prevent a company from placing a limitation upon the general agent's authority if third persons are informed of the restriction. We believe this to be the true rule. The powers of a general agent are admittedly very great.

"It may be laid down as a general rule that an agent with general authority, i. e., an agent who is authorized to take risks and enter into contracts of insurance without consulting the company, may waive any of the conditions contained in the policy, and his knowledge of facts material to the risk is the knowledge of the company." 16 A. & E. Enc. of Law (2d Ed.) p. 942.

"The extent of the agent's power to waive conditions and forfeitures is, of course, dependent on the extent of his authority to act for the insurer. If he is a general agent, his power to waive conditions and forfeitures is, according to the weight of authority, coextensive with that of the insurance company itself." Cooley's Briefs on the Law of Insurance, p. 2478.

But these general rules do not prevent a company from limiting the powers of any agent, no matter what his rank or designation. It was said in the opinion in Iverson v. Metropolitan Life Ins. Co., 151 Cal. 750, 91 Pac. 611, 13 L. R. A. (N. S.) 866:

"An insurance company can, like any other principal, prescribe limitations upon the power and authority of agents, and persons dealing with such agents with knowledge of the limitations upon their authority are bound by the restrictions imposed."

In Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co., 161 Cal. 468, 119 Pac. 646, 37 L. R. A. (N. S.) 322, this court adopted the opinion written by Mr. Justice Hall. In that opinion the law was clearly and unequivocally stated to the effect that an insurance corporation may, by its policies, limit the powers of its agents. At page 471 of 161 Cal., page 647 of 119 Pac., the following language is found:

"The policies delivered to and accepted by respondent were signed by the president and secretary of plaintiff, and countersigned by its general agent Bosworth. No evidence of the authority of Bosworth was given other than that he was the general agent of the plaintiff, and none was given as to the authority of Shepherd other than that he was the local agent at Fresno, and by the terms of his employment had no authority to change a policy in any way. It may be conceded that this was sufficient to clothe the agents with ostensible authority coextensive with the business intrusted to them, in the absence of any notice of a limitation thereon. But the policies accepted and retained by defendant contained the provision that 'no condition or provision of this policy shall be varied or altered by any one unless by written consent of the president or secretary of the company.' This was a limitation upon the authority of agents of which defendant had notice. That such provisions in policies are valid has frequently been decided. The matter is discussed at great length in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and it was there held (syllabus) that 'it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered.'"

There is no peculiar magic in the title "general agent" which prevents an employer of such an agent from limiting his authority. Without such limitation his powers are great and ordinarily will support any of his acts or contracts which might have been done or executed by his principal. Mr. Justice Temple, in delivering the opinion of this court in Westerfeld v. New York Life Ins. Co., 129 Cal. 78, 61 Pac. 670, said:

"It is also said that whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offered no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiffs. The title 'general manager,' for a specified territory, does not establish the particular authority required, especially, after this express limitation, which was known to the insured."

Commenting upon the position taken in some of the authorities that "notice to the agent is notice to the company," he said:

> "If this means that the company is bound unless it promptly gives notice that it is not satisfied, and in time to enable the insured to make his proof, it is clearly right and in accord with rules applicable alike to other transactions; but I see nothing in these decisions applicable to this case. Knowledge of the agent is not knowledge of the principal in matters not within the scope of the agent's authority. I see nothing unfair in such a limitation upon the authority of an agent as to matters involved here. To make such modifications of the contract is not usually expected of an agent, and the power to do so is not implied in what may be called his usual ostensible authority."

The clause of section 616, Political Code, declaring that the process agent shall also be "deemed in law a general agent," does not prevent the company from inserting in the policy stipulations that such agent shall have no power to waive forfeitures or alter the terms of the policy after it is issued. It was not intended to forbid such stipulations. The assured has notice of them, and therefore they bind him. The question whether such agent may afterwards do things which create an estoppel against the company, or which have the effect of a new contract of insurance, does not arise here and it is not considered.

The latest decision of this court called to our attention is Sharman v. Continental Ins. Co., 138 Pac. 711, where the following language was used:

> "An insurance company, like any other principal acting through agents, may limit their powers, and this was done by defendant by clear and plain terms in the policy here in question. When plaintiff accepted it, it became the contract between him and the company, and he was charged with knowledge of its terms, among others the limitations upon the power of the agent of the company. Westerfield v. N. Y. Life Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715, 91 Pac. 266; Blunt v. Fidelity & Casualty Co., 145 Cal. 268, 78 Pac. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34. Provisions in policies limiting the authority of agents to bind the company by waiver of conditions therein have been the frequent subject of consideration by the courts. It is held with practical unanimity that, notwithstanding such limitations upon the authority of these agents, conditions in policies may be waived by some agents of the company, and under some circumstances will be deemed to have been waived notwithstanding the method provided for in the policy has not been pursued. But the authority of an agent to effect the waiver in the face of such a limitation as here is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. They are the general agents of the company, and vested with full authority to consummate the contract of insurance, and are deemed, as such representatives, to have the same power to waive conditions as the companies themselves. As to the character of agents authorized to waive such conditions, it is said, in 3 Cooley's Briefs on Insurance, p. 2480: 'This rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have "full power to effect such contracts of insurance, to fix rates of premiums, to consent to changes, to make endorsements, and to cancel policies." ' It may also include those declared by statute of a state to be general agents."

[2] The last sentence of the quoted language must, of course, be read in connection with the rest of the text and is applicable to the case of a general agent whose powers are not limited by the contract of insurance itself. Reason and the weight of decision both support the doctrine that an insurance company may, in its contract with the assured, limit the authority of any agent, and whether a general agent's powers have been so limited or not, or whether they have been waived by the conduct of the principal or not, are questions of fact, and the mere proof without contradiction that one has been made a "general agent" under the provisions of section 616 of the Political Code does not make it a question of law. The assailed instruction was therefore erroneous and the giving of it constituted material error for which the judgment must be reversed.

The other assignments of error are based upon the alleged insufficiency of evidence to support certain findings. As the evidence which may be adduced at the next trial, if there shall be one, may be quite different from that presented at the first one, we need not pass upon these other questions.

The judgment is reversed.

BEATTY, C. J., does not participate in the foregoing.

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167 Cal. 798

BELDEN v. UNION CENTRAL LIFE INS. CO. (S. F. 5942.)

(Supreme Court of California. May 27, 1914. Rehearing Denied June 26, 1914.)

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Georgeana B. Belden against the Union Central Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. S. Andrews and Pringle & Pringle, all of San Francisco, for appellant. A. M. Kidd, Frohman & Jacobs, Titus, Creed & Dall, and A. H. Brandt, all of San Francisco, for respondent.

PER CURIAM. The error discussed in the opinion in Helen Belden v. Union Central Life Insurance Co. (S. F. No. 5941) 141 Pac. 370, was repeated in the instruction given at the trial of this case, and upon the authority of that case the judgment is reversed.

(167 Cal. 792)

COHEN v. MELROSE, Justice of the Peace.
(L. A. 3787.)

(Supreme Court of California. June 3, 1914.)

1. JUSTICES OF THE PEACE (§ 194*)—CERTIORARI—EXISTENCE OF OTHER REMEDY.

Where certiorari to annul a judgment and subsequent orders of a justice of the peace has been instituted in the superior court, the Supreme Court will not entertain an original petition in certiorari for the same relief, for petitioner may prosecute the proceeding in the superior court, and, under Const. art. 6, § 4, appeal to the District Court of Appeal from an adverse judgment, or, in event of an adverse judgment of the superior court already rendered, he may appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

2. MANDAMUS (§ 31*)—COMPELLING INFERIOR COURT TO TAKE JURISDICTION.

Where the superior court refuses to take any action in a matter pending therein within its jurisdiction, it may be compelled to act therein.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

In Bank. Application for certiorari by W. G. Cohen against George C. Melrose, Justice of the Peace of Burbank Township, County of Los Angeles, to direct the justice to annul a judgment and orders subsequent thereto. Dismissed without prejudice.

James H. Creely, of Oakland, for petitioner. Earl E. Sidebottom, of Los Angeles, for respondent.

PER CURIAM. This is a proceeding in certiorari instituted in this court for the purpose of obtaining an annulment of a judgment and certain orders subsequent to judgment, given and made by the respondent, George C. Melrose, as justice of the peace of Burbank township, in the county of Los Angeles, on the ground that the same were in excess of the jurisdiction of said justice.

[1] The writ was issued by this court without notice to the respondent. When the matter came on for hearing in this court upon the return made by the justice of the peace, it was made to appear by a demurrer to the petition filed by the respondent that the writ should not have issued. The petition for a writ shows upon its face that a proceeding in certiorari to obtain a review and an annulment of the same judgment and orders was instituted by this petitioner against this respondent in the superior court of Los Angeles county on the 2d day of March, 1914, by the filing of a verified petition therein, setting up the same facts that are alleged in the petition subsequently filed in this court. It was alleged that "the presiding justice of the said superior court refused and still refuses to issue said writ." It is not expressly made to appear whether or not any judgment has been formally entered in said proceeding in the superior court.

By the filing of said petition in the superior court of Los Angeles county, the proceeding for a review of the judgment and orders of the justice of the peace was duly instituted. If the final judgment has not been entered therein, and the superior court refuses to take any action whatever in the matter, it still remains that the proceeding is now pending in the superior court of Los Angeles county, and the petitioner herein may prosecute the proceeding to final judgment therein, with a right of appeal, in the event of a judgment against him, to the District Court of Appeal for the second appellate district. Const. art. 6, § 4. In the event that a judgment or order of dismissal has been entered, the plaintiff has the right of appeal therefrom to said District Court of Appeal. In either event, this court should not entertain an original application in the matter.

[2] To the suggestion made that the superior court refuses to take any action whatever in the matter pending therein, the obvious answer is that the superior court could be compelled by appropriate proceeding to act therein.

This proceeding is dismissed without prejudice to any of petitioner's rights in the proceeding pending in the superior court of Los Angeles county.

BEATTY, C. J., does not participate in the foregoing.

(167 Cal. 751)

PEOPLE v. LARSON. (Cr. 1844.)

(Supreme Court of California. May 29, 1914.)

1. HOMICIDE (§ 253*) — EVIDENCE — SUFFICIENCY.

Circumstantial evidence surrounding the killing of accused's wife *held* to support a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

2. CRIMINAL LAW (§ 1160*)—APPEAL—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

All questions as to the credit to be given any witness are exclusively for the jury and the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3804; Dec. Dig. § 1160.*]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Louis Andrew Larson was convicted of murder in the first degree, and he appeals. Affirmed.

Walter C. Fisher and Sturges Q. Adams, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was duly informed against for the murder of his wife, and upon trial by jury was convicted of murder in the first degree. Judgment of death was pronounced. We have here an appeal by defendant from such judgment and from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is seldom that we find an appeal so utterly destitute of merit as the one before us.

[1] The claim that the evidence is legally insufficient to support the verdict is entirely without foundation. While it is true that no living person saw the actual killing of deceased other than the perpetrator of the homicide, and that the evidence was entirely circumstantial, it is idle to assert that there was not enough in the evidence to warrant the conclusion beyond all reasonable doubt on the part of the jurors that the defendant was guilty as charged.

Mrs. Larson was found unconscious and dying in the hills above Casa Verdugo, a short distance from Glendale, on the afternoon of June 22, 1913, by a man and a woman who were taking a walk, and who were attracted by groans to the place where the body was; it having been moved aside and out of sight from the pathway. She died very shortly thereafter. She had been repeatedly struck on the head and skull by some instrument or instruments, and her death was due to concussion of the brain caused by the blows. The body was removed by the authorities to Los Angeles and was identified some days thereafter as the body of defendant's wife. The deadly wound was one that might have been caused by such a weapon as any one of certain empty beer bottles that were found at the place.

[2] Mrs. Larson had left her home in Los Angeles about 11:45 a. m. on that day, apparently dressed only for an afternoon's outing, and without any bag or baggage of any kind. She had an appointment with her husband at the corner of Sixth and Main streets, a point from which passage on a Glendale car could be taken, for about 12:10 p. m. Agreeably to the appointment, defendant and his wife met at that time and place. Defendant claims that they separated there at 12:20 p. m., she stating that she was going to San Francisco, in accord with her intention expressed to him the preceding night, and that he never saw her again until he saw her dead body in an undertaking establishment. Opposed to this theory is a mass of evidence amply sufficient to warrant the jury in concluding that he accompanied his wife from Sixth and Main streets, on a Glendale car, to a point a short distance from Glendale, where they alighted, and that he went with her to the place where her body was found, and there brutally killed and left her. That she herself almost immediately after meeting her husband must have gone from that point to the place where she was killed is clear. There was the testimony of the conductor of the Glendale car leaving the Main street depot at 1 p. m. that day that a man resembling defendant was a passenger on the car, accompanied by a woman, and that they alighted at a point near Glendale. There was the testimony of the man and woman who found the body, that just before finding it they met a man coming down the pathway, the man identifying the defendant as the person, and the woman testifying that, in her opinion, the defendant was the man. A watch was found among defendant's possessions when he was arrested, and the testimony was quite convincing to the effect that it was the watch worn by Mrs. Larson when she left her home on the day of the homicide. Defendant gave an account that was far from satisfactory as to his whereabouts during the afternoon of June 22d, up to about 6 p. m., when he met a young woman to whom he was paying some attention. The testimony of the 17 year old daughter of the parties was to the effect that she heard defendant and deceased plan a proposed outing on the evening or night of June 21st for the next day; that she helped her mother dress for the occasion; and that she (Mrs. Larson) left her home prepared only for such an outing, with only some $15 in money and no baggage or clothing for a journey to San Francisco. Defendant gave inconsistent statements as to where he left his wife on June 22d. Defendant and his wife had had considerable trouble, and within the few weeks immediately preceding the killing had quarreled several times. There were other circumstances in support of the verdict which it is not necessary here to detail. Enough has been set forth to show that there was sufficient evidence to sustain the verdict, if the same was believed by the jury to be true. Of course, all questions as to the credit to be given to any witness are exclusively for the jury and the trial court; but from a careful examination of the record we see no reason to doubt the correctness of the verdict.

There is no force in the claim of prejudicial misconduct on the part of the district attorney.

No other point is made for reversal. We have read the record carefully, and are constrained to say that it is apparent that defendant's rights were at all stages of the trial carefully protected by his counsel, and that the record is absolutely free from anything in the way of substantial error.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(167 Cal. 774)

BRIDGE et al. v. CONNECTICUT MUT. LIFE INS. CO. et al. (S. F. 6188.)

(Supreme Court of California. June 2, 1914. Rehearing Denied July 2, 1914.)

1. INSURANCE (§ 624*)—ASSIGNMENT OF LIFE POLICY—RIGHTS OF PARTIES.

One to whom a life policy is assigned as security, having the legal title, can collect its full amount when due; the assignor having

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merely a claim for the surplus after satisfaction of the secured debt.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557–1570; Dec. Dig. § 624.*]

2. LIMITATION OF ACTIONS (§ 167*)—PLEDGE —BAR OF DEBT.

One to whom a life policy is assigned as security may continue to hold it, though action on the debt secured is barred by limitations; and this though the secured debt is that of another than the assignor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*]

3. LIMITATION OF ACTIONS (§ 167*)—PLEDGE —BAR OF DEBT—SUBSTITUTION FOR PLEDGED PROPERTY.

Within the rule that the assignee of a life policy as security for a debt may continue to hold it though action on the debt secured is barred by limitations, the assignee having commenced action on the policy against the insurance company and the assignor, and the company having paid the money on the receipt of the other parties, and it having been deposited to await determination of their rights, it takes the place of the policy, and for the purposes of the action is to be deemed to be in plaintiff's possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*]

4. INSURANCE (§ 210*)—ASSIGNMENT OF POLICY AS SECURITY—CONSIDERATION.

Settlement and satisfaction of the account between T. and B. and of the right of action of B. against T. for money due is sufficient consideration not only for the execution of the note of T. to B., but for the contemporaneous assignment to B. by a third person of a life policy as security for payment of the note.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 477; Dec. Dig. § 210.*]

5. BILLS AND NOTES (§ 430*)—PAYMENT—RENEWAL NOTES.

The giving and acceptance of a renewal note is not a payment of the original note, unless it is so expressly agreed, though the original note is surrendered; and the presumption is against such agreement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251–1256; Dec. Dig. § 430.*]

6. LIMITATION OF ACTIONS (§ 95*)—RECOVERY OF PLEDGE.

Though M., who assigned a life policy to B. as security for payment of the note of T. to B., was a mere surety, so that a definite extension of the time of payment, without M.'s consent, released her assigned property, yet her right to recover it was barred by limitations, B. having continued to hold it under claim of right, with no claim on her part, for the statutory period, after the accrual of her cause of action; and this though she did not know of the extension, there having been no fraudulent concealment thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 473, 474; Dec. Dig. § 95.*]

7. CONSTITUTIONAL LAW (§ 92*) — VESTED RIGHTS—DECISIONS OF COURT.

A decision, made only after property was pledged, that a pledgor could as soon as the debt was barred by limitations retake pledged property without paying the debt, could not be a part of such contract of pledge, even if that would have been the effect of such a decision had it been made before the pledge, so that application to the case of such pledge of the contrary doctrine, announced by a later decision, does not deprive the pledgor of vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 207, 225–227, 237; Dec. Dig. § 92.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Carrie E. Bridge and her husband against the Connecticut Mutual Life Insurance Company and others. From a judgment for plaintiffs, and from an order denying a motion for new trial, defendant Alice A. Taylor appeals. Affirmed.

Franklin P. Bull, of San Francisco, for appellant. Thomas E. Haven and Haven & Athearn, all of San Francisco, for respondents.

PER CURIAM. In the year 1878 the Connecticut Mutual Life Insurance Company issued to one Charles L. Taylor a policy of life insurance, whereby it agreed to pay his wife, defendant Alice A. Taylor, the sum of $3,000, and accruing profits, upon his death, provided that he and his beneficiary complied with all the terms and conditions of said policy. On January 6, 1895, in settlement of an indebtedness of $2,501 then existing on the part of Mr. Taylor in favor of plaintiff Carrie E. Bridge and found to be due her upon a statement of an account, Mr. Taylor made, executed, and delivered to Mr. Bridge for Mrs. Bridge his promissory note, payable to the order of Mrs. Bridge, for $2,501, with interest thereon at the rate of 1½ per cent. per month from date until paid. As security for the payment of said promissory note and as part of the settlement, the same being executed and delivered contemporaneously with the note, Mr. and Mrs. Taylor and their son, Charles L. Taylor, Jr., executed and delivered to Henry S. Bridge, who was at all times acting as the agent of his wife in the matter, an assignment in writing of said insurance policy; the same purporting to be an absolute transfer of the policy. This assignment was consented to by the insurance company, and was never altered or revoked. On December 8, 1898, a new note was given by Mr. Taylor to Mrs. Bridge, payable one day after date, for $4,806.30, with interest at the same rate, being the amount of principal and accrued interest on the indebtedness evidenced by the first note, none of which had been paid, and the first note was delivered to Mr. Taylor. On October 18, 1902, a new note was given by Mr. Taylor to Mr. Bridge for $7,000, with interest at 6 per cent. per annum, being the principal and accrued interest due on the second note, none of which had been paid. No part of the principal or interest on the indebtedness evidenced by the original note has ever been paid, unless the same was extinguished by the so-called renewal notes. Said original promissory note was never changed in any respect, except by the renewal thereof as hereinbefore set forth. Mrs. Taylor took no part in either of said renewals, had no knowledge thereof, and never consented thereto. Mr. Taylor died on April 14, 1908. There was then due upon the insurance policy the sum of $3,027.39, an amount very much less than the amount due from him to Mrs. Bridge on account of such indebtedness. The insurance company having refused to pay to Mrs. Bridge the amount due on the policy, because of the conflicting claims thereto, this action was brought on February 10, 1910, by Mrs. Bridge and her husband against the company and Mrs. Taylor to obtain a decree that Mrs. Bridge is entitled to receive the same and awarding it to her. The company, acknowledging its liability on the policy, paid the amount due, $3,027.39, upon the joint receipt of plaintiff and Mrs. Taylor, and the amount has been deposited to await the determination of the respective rights of Mrs. Bridge and Mrs. Taylor. The action was therefore dismissed as to the insurance company. The action was tried as between the other parties, and the findings of the trial court were in favor of plaintiffs. Judgment was thereupon given establishing the right of Mrs. Bridge to receive all the moneys due on said policy, free from any claim of Mrs. Taylor, and decreeing that she recover the same. This is an appeal by Mrs. Taylor from the judgment and from an order denying her motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

As is substantially said in respondents' brief, the insurance company having admitted its liability and paid over the amount due on the policy to be awarded in accord with the determination by the court of the question which of the two claimants is entitled thereto, the contest is now between two rival claimants, both of whom are actors.

[1] The right of one to whom a policy of life insurance is assigned by another, as security either for his own debt or for the debt of a third person, to collect from the insurance company the whole amount of the policy when it falls due, if he is still entitled to hold the security, cannot be doubted. The assignee in such a case has the legal title to the policy to such an extent as is necessary to enable him to do this, and the assignor is without any right to maintain any action for the money due thereon, upon the theory that he is the owner thereof. The assignor's only interest in the policy, "upon that condition of fact, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied," and the assignee "cannot be made to surrender it" to the assignor until the advances made by him are repaid. Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094. See, also, Civ. Code, § 3006; Works v. Merritt, 105 Cal. 467, 38 Pac. 1109; Widaman v. Hubbard (C. C.) 88 Fed. 806; Colebrooke on Collateral Securities, § 426; Puckhaber v. Henry, 152 Cal. 425, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; Hoult v. Ramsbottom, 127 Cal. 175, 59 Pac. 587.

[2, 3] It can make no difference, in so far as the right of the creditor to continue to hold the security is concerned, that the obligation on account of which he holds it is barred by the statute of limitations. That question was fully and carefully considered by this court in Puckhaber v. Henry, supra, and decided against the contention of the appellant here. We see no reason why the views expressed in the opinion in that case on that question should be modified or departed from. While recognizing that, where the judgment is barred by the statute of limitations, any lien which the creditor holds as security "is extinguished" and the creditor is without any right to take affirmative action to enforce the same, it was held that he may still retain possession of the pledged property, and that the debtor may not in any way interfere with such possession without paying the debt, which has not been satisfied or extinguished. It was held that section 2911, Civil Code, "was not designed to prevent the application of the equitable principle which has always been recognized as warranting courts in refusing to aid the debtor in the recovery of possession of his property from the mortgagee in possession or pledgee * * * without paying his debt." It is true that in that case the contest was between the creditor and the administratrix of the estate of the debtor, who had apparently pledged a life insurance policy payable to his personal representatives instead of to some designated person, so that no question as to the rights of one who had pledged his property for the debt of another, and who was therefore, so far as such property was concerned, a surety, was involved. But we do not see that the distinction is at all material so far as this question is concerned. One who delivers his property in pledge to a creditor as security for a debt of another can be in no better position, in this regard, than the debtor who so delivers his own property. In each case the property is so delivered as security for the payment of the debt, and the equitable principle invoked precludes the pledgor, whoever he may be, from retaking possession before the debt is satisfied.

> "The statute of limitations is a bar to the remedy only, and does not extinguish, or even impair, the obligation of the debtor." Spect v. Spect, 88 Cal. 444, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314.

We are not now considering any question of the release of the pledgor who is only a surety, by reason of some act or neglect of the creditor other than his mere failure to commence proceedings to enforce the obligation within the time required by the statute of limitations. Such a question is presented in this case, and will be discussed later. And, of course, we do not mean to hold that the rights of the parties would not be otherwise than we have stated, if there were stipulation to the contrary in the contract of pledge. In the case at bar, as in Puckhaber v. Henry, supra, the position of the beneficiary of the policy is that of the pledgor seeking to recover possession of the pledged property from the pledgee, without paying the debt for which it was pledged.

> "The money paid * * * as proceeds of the policy has merely taken the place of the policy held in possession by the plaintiff, and for all the purposes of this action should be deemed to be in the possession of the plaintiff." Puckhaber v. Henry, supra.

Learned counsel for Mrs. Taylor relies somewhat on what is said in Faxon v. All Persons, 137 Pac. 919, to the effect that the equitable rule that, notwithstanding the lien of a mortgage is extinguished by the barring of the debt by limitation, the mortgagor cannot, without paying his debt, quiet his title against the mortgagee, "should not be extended to a case in which the liability to pay the debt does not, in morals and equity, rest upon the plaintiff, or his property." Here the liability to pay the debt did, in morals and equity, rest on the pledgor's property. The case referred to does not assist appellant.

[4] The trial court was amply warranted in concluding that the consideration for the execution of the original promissory note by Mrs. Taylor, and the contemporaneous execution of the assignment of the policy, was the settlement and satisfaction of the pending account between Mr. Taylor and Mrs. Bridge, and of the right of action of Mrs. Bridge against Mr. Taylor for the money due her from him. Certainly no other consideration was essential, so far as Mrs. Taylor was concerned. See section 2792, Civ. Code. What is said in Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111, as follows: "The contention of the appellant that a preexisting debt is not a sufficient consideration for the execution of a note, so far as the sureties thereon are concerned, where the obligation for the pre-existing debt is canceled upon the delivery of the new note, does not merit discussion. It is well settled that such a consideration is sufficient as a foundation for the promise of the sureties, as well as that of the principals" (citing cases)—is conclusive upon this question. The evidence here clearly showed "the substitution of a new obligation between the same parties, with intent to extinguish the old obligation" (Civ. Code, §§ 1530 and 1531).

[5] We are of the opinion that the conclusion of the trial court that no part of the original promissory note to secure which the policy was assigned in pledge has ever been paid cannot be held to be without sufficient support in the evidence. The claim of appellant in this connection is based entirely on the taking of the so-called renewal notes, and the surrender in each case of renewal of the old note. In Savings and Loan Society v Burnett, 106 Cal. 530, 39 Pac. 925, it is said:

> "It is the general rule that one executory contract does not extinguish another. It is also the rule that there must be an express agreement or understanding to that effect before another note, bill, or check extinguishes and satisfies the indebtedness evidenced by an earlier one. Without multiplying authorities upon these propositions, it is sufficient to refer to Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 [20 Pac. 28, 30] where the California cases are collated."

In the case referred to it is said:

> "It has been repeatedly held by this court that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; that in such case the right of action on the debt is suspended until the maturity of the note given, and suit may be brought on the original debt in case of the nonpayment of the accepted note (citing numerous cases). The language used in the opinions is, unless it is expressly agreed that the note is accepted as payment, it is not payment, and the debt is not extinguished."

In Welch v. Allington, 23 Cal. 322, this rule was applied; the court saying, among other things:

> "The law will not presume such an agreement, and it must be proved by the party relying upon it. The taking of the new note operated as an extension of the time of payment of the old note; and, as soon as that extended time had expired, the plaintiff had a right to bring his action upon the old note, if the amount was not then paid."

The mere fact that the old note was surrendered to the debtor at the time of receiving the new note was held to be insufficient to require a conclusion that there was such an agreement in both the case last cited and in Savings and Loan Society v. Burnett, 106 Cal. 529, 530, 39 Pac. 925.

In Sather Banking Co. v. Briggs, 138 Cal. 733, 72 Pac. 355; it was said:

> "The general rule is that the renewal of notes does not amount to payment. Savings Bank v. Central Market Co., 122 Cal. 33 [54 Pac. 273]. The presumption is that they were not so taken."

See, also, Merchants' Bank v. Bentel, decided December 3, 1913, 137 Pac. 25.

In the case at bar there was absolutely no evidence to show any agreement to the effect stated, other than the surrender of the old notes, and this, in the light of the evidence as to the circumstances of the giving of the new notes, was insufficient to require a conclusion that there was any agreement to the effect that the new notes were received by way of payment. Each of the new notes was apparently only a "renewal note," as found, given solely to avoid the bar of the statute of limitations, for the amount of principal and accrued interest then due.

[6] It is claimed that Mrs. Taylor was a mere surety in so far as the assigned policy was concerned, and that her property was released by the change in the original obligation for which the policy was assigned as security, effected by the taking of the renewal notes. The first of these renewal notes was given, as we have seen, on December 8, 1898,

and was payable, "one day after date." The second was given on October 18, 1902, and, it will be assumed, was also payable "one day after date." We do not think it can be seriously questioned that she did stand in the position of a surety of a debtor with relation to the property assigned, and that any change in the contract of the principal which would discharge a surety would operate to release and discharge such property held as collateral. See Jones on Pledges & Collateral Securities, § 517a, and cases there cited; Valentine v. Banking Co., 133 Cal. 191, 195, 65 Pac. 381, 382; Sather Banking Co. v. Briggs, 138 Cal. 724, 729, 72 Pac. 352; Parke & Lacey Co. v. White River, etc., Co., 110 Cal. 658, 43 Pac. 202; O'Mara v. Nugent, 37 N. J. Eq. 326; section 2831, Civ. Code. The property assigned occupied the position of a surety or guarantor, "and anything which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property." Valentine v. Banking Co., supra. "A surety is exonerated—1. In like manner with a guarantor." Civ. Code, subd. 1, § 2840. And section 2819, Civil Code, provides that:

> "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

While mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor (section 2823, Civ. Code), it is well settled that if he grants the debtor an extension of time within which to pay, under such circumstances as to impair or suspend his right to proceed against the debtor in accord with the terms of the original obligation, we have such an alteration of the original obligation as will release the surety, if the same is without his consent. See Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179; First National Bank v. Harris, 7 Wash. 139, 34 Pac. 466; O'Mara v. Nugent, 37 N. J. Eq. 326. The taking of a new note payable at any specified time after the date is, at least, as we have seen, an extension of the time of payment to the time so specified (Welch v. Allington, supra; Koutz v. Vanclief, 55 Cal. 345), and suspends the right of the creditor to enforce his claim until that time. See, also, 7 Cyc. 875, 876, 891, 902. The fact that the extension is for one day only is immaterial. "If there was a consideration, the law will not attempt to measure the amount thereof." Whelan v. Swain, 132 Cal. 391, 64 Pac. 561. To what extent the surety is in fact injured is not a legitimate subject of inquiry. See Tuohy v. Woods, supra.

Plaintiffs' claim, based upon Dewees v. Osborne, 178 Ill. 39, 52 N. E. 942, that Mrs. Taylor was not a surety, but a principal acting through her husband as her agent, cannot be upheld in view of the findings of the trial court which, of course, are conclusive on them on this appeal by Mrs. Taylor. These findings show a plain case of simple suretyship so far as she was concerned, a debt of Mr. Taylor alone, the giving of a note therefor by Mr Taylor alone, and the execution and delivery of the assignment of the policy by Mr. and Mrs. Taylor "as security for the payment of said promissory note." In the case relied on by learned counsel, the agreement made at the time of the pledge by the husband clothed with ostensible authority to deal with the policy as he saw fit, contemplated all that was done, and the question was one to be determined by the law of agency. Whatever may be said as to the effect of the evidence in this case regarding the execution and delivery of the assignment, the findings show simply what we have stated, and we have no question of agency thereunder.

In response to Mrs. Taylor's claim in this regard, set up in her pleading denominated her "amended answer and amended cross-complaint," filed August 18, 1911, as well as to other claims made by her, plaintiffs interposed the defense that the claim was barred by certain provisions of our statute of limitations, viz.: Subdivision 1 of section 339 and section 343 of the Code of Civil Procedure, and the trial court found in accord with this defense. We may assume that section 343, Code of Civil Procedure, which prescribed a limitation of four years after the cause of action shall have accrued, is the provision of our statute of limitations applicable to such a case as this, the limitation in subdivision 1, section 339, Code of Civil Procedure, being only two years.

The first renewal note was given, as we have seen, on December 8, 1898, and the second on October 18, 1902. Obviously if Mrs. Taylor's rights because of the extension accrued at the time thereof, so that she might then have legally asserted the same, they became barred at least as early as December 8, 1902, and October 18, 1906, respectively.

The evidence shows without conflict that the insurance policy was delivered to Mr. Bridge at the time of the giving of the original note and the assignment of the policy absolute in its terms, and that it remained in his possession, he claiming the right to hold the same as security for the debt due his wife, until, after the death of Mr. Taylor, the insured, he made the claim against the insurance company. He then surrendered the policy to the insurance company.

No sufficient reason is suggested why Mrs. Taylor's right to recover the policy on account of the extensions of the time of payment of the original note did not accrue at the time of such extensions. Such extensions, according to the contention of her counsel, each at once released the policy, so far as she was concerned, from any claim under which it could legally be held by plaintiffs as security for the payment of her husband's debt. She was thenceforth entitled to assert her right in this behalf by action. During the full period prescribed by the statute of limitations and thereafter to the death of her husband, plaintiffs continued to hold the same under claim of right and adversely to her, with no claim whatever on her part that they were not entitled so to do. The trial court found, it is true, that she took no part in either of the renewals, "and had no knowledge thereof," and that "said renewals were made without her knowledge or consent." But we think that all this is entirely immaterial in so far as any question in connection with the statute of limitations is concerned. There is nothing in either the findings or the evidence to warrant the application of the rule discussed and applied is Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093, to the effect that "a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the statute of limitations." There is nothing in this case to warrant a conclusion of anything in the nature of a fraudulent concealment. Ordinarily, of course, the time when the cause of action accrues marks the beginning of the running of the statute of limitations. There is nothing here to take the case from the operation of this general rule. We are of the opinion that the finding of the trial court to the effect that Mrs. Taylor's claim in this behalf is barred by certain provisions of the statute of limitations must be held to be sustained by the evidence.

[7] We see no force in the claim that the judgment is in violation of any provision of the federal Constitution. The claim of appellant in that connection appears to be substantially that the doctrine of Puckhaber v. Henry, supra, cannot be held applicable to this case without depriving her of vested rights, in that prior to that decision it was declared by our decisions that a pledgor of property could retake the same from the pledgee without paying the debt for which it was pledged as soon as the debt itself was barred by the statute of limitations; the lien of the pledge being extinguished by the lapse of the time which bars the principal obligation. Section 2911, Civ. Code. That a pledgee could not retain the pledged property after the lapse of such time was declared in Mutual L. Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67, and possibly in Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, both of which cases were decided subsequent to the giving of the pledge here involved. Puckhaber v. Henry, supra, disapproving the former of these cases and distinguishing the latter, was decided December 2, 1907. There is no claim that any such rule was declared by any decision prior to Conway v. Supreme Council, supra. It is obvious therefore that there is no basis in fact for any claim that at the time the contract of pledge was entered into the doctrine announced in the cases referred to became a part of the contract of the parties, even if such a situation would have existed had the decisions referred to been made prior to the contract of pledge—a matter that we by no means concede. See Allen v. Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460. It is certainly clear that the doctrine of the cases just cited is applicable to the claim of learned counsel for Mrs. Taylor that she is entitled under the federal Constitution to prevail by reason of decisions of this court rendered subsequent to the making of the contract of pledge.

The judgment and order denying a new trial are affirmed.

BEATTY, C. J., does not participate in the foregoing.

167 Cal. 754

PEOPLE v. BOSTIC. (Cr. 1850.)

(Supreme Court of California. May 29, 1914.)

1. Criminal Law (§ 274*)—Arraignment—Plea of Guilty—Withdrawal.

The trial court did not abuse the discretion vested in him by Pen. Code, § 1018, in refusing to permit defendant in a homicide case to withdraw his plea of guilty and substitute a plea of not guilty where, at the time of the arraignment, accused was fully advised by the court of his rights, and the plea of guilty was entered under circumstances which showed that accused was neither surprised nor cajoled into entering the plea of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. § 274.*]

2. Homicide (§ 237*)—Evidence—Sufficiency—Insanity.

In a homicide case, evidence *held* to sustain a finding by the court that there was no evidence that accused was insane at the time of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 237.*]

3. Homicide (§ 18*)—Homicide in Commission of Robbery—Statutory Provisions.

Under Pen. Code, § 189, making a killing committed in the perpetration or attempt to perpetrate robbery murder in the first degree, any killing committed in the perpetration of robbery, though it be accidental, is murder in the first degree, and does not apply only to such a killing as would be included in the scheme of robbery and planned as a part of the execution of that crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.*]

4. Criminal Law (§ 456*)—Evidence—Insanity.

In a homicide case defended on the ground of insanity, the court properly permitted witnesses to testify that at various times defendant appeared rational.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1045; Dec. Dig. § 456.*]

5. Criminal Law (§ 641*)—Trial—Counsel for Accused.

Where accused, before arraignment in a homicide case, was told that the court was ready to appoint a legal adviser who would serve without compensation, there was a substantial compliance with Pen. Code, § 987, providing that accused is entitled to have the aid of counsel before arraignment, etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1496–1505; Dec. Dig. § 641.*]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

John Bostic was convicted of murder in the first degree, and he appeals. Affirmed.

Gray, Barker & Bowen and Wheaton A. Gray, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

MELVIN, J. The defendant was charged with the murder of one Horace E. Montague; the date of the commission of the crime being December 1, 1913, and the place the county of Los Angeles. He was captured in San Francisco about three weeks after the commission of the homicide and was taken to Los Angeles. On the trip southward he freely confessed his guilt to Mr. W. A. Hammel, sheriff of Los Angeles county, and to Captain T. H. Broadhead, an employé of the Southern Pacific Company. Subsequently he was preliminarily examined before a magistrate, was held to answer, and an information duly charging him with the crime of murder was filed by the district attorney of Los Angeles county. He was arraigned upon this information, declined the offer of the court to appoint counsel in his behalf, and entered a plea of "guilty." The court sentenced him to death. Subsequently his parents having learned of his arrest, and having employed counsel to represent him, a motion was made to set aside the judgment on the grounds that the court had taken no testimony, and had not fixed the degree of the crime. This motion was granted, and evidence was offered for the avowed purpose of aiding the court in determining the degree of the crime and its punishment. Another declared reason for offering this evidence was to enable the court, if the crime should be found to be murder of the first degree, to determine whether justice demanded the execution of the defendant or his imprisonment for life. While the court was busily engaged upon that inquiry, defendant's counsel made a motion that defendant be permitted to withdraw his plea of "guilty" and enter a plea of "not guilty." It was also suggested that the court should consider the testimony for the purpose of aiding in the determination of the question whether or not the defendant's then present condition demanded the submission to a jury of the question of his sanity at that time. After considering the evidence offered, which included a transcript of the testimony given at the preliminary examination and some additional testimony, the court denied defendant's motion, found the murder to be of the first degree, and pronounced upon defendant the judgment of death. Defendant appeals from the judgment, and from the order denying his motion to be permitted to withdraw the plea of "guilty," and to substitute therefor a plea of "not guilty."

The defendant boarded a south-bound passenger train of the Southern Pacific Company near El Monte in Los Angeles county on the evening of December 1, 1913, about 8:30 o'clock, and proceeded to rob eight people who were in the rear Pullman coach at the time he entered it. He was armed with a revolver, which he used to emphasize and enforce his demands for valuables. He wore no mask or other disguise. J. W. Compton, the Pullman conductor, testified that the defendant stood near the middle of the rear Pullman coach. As he started to pass defendant, whom he regarded as a passenger, the latter seized him, presented a pistol at his breast, ordered him to throw up his hands, and, when he had complied with the command, proceeded to rifle his pockets. The defendant next turned his attention to the passengers, taking valuables from three women and one man. The defendant then asked Robbins, a brakeman, where the train was, and the latter, besides giving the desired information, said that, unless he should give a signal, the train would stop there. Defendant ordered him to give the signal to go ahead, and Robbins went out onto the platform, where he signaled the engineer to stop. Thereupon the defendant went after the brakeman, called him a vile name, and said he had a good notion to blow Robbins' brains out. Robbins was compelled at the point of the revolver to give the signal for the train to proceed. Then defendant forced Robbins to re-enter the car and take a seat. He then said to Robbins, "I will take your watch just to learn you a lesson." This he proceeded to do, remarking, "I don't often do this," and reiterating the statement that his act was just to "learn" Robbins a lesson. At this moment Montague entered the car and walked down the aisle toward the place where defendant was standing. The defendant seized Mr. Montague with his left hand, pointed the revolver at the breast of that gentleman with his right hand, and said, "Throw up your hands." Montague replied, "What?" The command was repeated; but Montague caught at defendant's left wrist with his left hand, whereupon defendant drew his victim towards him and fired, mortally wounding Montague, who dropped his valise, turned, and ran up the aisle from a point near the end to about the center of the car, when a second shot was fired by the defendant in the direction of the fleeing man, but it did not strike him. He fell near the door of the car. The defendant remarked, "I quess one of them got him," and told the others in the car that what they had seen was only a "lesson" of what they would get if they made any move. He then forced Robbins to give the signal for the train to slow down, and, when it was progressing at the rate of about 15 miles an hour, defendant jumped off and escaped. Montague died before the train reached Los Angeles, which was about 30 minutes after the shooting. The other witnesses corroborated Compton in all essential particulars. Robbins, the trainman, told of defendant's entering the washroom at the end of the car where the witness and a Mr. Colen were relieved of their valuables by the robber. He then drove Robbins and Colen in front of him into the main body of the car. He next took some of Mrs. Colen's property, including a diamond ring, threatening to shoot her if she would not readily yield up her money and jewelry. But it is unnecessary to go into the details of Robbins' testimony as it did not differ in any essential point from that of Compton. His description of the actual encounter and the shooting of Montague was as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "He took my watch. Just a few seconds after Mr. Montague come in the front end of the car and walked through quickly, walked right up to the defendant. The defendant stopped him and grabbed him by the lapel of the vest or coat and demanded him to throw up his hands. Mr. Montague says, 'What?' He says, 'Throw up your hands.' Mr. Montague says, 'Not by a damn sight,' and dropped his grip he had in his right hand and made some move, I could not see, as Mr. Montague was standing between me and the defendant, back to me; but at the same time this move was made a shot was fired. Mr. Montague turned, run down the aisle, and when about half way down the defendant fired another shot. Q. In what direction? A. Towards Mr. Montague. Q. What did the defendant say, if anything? A. I heard him make a remark that one of them got him anyway. That is all the remark I heard him make. He stood there probably two minutes or a little more, did not say anything till he demanded me to go and stop the train till he got off. I went out and gave a stop signal. He stood on the platform and demanded me to stand on the other side from where he was. I stood over as far as I could. The gun was still pointed at me, and I asked him for my watch. The train then slowed down to about 15 miles an hour. The defendant jumped off."

[1, 2] The first contention of defendant's counsel is that the court abused its discretion in not granting the motion that defendant be permitted to withdraw his plea of guilty. He calls out attention to the fact that the defendant was not represented by counsel at the time his plea was entered, and insists that the proof of insanity should have raised such doubt in the mind of the judge as would have impelled him under his oath to submit the question of defendant's mental condition at the time of the homicide to a jury. The record shows, however, that upon the arraignment of the defendant the court carefully explained his rights to him. He was told that if he desired to be represented the court would appoint counsel who would act for him without compensation; that he was entitled to a trial in open court by a jury, and to the process of the court to procure witnesses to testify in his behalf.

The question of the mental condition of the defendant, and whether or not the evidence was such as to warrant the submission of that matter to a jury, was one addressed peculiarly to the conscience of the judge, as well as to his observation. He saw the defendant and the witnesses. He heard their testimony and was in a position to weigh it. The defendant's father, testified by affidavit and personally that the young man was "weak-minded, mentally incompetent, and in fact insane," basing his conclusions largely upon the son's habit of running away from home, upon his addiction to theft, and upon the frequent recurrence, from early childhood, of sullen spells during which the defendant would refuse for long periods to speak to any member of the family. Other witnesses gave similar testimony, based upon almost identical reasoning, that in the opinion of each of them the defendant was insane. Dr. Pepper, who had examined the defendant, and had gleaned as much of his history as possible from the young man's statements, and from other sources, including the report of the testimony taken at the preliminary examination, stated in reply to a long question containing a synopsis of the testimony, that, basing his conclusion upon the facts related to him, and upon the personal examination which he had given the defendant, it was his opinion that the latter was suffering from a condition of insanity which the doctor characterized as "aggravated kleptomania."

For the prosecution Drs. Orbison and Allen, who had examined the defendant, and had obtained as much of his family history as possible from the young man himself, each testified that defendant's mental condition was very good, and that he was not insane. Others testified that at various times, including the occasion of the robbery, defendant appeared rational.

Appellant's counsel cite People v. McCrory, 41 Cal. 461, in support of their belief that the court erred in denying their motion; but the facts in that case are so totally different from those presented in the one at bar that the cited authority does not support the position taken by counsel. In the McCrory Case the court had erroneously denied a motion for a continuance of the trial to the next term because of the absence of material witnesses. Rather than go to trial on the charge of murder without his witnesses, the defendant withdrew his plea of "not guilty" previously entered and pleaded "guilty" to murder of the second degree. The court refused to permit this plea to be withdrawn, and that was held to be an abuse of discretion.

In People v. Scott, 59 Cal. 341, the facts were also very different from those displayed by the record before us in this case. Scott had been declared insane by a jury after his plea of "guilty," and had been a patient in the insane asylum at Napa. Upon his discharge from that institution the court sentenced him after denying his motion for leave to withdraw his plea. The substance of the affidavits in support of the plea is not fully given in the opinion; but it does appear that they were numerous and "tended to show that the defendant had not been of sound mind for several years, and that he was at one time an inmate of the insane asylum at Jacksonville, Ill." It was held that "under the peculiar circumstances of the case" the court erred in refusing to permit the withdrawal of the plea.

It is asserted by counsel for the appellant that the lower court erred in announcing that there was no evidence of insanity in the case "in the teeth of the testimony of three disinterested witnesses that the boy was irresponsible and insane, the testimony of the father and brother to the same fact, and the testimony of a competent expert witness that in his opinion the boy was entirely irresponsible at the time he committed the crime." But the facts upon which these witnesses based their opinions were as consistent with sanity as with a disordered state of the mind. Some sane people steal. Some sane people have moody periods at times, and many sane boys run away from home. The expert witness who testified in defendant's behalf stated that when he examined defendant the young man was rational and normal, and that in the opinion of the witness he knew the difference between right and wrong. The physician's conclusion that when the train robbery occurred the defendant was afflicted with "aggravated kleptomania" was based upon facts, so far as the evidence shows, which merely revealed a lack of honesty on the part of the defendant. We cannot say that the judge who heard these witnesses was mistaken in asserting that there was no evidence of defendant's insanity.

Undoubtedly a court should permit a plea of "guilty" to be withdrawn, and one of "not guilty" to be substituted, where it properly appears that the former plea was ignorantly induced or was made through motives of hope or fear unduly operating upon the defendant's volition. People v. Miller, 114 Cal. 16, 45 Pac. 986. But where, as in this case, the plea of guilty was made and entered under circumstances which showed that the accused person was neither surprised nor cajoled, we cannot say that the discretion vested in the trial court under section 1018 of the Penal Code was abused. The court must be upheld in the exercise of such sound discretion, unless abuse of discretion is clearly shown. People v. Dabner, 153 Cal. 403, 95 Pac. 880.

[3] The murder was committed in the perpetration or attempt to perpetrate robbery, and was therefore murder of the first degree. Pen. Code, § 189. There was some contention in the briefs and at the oral argument of this case that this section meant to apply only to such a murder as would be included in the scheme of robbery and planned as a part of the execution of that crime. A mere statement of such a theory carries its refutation, for it must be apparent that without reference to the robbery such a murder would be a "willful, deliberate, and premeditated killing." In one of their briefs counsel, referring to defendant, use this language:

> "His evident purpose, whether he was sane or insane, was simply to accomplish robbery. He had no deliberate intention and design of taking human life. The taking of human life was forced upon him by the unwise resistance of Montague. And it may very well be that the actual killing of Montague was the result of the accidental discharge of the pistol in the course of the scuffle, which scuffle and resistance on the part of Montague appears to have taken place, according to the testimony of three disinterested witnesses."

Even if it be conceded that Montague was killed by an accidental discharge of the revolver which occurred during the struggle, the defendant would be guilty of murder of the first degree. The moment he entered that car with a deadly weapon in his hand, with the purpose of committing robbery, the law fixed upon him the intent which would make any killing in the perpetration of the robbery, or in the attempt to perpetrate it, a murder of the first degree. In such cases the law does not measure the delicate scruples of the robber with reference to shooting his victim. The law holds him highly guilty if he does kill, and it makes no difference whether he strikes down a man, as did Dabner and Siemsen, presumably upon the theory that "dead men tell no tales," or slays the brave man who resists, as did Montague. In either case he is a murderer subject to the finding of the jury upon trial, or of the court after a plea of "guilty," that he shall suffer death or imprisonment for life. But there was evidence which would abundantly justify the court in finding, not that the revolver exploded in the struggle, but that the defendant deliberately took Montague's life, because after the dying man was in full retreat the defendant sent a second bullet flying in his direction and then remarked that "one of them got him anyway." It was an atrocious crime, and we can perceive no reason why the court was not justified in pronouncing the sentence which was given.

[4] The court permitted certain witnesses to testify to the fact that at various times the defendant appeared rational. This was proper. People v. McCarthy, 115 Cal. 260, 46 Pac. 1073; People v. Manoogian, 141 Cal. 596, 75 Pac. 177.

[5] There was a substantial compliance with section 987 of the Penal Code when the defendant was taken into court for arraignment. While he was not informed in the exact language of the statute that he was entitled to have the aid of counsel "before being arraigned," he was told that the court was ready to appoint a legal adviser who would serve without compensation. He had not then been arraigned, and the court's

readiness to appoint counsel then was sufficient notice to him that he was entitled, if he so wished, to the aid of counsel at all stages of the prosecution against him. The court explained with scrupulous care that he might have two days between arraignment and plea if he so desired. No advantage was taken of him, and he was given every fair opportunity allowed by statute for obtaining legal advice, and for time to deliberate upon the course to be pursued by him.

The judgment and order are affirmed.

We concur: HENSHAW, J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.

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167 Cal. 762

SAN CHRISTINA INV. CO. v. CITY AND COUNTY OF SAN FRANCISCO.

(S. F. 6290.)

(Supreme Court of California. June 2, 1914. Rehearing Denied July 2, 1914.)

1. Municipal Corporations (§ 956*)—Charter—Construction.

The provision of San Francisco charter that the taxes should not exceed a certain rate, except in case of great necessity or emergency, when the limitation might be suspended, but that no increase should be valid unless authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor, does not require a unanimous vote of all of the supervisors elected, and it is sufficient that all present vote in favor of a suspension of the limitation, for other sections of the charter showed that apt language was used when it was desired to distinguish between the supervisors present and the entire number.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. § 956.*]

2. Pleading (§§ 193, 205*)—Conclusions of Law.

A complaint to recover taxes paid under protest, on the ground that the levy, being in excess of the usual legal rate, was invalid, which alleged that no great emergency or necessity existed, so as to authorize any part of the extra tax levy, is good as against general demurrer, although subject to special demurrer as a legal conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443, 491–493, 495, 496, 498–510; Dec. Dig. §§ 193, 205.*]

3. Municipal Corporations (§ 103*)—Power of Legislative Body — Review by Courts.

While the determination of a fact by a general legislative assembly is conclusive on the courts, the rule is otherwise with respect to inferior legislative tribunals, as the board of supervisors of a city and county, unless their determination is expressly made conclusive; and, though declared to be conclusive, their finding cannot bind a citizen whose property is affected thereby, unless he is at some stage in the proceeding given an opportunity to be heard on the question.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 219; Dec. Dig. § 103.*]

4. Municipal Corporations (§ 969*)—Legislative Assembly—Powers.

Under the charter of the city and county of San Francisco, providing that taxes should not exceed a certain rate, except in case of great necessity or emergency, and that no increase should be valid unless authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor, which must recite the character of the necessity or emergency, the determination by the board of supervisors that a great emergency or necessity existed is not conclusive, and may be reviewed by the courts; the taxing power being always rigidly scrutinized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2068–2074; Dec. Dig. § 969.*]

5. Appeal and Error (§ 842*) — Review — Questions Reviewable.

Upon appeal from a judgment rendered upon the sustaining of a demurrer to a complaint seeking to recover taxes paid under protest on the ground that the special levy in excess of the usual rate, was not authorized by any great emergency or necessity, the question whether certain taxes were for emergencies or necessities will not be reviewed, being first one of fact for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. § 842.*]

6. Municipal Corporations (§ 956*)—Legislative Assemblies—Taxation—Powers—"Emergency"—"Great."

Under the San Francisco charter, providing that in case of great emergency or necessity a limitation upon the tax rate should not apply, the "emergency," by which is meant an unforeseen occurrence or combination of circumstances calling for immediate action, as well as the necessity to be "great," must be of grave character and serious moment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. § 956.*

For other definitions, see Words and Phrases, vol. 3, p. 2361; vol. 4, p. 3162.]

7. Municipal Corporations (§ 974*)—Powers of Municipality—Charter.

No argument of hardship or inconvenience will justify a court in setting at naught limitations on the taxing power contained in a city's charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2083–2086; Dec. Dig. § 974.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the San Christina Investment Company against the City and County of San Francisco. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Cushing & Cushing, of San Francisco, and J. P. Langhorne, amicus curiæ, of San Francisco, for appellant. Percy V. Long, City Atty., and Jesse H. Steinhart, Asst. City Atty., both of San Francisco, for respondent.

HENSHAW, J. This is an action brought to recover taxes paid under protest for the asserted illegality and invalidity of the tax levy. A general demurrer to the complaint was sustained, and from the judgment which followed plaintiff appeals.

Chapter 1, art. 3, § 11, of the charter of the city and county of San Francisco contains a restriction upon the general grant of the taxing power to the municipality, which restriction is widely and popularly known as the "dollar limit." This section, excluding from its limitation certain defined taxes, declares that the annual levy "shall not exceed the rate of one dollar on each one hundred dollars valuation of the property assessed." Section 13 of the same article and chapter is as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The limitation in section eleven of this chapter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year, unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and be entered in the journal of the board. * * *"

In 1910, in preparing the tax levy for the fiscal years 1910-11, the supervisors, acting under the authority of section 13, passed two ordinances. Sections 1 and 2 of the first are as follows:

> "Section 1. It is hereby recited, determined and declared that a great necessity and emergency exists within the city and county of San Francisco, which requires that the limitation of taxation contained in section 11, chapter 1 of article III of the charter of said city and county be temporarily suspended, and that the character of such necessity and emergency is as follows, to wit: On the 18th day of April, 1906, a large number of the public buildings, and other structures, and much of the fire department equipment of said city and county were destroyed by fire, and on said day a large extent of the public sewers of said city and county were damaged and destroyed by earthquake; that a large extent of the public streets of said city and county were damaged by the combined effects of fire and earthquake; also there is danger that the bubonic plague, prevalent in 1907, may recur and provision should be made to prevent such recurrence; that it has been impossible to pave, repave and repair streets, reconstruct and repair sewers, construct and repair the public buildings destroyed and damaged as aforesaid in April, 1906, from the appropriations heretofore made, and the great necessity and emergency hereby declared to exist has not been adequately provided for by previous tax levies made by the board of supervisors.
>
> "Sec. 2. That by reason of the great necessity and emergency, herein set forth, large sums of money will be required to be expended by the city and county during the fiscal year ending June 30, 1911, for the paving, grading, repaving and repairing of streets, for the reconstruction and repair of sewers, construction of and repairs to public buildings, for construction and equipment of fire department buildings, for the purchase of lands for fire department buildings, for the reconstruction of, repairs to and equipment of school department buildings, for the construction and equipment of police department buildings, and for the purchase of lands for police department purposes, and for the continuation and enforcement of sanitary measures. That the large sums required for the aforesaid purposes cannot be obtained from the annual income and revenue of the city and county, and said necessary expenditures cannot be made without temporarily suspending the limitation upon the rate of taxation provided for in section 11 of chapter I of article III of the charter of said city and county."

The ordinance further declared that for the assigned reasons the provisions of section 11, supra, of the charter were therefore suspended, and an additional tax levy of 29 cents upon the $100 was authorized and declared necessary; the moneys derived from such tax being segregated for named purposes.

The second ordinance formally levied the tax. The purposes and amounts were thus set forth:

For paving, repaving, grading and repairs to streets, for reconstruction of and repairs to sewers, and for construction and repairs to public buildings and other structures, except school buildings.....	22 cents
For construction and equipment of fire department buildings, and for purchase of lands for fire department purposes	2½ cents
For reconstruction and repairs to and equipment of school department buildings	2 cents
For construction and equipment of police department buildings, and for purchase of lands for police department purposes	2 cents
For continuance of sanitary measures	½ cents.

The plaintiff in its protest and in its complaint presented three grounds of attack against the validity of the tax levy under this ordinance, which may be thus stated: (a) The ordinance suspending the operation of section 11 was not passed in accordance with the requirements of the charter; (b) no "great necessity or emergency" justifying the suspension of section 11 in fact existed; and (c) a large part, if not all, of the revenue to be raised by the levy was, upon the face of the ordinance, to be devoted to objects and purposes which were not emergency or necessity purposes. These questions may be taken up in the order indicated, for clearly, if the ordinance was not legally passed, there is an end at once put to the whole controversy.

[1] (a) Appellant here contends that the people of San Francisco, in adopting their charter, and the Legislature, in ratifying it, limited the power of the board of supervisors with great rigidity to the "dollar limit," and authorized the suspension of this limit and the levying of an additional tax with extreme reluctance and with equal care. It could be done not even in the case of necessity or emergency, but only in the case of a *great* necessity or emergency, and then it could be done only "by the unanimous vote of the supervisors," which should be construed under these considerations to mean the unanimous vote of *all* the supervisors. It is argued that if the word "supervisors" as here used is to be interpreted as synonymous with "board of supervisors" under chapter 1, art. 20, § 1, of the charter, which declares that the legislative power of the city and county is vested in a body designated the

board of supervisors, but that "such body is also designated in this charter, the supervisors," it would amount to a declaration that such an emergency tax could be laid and levied by a bare quorum of the board—by ten members—whereas by inspection of other charter provisions it will be seen that in matters of far less consequence a greater number of votes is required. Thus to pass an ordinance over the mayor's veto requires "the affirmative vote of not less than fourteen members." Chapter 1, art. 1, § 16. The vote of the same number is required to extend the time on a contract or to authorize the purchase of property for public works. Chapter 1, art. 6, § 21; chapter 4, art. 6, § 6. Fifteen votes are required to lease school property. Chapter 4, art. 7, § 11. To grant a franchise the vote of three-fourths of all the members of the board is required, or 14, and to pass a franchise over the mayor's veto a vote of five-sixths of all the supervisors is required—a vote of 15. Chapter 2, art. 2, § 6; subdivision 6, § 36. To pay any money out of the urgency necessity fund a five-sixths vote of all the members is required. Chapter 1, art. 3, § 8. But these citations rather destroy than confirm appellant's contention. It becomes apparent that the charter in these particulars was framed with careful attention to the language employed, and that in every other instance there can be no ambiguity or doubt as to the actual number of votes required to accomplish a given purpose. We find, moreover, that in every instance save one the phrase "the supervisors," is used interchangeably in meaning with "board of supervisors," as the charter itself expressly declares it will do. The one exception to that is found in article 2, c. 2, § 36, subd. 6, which declares:

> "It shall require a vote of five-sixths of all the supervisors to pass an ordinance, notwithstanding the objections of the mayor."

There can be no doubt whatsoever of the meaning of this language, and there can be no successful answer to the declaration of the respondent that, if in the section under consideration the charter had meant the unanimous vote of *all* the supervisors, it would have said so, as it did say in the less important section just quoted. Moreover, good and sufficient reasons appear why the charter framers deemed it wise not to require the unanimous vote of all of the supervisors. Those reasons at once occur to the mind. Their action was to be called forth, and could properly be called forth, only in case of great necessity or emergency. It might well be that in such a case it would be difficult, if not impossible, to assemble all of the members of the board, and a perilous and perhaps calamitous delay might result. Upon the other hand, the interests of the taxpayers were amply guarded by the provision that the suspension could not take place except by the unanimous vote of all present. Therefore, if the attempted suspension was, in fact, unwarranted, the voice of one member of the board raised in protest and voting in the negative would defeat the scheme. Indeed, it is the single instance presented by the charter where one dissenting vote will block legislation. Wherefore, it appearing from the complaint itself that 17 out of the 18 supervisors (all of the board who were actually present) voted for the ordinance, and there being no dissenting vote, the ordinance was duty adopted within the meaning and provisions of the charter, and the demurrer to the complaint on that ground was properly sustained.

[2, 3] (b) Herein appellant contends that the existence or nonexistence of a great necessity or emergency justifying the temporary suspension of the dollar limit is a question of fact; that a finding of the existence of this fact is a prerequisite to the right of the supervisors to suspend the limit, but that their determination in this respect is not final, and is subject to review by the courts. The position of respondent is that the finding of the board of supervisors, entered upon the journal of the board, is conclusive upon all courts. In this connection respondent also advances a minor argument, to the effect that appellant fails sufficiently to deny the existence of the great necessity or emergency; its denial being couched in the following language:

> "That no great emergency or necessity existed so as to authorize all or any part of said extra tax levy."

It is asserted by respondent, and with force, that this is but the pleading of a legal conclusion. Unquestionably, if a special demurrer had been directed to this imperfection in the complaint, the point would have been well taken. But against a general demurrer it will be held, as it was held in Eva v. Andersen (Cal.) 137 Pac. 16, that the allegation is sufficient.

Returning to the principal proposition now under consideration, respondent's position is that the supervisors were empowered to make a determination of the existence or nonexistence of the necessity; that their determination here made was a legislative determination, and that it is fundamental that such determinations upon questions of fact are not subject to judicial review. The cases which respondent cites in support of this proposition are cases where the determination was by the general Legislature. Where an act of the Legislature is brought up for review, the rule is that announced by respondent. The principle is this: The legislative determination of a fact is conclusive upon the courts. Where evidence is required to be taken it will be conclusively presumed that the Legislature acted after the taking of such evidence, and, even if a special finding of fact be required, the legislative enactment will be construed to contain such finding by implication. The question has received recent consideration from this court in People v. Sacramento Drainage District, 155 Cal. 373, 386, 103 Pac. 207. In Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, in the discussion of this question and of the dignity which attaches to the legislative determination, it is said:

> "This view seems to be sustained by the decisions of the highest courts of other states, and is in harmony with the central idea of the Constitution in prescribing the independence and equality of the three great departments of the state."

But neither the reasoning nor the rule applies to the acts of inferior legislative tribunals. As to them it may be said, generally speaking, that, when the power or jurisdiction of such an inferior board, body, court, or other tribunal is made to depend upon the existence of a fact, its determination of the fact is not conclusive, unless declared to be so in express terms or by necessary implication. And, if so declared to be conclusive, the declaration or finding can operate to bind the citizen whose property is affected thereby only in the event that at some stage of the proceedings he shall have been afforded an opportunity to be heard on the question; in short, shall have had his day in court. Otherwise there is a clear taking of property without due process of law. For it is of the essence of due process of law in such cases that a man shall be accorded the right and opportunity to be heard and to be heard effectively at some stage of the proceedings before he is deprived of his property or property rights. So we find that the principle which accords the great dignity of conclusiveness to determinations of the general Legislature (and it is these determinations which respondent cites in support of its position) is not only not applied to the proceedings of inferior legislative tribunals, but is distinctly held to be nonapplicable. Thus in Waterworks v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116, it is said:

> "We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the Legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government, and beyond judicial control."

And in Davis v. Mayor of New York, 1 Duer (N. Y.) 451 (affirmed in People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536), it is said:

> "The doctrine, exactly as stated, may be true when applied to the Legislature of the state, which, as a co-ordinate branch of the government, representing and exercising in its sphere the sovereignty of the people, is, for political reasons, of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative, and even political, powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction as any other body or person, natural or artificial."

The rule of decision holding that the determination of a municipality of the necessity or expediency of exercising the right of eminent domain against a given piece of land is conclusive upon the courts is neither in conflict with nor an exception to the principle we have been discussing: First, because the exercise of the right of eminent domain is essentially a political question, and not judicial (Dillon, Mun. Corp. [5th Ed.] § 1036); and, second, because the property owner is in no sense legally injured by such determination, since he receives full value for his property thus taken for a public use. We are here dealing with the taxing power, proceedings in which are always in invitum—a power which, when exercised under delegated authority by a municipal corporation, is always subject to rigid scrutiny, first, to determine whether the power actually exists; and, second, to determine whether it has been exercised under the limitations imposed. For, says Sutherland, treating of acts delegating the power of taxation:

> "Acts of this kind are construed with great strictness. Two concurring principles leading to strict construction apply. Such acts affect arbitrarily private property, and are grants of power." 2 Lewis' Sutherland, Stat. Cons. § 541.

See, also, Douglass v. Mayor of Placerville, 18 Cal. 643; Wallace v. Mayor of San Jose, 29 Cal. 181; Wichmann v. City of Placerville, 147 Cal. 162, 81 Pac. 537.

Finally, upon this proposition, reference may be made to the consideration given to it by the Supreme Court of Washington in two cases. Green v. Okanogan County, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, and Stern v. Spokane, 60 Wash. 325, 111 Pac. 231. In the first of these cases the law forbade the letting of a contract without competitive bidding, "except in case of an emergency." Under this provision the court examined into the facts, and made its determination contrary to that of the supervisors of Okanogan county that the emergency did not exist, and that competitive bids were therefore required. In the second case the charter of Spokane contained the provision dispensing with competitive bidding "if the mayor and city council shall by resolution declare an emergency to exist." The mayor and city council did so declare, and the court expressed its inability to review that declaration in the following language:

> "That which the Legislature can give, it can take away; and, while we agree with counsel for appellant that, if the action of the council in declaring an emergency to exist be upheld, it practically nullifies those provisions of the charter which were designed to insure open competition in the matter of letting contracts for public works, we must nevertheless hold that it can be no concern of the courts if it does. If the Legislature passes a wholesome law, and at the same time creates a weapon to strike it down, it is still within the limits of its constitutional authority, as much so as if it had repealed an existing statute by express enactment. It is so in this case. The charter does not say that time may be dispensed with if an emergency exist, thus leaving the court free to in-

quire into the fact, but it says that the council shall have the power under any state of facts to declare an emergency. * * * This case is to be distinguished from Green v. Okanogan County (just decided) 60 Wash. 309, 111 Pac. 226, wherein we held that no emergency existed which would warrant the board of county commissioners in letting a contract without inviting open competition. The provision of the law there construed (Laws 1903, p. 226, § 15) is that all work shall be let to the lowest bidder, 'except in case of emergency'; but no authority is given the board of county commissioners to declare the emergency as a matter of legislative discretion, thus leaving the court free to inquire into the facts."

[4] In the light of these fundamental principles we come to the immediate question: Does the charter of San Francisco in terms or by necessary implication make the determination of the supervisors as to the existence of a great emergency or necessity conclusive? Manifestly it does not. The language of the charter is not that the dollar limit may be suspended upon the declaration of the supervisors that a great emergency or necessity exists. It is that this limit may be suspended "in case of [the existence of] any great necessity or emergency." Moreover, and as persuasive to this view, even were it not so plain as it appears, is the added fact that the supervisors are required to spread upon the journal "the character of such necessity or emergency." If their determination was to be conclusive, this recital in their journal would be meaningless. It can have significance and value only in contemplation that the determination of the board is subject to review. It is therefore concluded that the complaint in this regard states a cause of action, and the general demurrer to it was improperly sustained.

[5] (c) Appellant analyzes and tabulates the tax levy as follows:

Paving and grading streets is included with other purposes for which, in all, $1,112,000 was to be raised by a levy of....................	22 cents
Purchasing lands for fire department purposes was included with other purposes for which in all, $127,500 was to be raised by a levy of....	2½ cents
Purchasing lands for police department purposes was included with other purposes for which, in all, the sum of $102,000 was to be raised by a levy of.............	2 cents
Making a total of $1,351,500, which was to be raised by a levy of....	26½ cents

Appellant contends: First, that some of the purposes are clearly not emergency or necessity purposes; and that they are so commingled and intermingled in the levy with other purposes, which may conceivably be emergency or necessity purposes, as to render invalid the tabulated 26½ cents of the 29 cents levy. This question, however, calls for first consideration by the trial court.

[6] We need here go no further than to say that by the use of the adjective "great" the charter plainly means a necessity or emergency of grave character and serious moment. Webster's International Dictionary defines "emergency" as:

"An unforeseen occurrence or combination of circumstances which calls for an immediate action or remedy; pressing necessity; exigency."

This definition is approved in People v. Lee Wah, 71 Cal. 80, 11 Pac. 851. It is the meaning of the word that obtains in the mind of the lawyer as well as in the mind of the layman. In was not in contemplation that the supervisors could foster and nurse such an emergency so as to spread their taxing power over an undetermined number of years. As little was it designed that under the head of emergency or necessity should be imposed taxes not bearing forcefully and directly on the relief, cure, or prevention of this emergency or necessity. Recalling once more to mind the fact that the exercising of the taxing power, for the reasons already given, is subject to strict construction, the trial court will scrutinize the items presented: First, to determine whether or not the great emergency or necessity, within the meaning of the charter, existed at the time of the levy; and second, whether, if it be found that such emergency or necessity did, in fact, exist, any of the items in the levy do not fairly come within the purport and scope of such emergency levy.

[7] And, finally, it must be said that no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials. As was said by this court in Connelly v. City of San Francisco, 164 Cal. 101, 127 Pac. 834:

"An inconvenience to the city does not justify the despoiling of its tax payers."

If these large revenues sought to be raised by the city do not fairly come within the purview of an emergency tax measure, it is for the city to meet the desired end either by the issuance of bonds or by an amendment to its charter. It is not for the courts themselves to amend this charter by striking therefrom any of its salutary and protective provisions.

The judgment appealed from is therefore reversed, with directions to overrule the demurrer and permit defendant to plead.

We concur: LORIGAN, J.; MELVIN, J.

(167 Cal. 786)

MOODY et ux. v. SOUTHERN PAC. CO.

(L. A. 3255.)

(Supreme Court of California. June 3, 1914.)

1. Limitation of Actions (§ 73*)—Actions by Married Women—Limitations.

Where a married woman may sue without joining her husband, limitations run against her; but, where the husband is a necessary party with her, she is, under Code Civ. Proc. § 352, subd. 4, deemed under disability, and limitations cannot be urged.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. Husband and Wife (§ 209*)—Personal Injuries to Wife—Actions—Necessary Parties.

In an action for damages for personal injuries to a wife, her husband is a necessary party with her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766–772, 968, 973; Dec. Dig. § 209.*]

3. Husband and Wife (§ 209*)—Personal Injuries to Wife—Right of Action by Husband.

A husband may sue in his own name for damages caused to him by reason of injuries to his wife, such as the loss of her services and medical and other expenses incurred.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766–772, 968, 973; Dec. Dig. § 209.*]

4. Action (§ 50*)—Joinder of Causes—Personal Injuries to Wife—Right of Action by Husband.

An action for damages for personal injuries to a wife, brought in the name of herself and husband, cannot be joined with an action by the husband alone suing for loss of services and medical and other expenses incurred on account of the injuries, but the two causes of action are subjects of separate suits.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50.*]

5. Husband and Wife (§ 249*)—Community Property.

Property acquired by a husband or wife during marriage and while they are living together is community property, except that which is acquired by gift, devise, or descent, though at common law property acquired by either spouse during marriage, other than by gift, devise, or descent to the wife, was the property of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 887, 889–892; Dec. Dig. § 249.*]

6. Husband and Wife (§§ 209, 260*)—Injuries to Wife—"Community Property"—Actions.

A right of action for damages for personal injuries to a wife is community property, within Civ. Code, § 172, conferring on the husband the management and control of community property, and, while in general the husband is the only party who may sue in respect to community property, an action for personal injuries to a wife must be brought by the husband and wife, notwithstanding section 1402, providing for the distribution of common property on the death of the husband, and notwithstanding Code Civ. Proc. § 367, requiring every action to be prosecuted in the name of the real party in interest.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 766–772, 912, 968, 973; Dec. Dig. §§ 209, 260.*

For other definitions, see Words and Phrases, vol. 2, pp. 1343, 1344; vol. 8, p. 7608.]

7. Husband and Wife (§ 204*)—Personal Injuries to Wife—Right of Action—Parties—Statutory Provisions.

The amendment of St. 1913, p. 217, to Code Civ. Proc. § 370, conferring on a wife the right to sue alone for personal injuries, does not affect an action for an injury to a wife prior to the amendment.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 739, 748, 749; Dec. Dig. § 204.*]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Harry H. Moody and wife against the Southern Pacific Company. From a judgment of dismissal, plaintiffs appeal. Reversed.

Crouch & Crouch, of Los Angeles, for appellants. J. W. McKinley, of Los Angeles (W. R. Millar, and A. W. Ashburn, both of Los Angeles, of counsel), for respondent.

SHAW, J. This case was transferred to the District Court of Appeal, and therein, upon an opinion by Mr. Justice James, the judgment was reversed. Thereupon this court vacated that decision and tranferred the cause to the Supreme Court. Upon further consideration we are satisfied with the reasoning and conclusion of the learned justice of the District Court and adopt his opinion as the opinion of this court. It is as follows:

This action was brought to recover damages for personal injuries alleged to have been suffered by the plaintiff Claire Moody through the negligence of defendant corporation in the management of a train upon which the said plaintiff was a passenger. The negligent acts were alleged to have been committed on the 22d day of May, 1907, and the complaint in the action was filed on January 2, 1912. Defendant interposed a demurrer to plaintiffs' complaint, setting up, first, the general ground that sufficient facts were not stated to constitute a cause of action, and the further ground that the alleged cause of action was barred by the provisions of sections 337, 338, 339, and 340 of the Code of Civil Procedure. This demurrer was sustained by the court, and, no amended complaint being filed within the time allowed, judgment of dismissal was entered, from which judgment this appeal is taken.

Harry H. Moody, the coplaintiff of Claire Moody, was the husband of the latter, and the preliminary portion of the complaint contained the following allegation: "That, during all times herein mentioned, plaintiffs, Harry H. Moody and Claire Moody, were, and still are, husband and wife; and during all times mentioned, and ever since said times, plaintiffs have lived together." The complaint sufficiently stated a cause of action, as is admitted by counsel for respondents; the respondents' sole contention being that the judgment of the court was correct because the statute of limitations had interposed to bar a right of recovery. Appellants answer this contention with the argument that the husband was a necessary party to this action, and that, such being the case, plaintiff Claire Moody, as a married woman, was entitled to the benefit of the provisions of subdivision 4 of section 352 of the Code of Civil Procedure. The section referred to, in that part which is material to a consideration of this question, reads as follows: "If a person entitled to bring an action, mentioned in chapter three of this title, be, at the time the cause of action accrued: * * * (4) A married woman, and her husband be a necessary party with her in commencing such action, the time of such disability is not a part of the time limited for the commencement of the action."

Under the common law, where, upon marriage, the legal rights of a woman were suspended, the statute of limitations for her protection was also suspended and not allowed to run against any cause of action which might have been enforced by her except for the disability of marriage. In more modern times, the wife having been freed from many of the common-law disabilities arising from her marriage, the Legislatures have to a corresponding extent provided that the statute of limitations may be made to run against her. Wood on Limitations, § 240.

[1] In this state, in so far as a married woman is entitled to bring an action without joining her husband, all limitations as to the time of commencement of such action may be urged against her suit. Where, however, the husband is a necessary party with her, she is deemed to be under disability as to the commencement of the action and the limitation of time cannot be urged.

[2] It has been settled by our Supreme Court that, in an action brought for damages by reason of personal injuries caused to the wife, the husband is a necessary party, as is also the wife. McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 Pac. 980, and cases therein cited.

[3] In the decision in that case it is pointed out that while the husband may have a separate action which he is entitled to maintain in his own name for damages which are caused to him by reason of his wife's injuries, such as the loss of her service and medical and other expenses incurred, for those damages which are purely personal to the wife, such as her pain and suffering, etc., the wife is a necessary party.

[4] These two causes of action, it is also held, cannot be joined and must be made the subject of separate suits. Counsel for respondents cite the cases of Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. 515, and Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 111 Pac. 530, Ann. Cas. 1912A, 642, and contend that the conclusions expressed in these decisions on the point here urged are at variance with the holding in the McKune Case, supra. A close examination of the decisions cited will show that they contain no statement of the law contrary to the expressions occurring in the McKune Case.

The order sustaining the demurrer to plaintiffs' complaint, under the statute and authorities cited, seems to have been improperly made.

The rehearing was granted chiefly for the purpose of again considering the previous decisions of this court upon the subject.

[5] In this state all property acquired by a husband or wife during marriage, and while they are living together, is community property, except that which is acquired by gift, devise, or descent. At common law, property acquired by either spouse during marriage, otherwise than by gift, devise, or descent to the wife, was the separate property of the husband.

[6] A right of action for damages caused by personal injuries to the wife during marriage is property. By the common-law rule it was the separate property of the husband. According to the rule in this state it is community property. The husband has the like absolute power to dispose of the community property, other than household goods and clothing, that he has of his own separate property, except that he cannot make a gift thereof without the consent of the wife. Civ. Code, § 172. In general, the husband is the only party entitled to sue in respect to community property, and the wife is neither a necessary nor a proper party to such suit. So far as we are advised, the sole exception to this rule is the case of an action for damages for injury and suffering of the wife caused by a personal injury to her. In such cases it has become the settled rule in this state that the wife is a necessary party. We speak here only of causes of action for the pain and suffering endured by the wife. A different cause of action arises for the recovery of consequential damages to the husband for the loss of her services or for expenses for her treatment for the injury, and for that cause the husband is the sole party plaintiff. McKune v. Santa Clara, etc., Co., 110 Cal. 487, 42 Pac. 980; Schouler on Husband and Wife, § 142.

Although at common law the cause of action for the wife's suffering was the separate property of the husband, it was settled that the wife was a necessary party to the suit; the reasoning being, as the authorities express it, that she was the "meritorious cause of action," and that, in case of his death pending the suit, the cause of action would survive to her. 10 Ency. Pl. & Pr. 205; Schouler on Husband and Wife, § 142. It did not descend to her, as does the community property in this state; it remained to her as the survivor and she could continue the prosecution of the action in her own name after his death. Id. The early decisions in this state declared that the wife was a necessary party to the action. Sheldon v. S. S. Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193; Matthew v. C. P. R. R., 63 Cal. 450; Tell v. Gibson, 66 Cal. 247, 5 Pac. 223. These decisions were based on the decisions at common law, but did not mention the fact that the right of action in this state was community property. In McFadden v. Santa Ana, etc., Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252, the question arose whether the contributory negligence of the husband would bar a recovery in such an action. It was for the first time held that the right of action was community property, inuring directly to the benefit of the husband, and that, as he could not be allowed to benefit from his own wrong, his contributory negligence would defeat the action. Ever since this decision the courts have held it to be community property, but, following the common-law rule, they have also uniformly declared that the wife is a necessary party to an action for its recovery. Neale v. Depot Ry. Co., 94 Cal. 429, 29 Pac. 954; McKune v. Santa Clara, etc., Co., supra; Paine v. San Bernardino, etc., Co., 143 Cal. 658, 77 Pac. 659; Gomez v. Scanlan, 155 Cal. 530, 102 Pac. 12; Gomez v. Scanlan, 2 Cal. App. 579, 84 Pac. 50; Justis v. Atchison, etc., Co., 12 Cal. App. 642, 108 Pac. 328. In Lamb v. Harbaugh, 105 Cal. 691, 39 Pac. 56, and Williams v. Casebeer, 126 Cal. 82, 58 Pac. 376, the court decided that the wife could not sue alone for such injuries.

We are now asked to overrule these decisions. The argument is that the right of action is community property, of which the husband has sole control and power of disposition; that even the title thereto is vested in him so that upon his death the title goes to the wife by descent and not by survivorship (Civ. Code, § 1402); that there is no ground for any distinction between this right and other community property; and that consequently an action upon it should be governed by the Code rule that "every action must be prosecuted in the name of the real party in interest" (Code Civ. Proc. § 367), whereupon it would follow that the husband is the only proper party plaintiff in such an action. The reasoning is forceful, but the rule has been followed so long and so often that it should be considered settled. The proposition that, although the right of action is community property, yet the wife is a necessary party in this particular class of cases is no more illogical than the rule at common law that the wife must join, though the right was the separate property of the husband. The reasons for the decisions under the common law are applicable to the case where the right is community property, as fully and completely as to the case where it is the husband's separate property. The remedy for any hardships or anomalies resulting from this long-settled rule rests with the Legislature.

[7] It may be remarked that it has acted in the matter by the amendment of 1913 (St. 1913, p. 217) to section 370, Code of Civil Procedure, whereby the wife may sue alone in such actions. This amendment was enacted after this action was begun, and it does not affect this case.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

24 Cal. App. 365

F. A. HIHN CO. v. CITY OF SANTA CRUZ et al. (Civ. 1182.)

(District Court of Appeal, First District, California. April 22, 1914. Rehearing Denied by Supreme Court June 20, 1914.)

QUIETING TITLE (§ 54*) — COSTS — STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1022, providing that costs are allowed of course to plaintiff on a judgment in his favor in an action for the recovery of real property, and section 1024, providing that costs must be allowed to defendant on a judgment in his favor in a similar action, a judgment in a suit to quiet title, which adjudges that plaintiff is the owner in fee simple and entitled to the possession of a part of the land in controversy, and that defendant is the owner in fee simple entitled to the possession of the remainder, carries costs in favor of both parties as a matter of right.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 105; Dec. Dig. § 54.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the F. A. Hihn Company against the City of Santa Cruz and another. From an order striking out plaintiff's bill of costs, but refusing to strike out defendants' bill of costs, plaintiff appeals. Reversed in part.

Charles B. Younger, of Santa Cruz, for appellant. Netherton & Torchiana, of Santa Cruz, for respondents.

LENNON, P. J. This is an appeal from the order of the lower court whereby the defendants' motion to strike out plaintiff's bill of costs was granted, and the plaintiff's motion to strike out the defendants' bill of costs was denied. The action out of which the claimed costs arose was one to quiet plaintiff's title to certain land in the city of Santa Cruz. The motion to strike out plaintiff's bill of costs was made and granted solely upon the ground:

> "That the plaintiff did not recover judgment in said action, and that the defendants recovered judgment in said action for all of the land to which said defendants or either of them claim any right or title."

Each of the defendants by appropriate denials in their respective answers put in issue the plaintiff's ownership of all or any portion of the land described in the complaint. Upon the issue thus raised, the case was tried by the court, and resulted in a judgment favorable in part to both the plaintiff and the defendants; that is to say, the trial court found and adjudged that the plaintiff was the owner in fee simple and entitled to the possession of a specified portion of the land in controversy, and that the defendant city of Santa Cruz was the owner in fee simple, entitled to and in the possession of the remainder of such land. In addition the trial court found and adjudged that the defendant Union Traction Company was the owner of and in the possession of a certain right of way along and upon that portion of the land in controversy adjudged to be the property of the defendant city of Santa Cruz. The judgment carried an award of costs to each defendant, but none to the plaintiff.

The motion to strike out plaintiff's bill of costs should have been denied. The action, as stated, was one to quiet title to real property, and the judgment, to the extent that it affirmed plaintiff's title to a portion of the land in controversy, was favorable to the plaintiff. Therefore the plaintiff as well as the defendants was entitled to costs as a matter of right. Code Civ. Proc. 1022, 1024; Schmidt v. Klotz, 130 Cal. 223, 62 Pac. 470; Sierra Union v. Wolff, 144 Cal. 430, 77 Pac. 1038; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569.

The order appealed from, in so far as it purports to strike out the plaintiff's bill of costs, is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24 Cal. App. 362

MORTON GAS ENGINE CO. v. CALIFORNIA SEEDED RAISIN CO.

(Civ. 1340.)

(District Court of Appeal, First District, California. April 22, 1914. Rehearing Denied May 22, 1914; Denied by Supreme Court June 19, 1914.)

1. Execution (§ 247*)—Motion to Set Aside—Proceedings.

Upon a motion to set aside an execution and sale thereunder, the judgment upon which the execution was issued, though voidable, cannot be assailed; but infirmities arising subsequent to the judgment and out of the issuance of the writ and its attempted enforcement can only be reached by such motion.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 687–694; Dec. Dig. § 247.*]

2. Execution (§ 253*)—Sale—Setting Aside—Proceedings—Pleading.

On a motion to set aside executions and sales, an averment generally and upon information and belief that the sales were not made pursuant to any of the provisions of Code Civ. Proc. § 694, was a mere conclusion of the pleader.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 698, 717–721; Dec. Dig. § 253.*]

3. Corporations (§ 312*)—Powers of President—Purchase at Execution Sale.

The president of a corporation may purchase property of the corporation at an execution sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1376–1386, 1388–1392; Dec. Dig. § 312.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Morton Gas Engine Company against the California Seeded Raisin Company, in which defendant filed a petition to set aside certain execution sales. From an order sustaining plaintiff's demurrer to the petition, defendant appeals. Affirmed.

L. L. Cory, of Fresno, for appellant. F. C. Huebner, of Albia, Iowa, for respondent.

RICHARDS, J. This is an appeal from an order sustaining respondent's demurrer to a petition of the appellants for an order setting aside certain sales of personal property under several executions.

The facts as disclosed by the petition are briefly these: In March, 1910, the Morton Gas Engine Company commenced this action against the California Seeded Raisin Company, a corporation, to recover a debt amounting to $384.25. The summons was regularly issued and served upon Newton B. Converse, the president of the defendant corporation. It is averred that Converse was acting in collusion with the plaintiff in respect to said action, in pursuance of which he not only permitted a judgment by default to be entered against the defendant, but also concealed the fact of the institution and pendency of the action from the knowledge of his fellow officials until some time after the entry of such judgment. It is further averred that an execution was issued upon such judgment, and levied upon certain specific personal property of the defendant, which was of the alleged value of $1,200, and which property was thereafter sold under such execution to the plaintiff for the sum of $100, who immediately transferred the same to said Converse for a like sum; that said Converse also purchased from the plaintiff the deficiency judgment, and proceeded to have two other executions successively issued thereon and levied upon other personal property of the appellant, which property was also sold at successive execution sales, and bought in either by said Converse or by some person acting for him, at sums very much below the real value of the property. It is averred that Converse acted fraudulently throughout these several proceedings, and that they are therefore void, and that he and his successors in the apparent ownership of these several pieces of personal property hold the same as trustees for appellant.

The prayer of the petition is that all of the acts and things done by said Converse in the course of these proceedings be held to be fraudulent and void, and that said sales and each of them be set aside, and that the petitioner have general relief.

To this petition filed in the original action, and being in effect a motion to quash these executions and set aside the sales thereunder, a demurrer was presented, and, after hearing, sustained by the trial court; and, from the order sustaining such demurrer, this appeal has been taken.

[1] The first question raised upon the appeal is whether the judgment alleged to have been procured through the collusion of Converse, the president of the defendant corporation, can be assailed in this form of proceeding. It is not contended that the judgment is other than a voidable judgment, and it affirmatively appears from the petition that the other officials of the corporation became apprised of its existence, and of the facts which would have entitled them to have sought relief from it in some proper proceeding, within a short time after its entry. The rule would seem to be well settled that, upon a motion to set aside an execution, the voidable judgment upon which the execution has been issued cannot be assailed; and this for the reason that the law has provided a number of specific and appropriate remedies against voidable judgments of which this is not one, and has also provided that the grounds upon which executions issued upon voidable judgments and sales thereunder may be attacked are those infirmities which arise after the judgment and out of the issuance of the writ and its attempted enforcement. Freeman on Executions (3d Ed.) §§ 305–309.

[2] The judgment being thus beyond assault in this proceeding, we turn to the peti-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion to see on what grounds the executions issued upon it were assailed. The petitioner makes no specific attack upon the regularity in form of the several writs, but avers generally and upon information and belief that the sales made thereunder "were not made or held pursuant to any of the provisions of section 694 of the Code of Civil Procedure."

[3] This must be held to be a mere conclusion of the pleader, and hence an insufficient averment to put in issue any specific infirmity in the writ itself, or in the procedure attending its execution and the sales thereunder. The only specific charge which the pleader makes is to be found in averments showing that Newton B. Converse, either directly or indirectly, became the purchaser of the several items of personal property in question at such execution sales, and for sums much below the real value of such property; but, since the regularity of these sales has not been sufficiently attacked, we can see no reason in law why Newton B. Converse, even though he was president of the defendant corporation, could not be a bidder for and a purchaser of its property at such regularly conducted sales, however far the sum bid might be below the real value of the property. What relation of trust such a purchaser would occupy toward the defendant corporation in respect to the property so purchased is another question; but it would seem to require no citation of authorities to sustain a holding that this latter question is one which cannot be presented upon a motion to set aside executions and sales not otherwise shown to be irregular, but only in an appropriate proceeding in equity to establish and enforce the trust.

The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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24 Cal. App. 339

Ex parte PARRA. (Cr. 258.)

(District Court of Appeal, Third District, California. April 14, 1914. Rehearing Denied by Supreme Court June 13, 1914.)

1. FISH (§ 8*)—POWER TO PROTECT AND REGULATE—STATUTE—CONSTITUTIONALITY.

Under Const. art. 4, § 25½, giving to the Legislature power to enact laws "for the protection of fish and game," the Legislature could enact Act March 13, 1909 (St. 1909, p. 302), and Act March 16, 1913 (St. 1913, p. 985), imposing a license fee of $10 per annum for the privilege of fishing in the waters of the state; such license fee being reasonable.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. § 8.*]

2. FISH (§ 9*)—POWER TO PROTECT AND REGULATE—STATUTE—CONSTITUTIONALITY.

Acts March 13, 1909 (St. 1909, p. 302), and Act March 16, 1913 (St. 1913, p. 985), imposing a license fee of $10 per annum for the privilege of fishing in the waters of the state, is not repugnant to Const. art. 1, § 25, declaring that the people shall have the right to fish upon public lands and in the waters thereof, and prohibiting the transfer of such land by the state without a reservation of such right, and also any law to be passed making it a crime for the people to so fish, etc.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 17, 18; Dec. Dig. § 9.*]

Petition by A. Parra for a writ of habeas corpus. Writ denied.

John R. Cronin, of Benicia, for petitioner. R. D. Duke, of San Francisco, and Malcolm C. Glenn, of Sacramento, for respondents.

CHIPMAN, P. J. Petitioner was arrested on March 14, 1914, in Solano county, for engaging in the vocation of fishing for profit in the public waters of this state, to wit, in the straits of Carquinez, in said county, without having first obtained a license therefor as required by the act of the Legislature approved March 13, 1909 (Stats. 1909, p. 302), and the act approved March 16, 1913 (Stats. 1913, p. 985), being an act amendatory of section 3 of the said act of March 13, 1909, "by spreading out in said waters and placing therein a certain net known as a salmon net for the purpose of taking and catching salmon from the said waters."

The sufficiency of the complaint, or warrant of arrest, is not disputed. The claim of petitioner is:

> "That he has the right to engage in the vocation of fishing for profit (or for pleasure) without the payment of any license therefor, and that this right is secured to him by virtue of the provisions of section 25, art. 1, of the Constitution of the state."

This section was adopted in 1910, and reads as follows:

> "The people shall have the right to fish upon and from the public lands of the state and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the state shall ever be sold or transferred without reserving to the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the state; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken."

This section must be read in connection with section 25½, art. 4, adopted in 1902; for the two sections do not in any wise conflict with each other. This section reads:

> "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts."

The act of 1909 is entitled:

> "An act to regulate the vocation of fishing, and to provide therefrom revenue for the propagation, restoration and preservation of fish in the waters of the state of California."

Section 3 provides for the issuance of licenses for the privilege of fishing and the amount to be paid for each year. The act of 1913 is amendatory of section 3 of the act of 1909, and fixes the license fee at $10 per annum.

Petitioner's contention is that, by the adoption of the constitutional amendment of 1910, now section 25, art. 1, the act of 1909 relating to license fees for fishermen became null and void, and of necessity the like fate befell the amendment of section 3 of the amendatory act of 1913. We quote from petitioner's brief so much as fairly states his position, preserving his italics:

> "It is contended by and on behalf of petitioner that with the adoption of the constitutional amendment in 1910, now section 25 of article 1 of our state Constitution, that the act of 1909 relating to license fees for fishermen became null and void, and that, of necessity, the act of 1913, amendatory of section 3 of the act of 1909, is null and void, as being in direct conflict with the provisions of section 25, art. 1 of our state Constitution. The only portion of that part of our state Constitution which gives to the Legislature any power in the matter of regulating the business or pleasure of fishing is contained in the proviso '*that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.*' There is no question here as to the right of the Legislature to provide for the 'season,' as that is quite clear. Then the entire question hinges on what was meant by the words '*and the conditions under which the different species of fish may be taken.*' The word 'conditions' is qualified by the words that follow it, '*under which the different species of fish may be taken,*' which, it is contended, clearly refer to such physical conditions connected with the taking of the fish, such as the size of the net, the size of the fish, the prevention of the use of explosives, and other kindred conditions under which the different species of fish may be taken. Without this proviso, the Legislature would be inhibited from making any regulation save and except the question of the length of the season. To give to the proviso, as used in and in connection with the whole of section 25, the construction that thereby the Legislature might impose a license fee (which might be prohibitive in its nature and which is even now prohibitive to some) would tend to frustrate and nullify the express declaration contained in that part of our state Constitution which says that '*no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the state.*' "

[1] By section 25½, art. 4, power is given to the Legislature to "enact * * * laws for the protection of fish and game * * * as it may deem appropriate for the respective districts" into which the state may be divided; and by section 25, art. 1, "the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken." If, as is contended, the clause last quoted refers only "to such physical conditions connected with the taking of the fish, such as the size of the net, the size of the fish, the prevention of the use of explosives, and other kindred conditions under which the different species of fish may be taken," we yet have section 25½, art. 4, which gives the power to the Legislature to enact such laws as it may deem appropriate "for the protection of fish and game" in the state. We need not therefore concern ourselves particularly as to what was intended by the later provision if the imposition of a license to fish for profit can be upheld as "appropriate" for the "protection of fish." We venture to say, however, that the principal object of section 25, article 1, was to preserve to the people the right to fish upon the public lands of the state and to require that grants of land by the state should not be made "without reserving to the people the absolute right to fish thereupon."

[2] The question of the power of the state to control or regulate the taking of fish and game and their preservation for the benefit of the people at large has been the subject of many decisions, to only a few of which need we advert.

In Geer v. Connecticut, 161 U. S. 517, 532, 16 Sup. Ct. 600, 606 (40 L. Ed. 793), the Supreme Court, by Mr. Justice White (now Chief Justice), said:

> "So far as we are aware, it has never been judicially denied that the government, under its police powers, may make regulations for the preservation of game and fish, restricting their taking and molestation to certain seasons of the year, although laws to this effect, it is believed, have been in force in many of the older states since the organization of the federal government. * * * The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game or qualify or restrict, as, in the opinions of its members, will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority, not a right inherent in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game. It is perhaps accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state. But, in any view, the question of the individual enjoyment is one of public policy and not of private right."

It was held, in State v. Hume, 52 Or. 1, 6, 95 Pac. 808, 810, that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals, feræ naturæ, the title to which, so far as title can be asserted before possession, is in the state in trust for all its citizens, and that the Legislature may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture. In Smith v. State, 155 Ind. 611, 613, 58 N. E. 1044, 1045, 51 L. R. A. 404, 406, it was said:

> "The individual has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state."

In State v. Hume it was further said:

> "The unrestricted taking from navigable streams, of fish that are valuable for food usually causes their extermination, to prevent which, and to afford time and opportunity for

> an increase of the species, laws have been passed limiting the time and manner, or temporarily prohibiting, the catching of them, which enactments have been upheld as legitimate exercise of the police power employed by a state to protect the welfare of all its citizens."

Similar views were expressed in Sherwood v. Stephens, 13 Idaho, 399, 90 Pac. 345. In Morgan v. Commonwealth, 98 Va. 812, 814, 35 S. E. 448, 449, a license tax for the privilege of fishing in the waters belonging to the state was upheld, as not in violation of the state or national Constitution.

"If," said the court, "the state has a right to require a license tax of merchants and others engaging in business upon their own capital, it certainly has the right to require a license tax of those * * * carrying on their business, as do the fishermen mentioned in the statute."

In State v. Hanlon, 77 Ohio St. 19, 29, 82 N. E. 663, 664, it was said:

> "In the present case the section under review is one of the sections of an act entitled 'An act for the further and better protection of fish and game.' If the true purpose and object of this act is expressed in its title, as would seem apparent from a consideration of the other provisions of said section, one of which is, 'All fees required to be paid hereunder shall be paid to the president of the commissioners of fish and game, and by him paid into the state treasury to the credit of a fund, which is hereby appropriated, for the purpose of propagating, protecting and preserving the fish in the waters of Lake Erie,' then certainly the imposition, for such purpose, of a license fee upon all persons who engage in the business of fishing with nets in the waters of Lake Erie is a proper exercise of legislative power."

Of the police power, Freund on Police Power, p. 19, says:

> "The police power is the power to restrain common rights of liberty to property. When it is sought to exercise rights which are not common or fundamental, still more when special privileges are asked, the state may grant the required permit or license upon such conditions as it pleases, without observing the limitations which otherwise hedge about the exercise of the police power."

The restrictions upon the right to fish and pursue game are given among other "conspicuous illustrations" of the exercise of power respecting cases of qualified property.

That the imposition of a license tax of $10 per annum for the privilege of fishing in the waters of the state for profit is a reasonable tax we are satisfied. The food fishes caught in those waters have an annual value running into millions of dollars, and furnish the means of livelihood to thousands of our citizens. Large sums are expended annually by the state to maintain the propagation of our food fishes and to prevent the decrease of the supply. It is but fair that those who profit by these laudable and paternal efforts of the state should contribute something towards their cost, and this license tax is, from the nature of the business, the only tax which can be imposed to aid in the protection of this important industry.

We think also that the imposition of this license has a tendency to protect the fish and prevent their extermination, and the Constitution expressly authorizes the Legislature to "enact laws for the protection of fish." Section 25½, art. 4.

The writ is denied.

We concur: HART, J.; BURNETT, J.

24 Cal. App. 348

BAKER v. EILERS MUSIC CO. (Civ. 1520.)

(District Court of Appeal, Second District, California. April 17, 1914. Rehearing Denied by Supreme Court June 16, 1914.)

APPEAL AND ERROR (§ 622*)—RECORD—TRANSCRIPT—TIME OF FILING.

Under Court Rule 2 (119 Pac. ix), providing that where a party appealing from a judgment had given notice of motion for new trial before perfecting the appeal the time within which he shall file a bill of exceptions or statement shall not begin to run until the motion has been decided or the proceeding therefor dismissed, the time for filing a transcript does not begin to run until denial of motion for new trial made prior to the perfecting of an appeal, and the mere fact of a delay of about 15 months in disposing of the motion does not justify the dismissal of the appeal for failure to file any transcript prior thereto, in the absence of any showing that the appeal was not made in good faith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2732–2735; Dec. Dig. § 622.*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. M. Baker against the Eilers Music Company. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied.

L. M. Fall, of Los Angeles, for appellant. Frank Bryant, of Los Angeles, for respondent.

CONREY, P. J. The only grounds presented which require discussion in ruling upon this motion to dismiss the appeal of plaintiff from the judgment are that the appellant has failed to file any transcript within the time allowed by law, and has failed for 15 months to prosecute the appeal. The judgment was entered on October 18, 1912, and notice of appeal was filed in the office of the clerk of the superior court on December 16, 1912. At all times from November 2, 1912, until March 5, 1914, there was pending a motion for a new trial of the action, and, incidental thereto, the settlement of a proposed bill of exceptions. On March 5, 1914, the court below disallowed the bill of exceptions and denied the motion for a new trial.

Rule 2 (119 Pac. ix) of this court, after stating the general rule requiring that a transcript be served and filed by the appellant in a civil action within 40 days after the appeal is perfected, says:

> "If a proceeding is pending for the settlement of a bill of exceptions or statement which may be used in support of such appeal, the time aforesaid shall not begin to run until the settled and authenticated statement or a bill of exceptions has been filed. When a party

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time aforesaid shall not begin to run until the motion for a new trial has been decided, or the proceeding therefor dismissed."

We need not take into consideration the reasons for the delay which occurred in the court below in the proceedings relating to the motion for a new trial. The respondent has not shown by the record any facts establishing its claim that the appeal is not made in good faith, and we are deciding this matter without reference to the affidavit filed by appellant's attorney. According to the plain language of the rule, as applied to the facts shown in the clerk's certificate filed herein, the time for filing the transcript did not begin to run until March 5, 1914. We have examined the decisions referred to by respondent, which relate to motions to dismiss appeals on account of failure to file transcript, where it appeared that the appellant did not take steps within a reasonable time to secure the settlement of a bill of exceptions. In those cases there was not pending any motion for a new trial, and the facts showing an unreasonable delay or practical abandonment of the proceedings for settlement of bill of exceptions were clearly apparent on the record. The cases referred to are: Depeaux v. Peck, 118 Cal. 522, 50 Pac. 682; Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112.

The motion to dismiss the appeal is denied.

We concur: JAMES, J.; SHAW, J.

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24 Cal. App. 804

BAKER v. EILERS MUSIC CO. (Civ. 1521.)

(District Court of Appeal, Second District, California. April 17, 1914. Rehearing Denied by Supreme Court June 16, 1914.)

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. M. Baker against the Eilers Music Company. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied.

L. M. Fall, of Los Angeles, for appellant. Frank Bryant, of Los Angeles, for respondent.

PER CURIAM. The facts presented upon this motion are in all respects similar to those under consideration in case No. 1520, Baker v. Eilers Music Co., 141 Pac. 395, in which the motion to dismiss appeal was denied. For the reasons stated in the opinion filed in that case, the motion of respondent for an order dismissing the appeal herein is denied.

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24 Cal. App. 355

HOOD v. MELROSE, City Recorder. (Civ. 1498.)

(District Court of Appeal, Second District, California. April 17, 1914.)

1. Municipal Corporations (§ 601*)—Buildings — Regulation — Construction — Ordinance.

A city ordinance provided for the appointment of a building inspector who was authorized to issue permits for the construction, repair, and removal of buildings, section 2 making it unlawful for any person to erect, alter, or remove any such structure or building exceeding $20 in cost without a permit. Section 19 declared that it should be unlawful for any person within the city, except on a written permit granted by the board, and then only at the place specified in such permit, to erect any tent, tenthouse, cloth or shake house, etc. *Held*, that section 19 prohibited the erection or removal of a shake house without a permit obtained from a board of trustees without reference to the cost of the structure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. § 601.*]

2. Criminal Law (§ 1032*)—Review—Certiorari—Scope—Objections Below—Necessity.

Where no demurrer was interposed to a complaint on the ground that it charged the offense in the disjunctive, such objection could not be taken advantage of by certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. § 1032.*]

3. Municipal Corporations (§ 112*)—Ordinances—Title.

An objection that a city ordinance was unconstitutional, in that more than one purpose was expressed in the title, was unsustainable, where a dual purpose expressed in the title of an ordinance contravened no provision of the city's charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 258–262; Dec. Dig. § 112.*]

4. Municipal Corporations (§ 112*)—City Ordinances—Subjects.

A constitutional provision that acts of the Legislature shall embrace but one subject does not apply to city ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 258–262; Dec. Dig. § 112.*]

5. Municipal Corporations (§ 601*)—City Ordinances—Building Ordinance—Reasonableness.

In the absence of an attack on the reasonableness of a city building ordinance prohibiting certain erections without a permit of the board of trustees, a contention that the ordinance enabled the board to prevent altogether the erection of such structures by refusing to grant all permits therefor was unsustainable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1333; Dec. Dig. § 601.*]

6. Criminal Law (§ 1014*) — Certiorari — Scope of Remedy—Appeal.

Where petitioner was proceeded against in a recorder's court and convicted of violating a city ordinance and appealed to the superior court, as he was authorized to do, where the judgment was affirmed, he had the plain and adequate remedy of appeal, and hence was not entitled to a further review of the proceedings in the District Court of Appeal by certiorari under Code Civ. Proc. § 1068, providing that a writ of review may be granted only when a tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal or other plain, speedy, and adequate remedy, and this though the superior court is not the court of last resort.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 25, 71; Dec. Dig. § 1014.*]

Application for writ of review by William O. Hood against George C. Melrose, Recorder of the City of Tropico. Writ dismissed.

Frederick M. Hall, of Casa Verdugo, and Frank L. Muhleman and Wirt C. Smith, both of Los Angeles, for petitioner. Frederick Baker, of Los Angeles, for respondent.

SHAW, J. In response to a writ of certiorari issued by this court and directed to respondent as recorder of the city of Tropico, the proceedings had and taken in the recorder's court presided over by respondent in a certain action, wherein petitioner was convicted of the violation of a city ordinance, have been transmitted to this court for review.

The city of Tropico is a municipal corporation of the sixth class, empowered, among other things:

> (1) "To pass ordinances not in conflict with the constitution and laws of this state, or of the United States." (16) "To establish and maintain fire limits and regulate building and construction and removal of buildings within the municipality."

Pursuant to such power the board of trustees adopted an ordinance prescribing certain rules and regulations for control in the construction and removal of buildings, and fixing a penalty for the violation thereof. This ordinance provided for the appointment of a building inspector, who was authorized to issue permits for the construction, repair, and removal of buildings, upon the applicant therefor complying with the rules and regulations prescribed by the ordinance; and by section 2 thereof declared it unlawful for any person to commence or proceed with the erection, alteration, removal, etc., of any such structure or building exceeding twenty dollars in cost, unless a permit so to do be first obtained from said building inspector. Section 19 of the ordinance further provided:

> "It is hereby declared to be unlawful for any person, firm or corporation, within the limits of the city of Tropico, except upon a written permit granted by the board of trustees of the city of Tropico, and then only at the place specified in such permit, to build, construct or erect any tent, tenthouse, cloth or shake house, cloth or shake building or structure, or California house, or repair the same or to construct any addition thereto, or to remove any such tent, tenthouse, cloth or shake house, building or other structure, to any location in said city of Tropico, or to cloth or paper, in whole or in part, any room except such room be first ceiled with board and such cloth be tightly stretched thereon; or to construct or extend through the walls, windows or roofs of any building or structure, a stovepipe or tiling, for use as a chimney or flue."

On July 21, 1913, a complaint was filed in the recorder's court charging petitioner with the violation of said ordinance in that he did "move and construct, or attempt to move and construct, a building, to wit, a shake house upon lot No. 1, tract 2137, corner of Glendale avenue and Moore avenue, in violation of the said ordinance No. 44, of the said city of Tropico, without first procuring a permit from the said city of Tropico to move and construct said building." Upon trial, petitioner was convicted and adjudged to pay a fine, or, in default thereof, suffer imprisonment in jail. On appeal to the superior court, and prior to the issuance of this writ, the judgment was affirmed.

[1-5] Petitioner attacks the proceedings upon several grounds: First. He insists the complaint fails to charge a public offense in that it is not alleged that the cost of the removal or construction exceeded the sum of $20, in which case only, as provided by section 2 of the ordinance, was a permit required. The offense charged, however, is the construction of a "shake house," a permit for the erection of which the building inspector had no power to issue. Since section 19 of the ordinance prohibits the erection or removal of such structures, without regard to the value thereof, unless a permit be obtained from the board of trustees, the complaint charged an offense under the provisions of section 19. Second. Petitioner attacks the sufficiency of the complaint by reason of the fact that it is uncertain in that it charges the offense in the disjunctive. Conceding this to be true, no demurrer was interposed upon such ground, which defect in no event is available in this proceeding. Ex parte Jackson, 143 Cal. 564, 77 Pac. 457. Third. Finally, petitioner insists the ordinance is unconstitutional in that more than one purpose is expressed in its title. A dual purpose expressed in the title of the ordinance contravenes no charter provision, and "the constitutional provision that acts of the Legislature shall embrace but one subject has no application to municipal ordinances." Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. Nor, in the absence of an attack upon the reasonableness of the ordinance as affecting petitioner, is there any merit in the contention that it enables the board of trustees to prevent altogether the erection of the structures specified in said section 19, by refusing to grant permits therefor. That it might do so admits of no doubt. In re Newell, 2 Cal. App. 767, 84 Pac. 226.

It is also urged that since such structures may be erected only in case a permit therefor be obtained from the board, which in the exercise of its discretion it may, unguided by any fixed rule, grant or refuse, the ordinance empowers the board to act arbitrarily, favor one individual as against another, and without cause refuse to grant such permit. The charter in express terms empowers the board of trustees "to regulate building and construction and the removal of buildings within the municipality"; and "it is a well-recognized rule of statutory construction that a general grant of power, unaccompanied by specific directions as to the manner in which the power is to be exercised, implies the right and duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power." Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953, and authorities cited. In the case of Ex parte Fiske, 72 Cal. 125, 13 Pac. 310, the court upheld the validity of an ordinance which prohibited the repair of wooden buildings within the fire limits, unless permission so to do was obtained from the fire wardens, and in discussing the question the court said:

> "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that no general rule could be established beforehand that would meet the emergencies of individual cases."

This language is particularly applicable to the case at bar. For the purpose of effectually carrying out the powers conferred, the board could prohibit altogether the erection of tent and shake houses which, by reason of their inflammable character, might enhance the danger of fires. Instances, however, might arise where, by reason of location or otherwise, such structures could be erected without danger or detriment to the public interest, and where the denial of a permit might work great and unnecessary hardship; hence no general rule could be established that would meet the emergencies of individual cases. While there exists apparent conflict of authority, this view finds support in numerous cases. Ex parte Fiske, supra; In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529; Ex parte Luening, 3 Cal. App. 76, 84 Pac. 445; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27. In the Flaherty Case it is said:

> "In dealing with this and similar questions—such as repairs of wooden buildings within fire limits, carrying concealed weapons, using public buildings and grounds, * * * our federal, state, and municipal governments have always recognized the practical impossibility of providing in advance for proper exceptional cases, and the necessity of giving to a public officer some discretion in the premises. * * * Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for the purposes of oppression and mischief."

It is to be noted that in most of the cases wherein the question is involved the power to grant or withhold a permit was delegated to subordinate officers, while in the case at bar the board itself retains and exercises the power of passing upon each application for a permit. Moreover, since the board might absolutely prohibit the erection of such structures, it is difficult to understand how petitioner is injured by the possibility of the board permitting him to do that which it could prohibit. Inhabitants v. Kennard et al., 151 Mass. 563, 24 N. E. 860.

[6] Thus far we have treated the case upon its merits. Conceding, however, that petitioner has just cause for complaint, his remedy is not by writ of certiorari. Under section 1068, Code of Civil Procedure, a writ of review may be granted only in those cases where a tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. Petitioner not only had the right of appeal from the judgment rendered by the recorder's court, but, as shown by his petition, did appeal to the superior court, where the case was tried and the judgment affirmed. The fact that the superior court is not the court of last resort is immaterial. It is a court of general common-law jurisdiction which might have issued a writ of certiorari in this case (Const. art. 6, § 5), and whose appellate jurisdiction extends to all cases arising in justices' and other inferior courts in their respective counties. Having the right of appeal to the superior court, petitioner is not entitled to a writ of review issued out of this court. Tucker v. Justice's Court, 120 Cal. 512, 52 Pac. 808; Grant et al. v. Justice's Court, 1 Cal. App. 383, 82 Pac. 263; Bennett v. Wallace, 43 Cal. 25; Wittman v. Police Court, 145 Cal. 474, 78 Pac. 1052; Valentine v. Police Court, 141 Cal. 616, 75 Pac. 336; People v. Shepard, 28 Cal. 115; Times-Mirror Co. v. Superior Court, 15 Cal. App. 515, 115 Pac. 248; La Due v. Forbes, 19 Cal. App. 124, 124 Pac. 867. While some of these cases involved civil actions, the rule applicable to the question is the same. Says the Supreme Court in discussing a like question:

> "This court has never recognized the right of a petitioner to a writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court." Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317.

It is true that in the case of Denninger v. Recorder's Court, 145 Cal. 629, 79 Pac. 360, the court, basing the statement upon the fact that the jurisdiction of a recorder's court is limited in character, said:

> "So that if the complaint upon which a defendant is arrested and tried fails to allege facts constituting one of the offenses to which its jurisdiction is confined, a judgment of conviction may be reviewed and annulled upon certiorari."

The point, however, that in such case certiorari will not lie for the reason that the aggrieved party has a remedy by appeal, does not appear to have been urged as a ground for its refusal; and for this reason, in view of the numerous cases holding the contrary, it should not be deemed an authority upon the question. Neither can the case of Mill v. Brown, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935, cited by petitioner, be deemed an authority in support of his contention, for the reason that the Utah statute expressly provides that a case arising in an inferior court from which an appeal lies to the superior court, may, nevertheless, where it involves the constitutionality of an ordinance or statute, be further appealed to the Supreme Court.

The writ of certiorari heretofore granted is dismissed.

I concur: CONREY, P. J.

I concur in the judgment: JAMES, J.

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24 Cal. App. 367

LOWE v. LOS ANGELES SUBURBAN GAS CO. et al. (Civ. 1477.)

(District Court of Appeal, Second District, California. April 22, 1914. On Rehearing, May 22, 1914; Denied by Supreme Court June 20, 1914.)

1. Corporations (§ 298*)—Meetings of Directors—Notice—Evidence.

The testimony of two directors of a corporation that they received no notice of a meeting of the board of directors was sufficient to show that no written notice was given.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1317, 1319; Dec. Dig. § 298.*]

2. Corporations (§ 298*)—Meetings of Directors—Necessity of Notice.

Under Civ. Code, § 320, declaring that when no provision is made in the by-laws of a corporation for regular meetings of the directors all meetings must be called by special notice in writing to each director, where the by-laws name the day for regular meetings, but not the hour of the day, notice must be given.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1317, 1319; Dec. Dig. § 298.*]

3. Corporations (§ 194*)—Stockholders' Meeting—Necessity of Notice.

Where a stockholders' meeting was held without the giving of notice to stockholders, its validity depended on whether it was held with the written consent of all the stockholders or whether all the stockholders were present.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 734–743; Dec. Dig. § 194.*]

4. Corporations (§ 316*)—Directors—Authority—Personal Intent.

A director cannot participate in any action of the board of directors of a corporation authorizing a contract or the performance of an act for his own benefit, nor be counted as a part of a quorum of the board for the purposes of any such action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404–1406, 1408, 1409, 1412–1414; Dec. Dig. § 316.*]

5. Corporations (§ 425*)—Bonds—Estoppel to Deny Validity.

A corporation, after having accepted and appropriated to its own uses the full value of bonds, was estopped to dispute their validity because of the want of proper notices of the directors' meetings at which their issuance was authorized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

6. Corporations (§ 482*)—Action on Bonds—Estoppel—Necessity of Pleading.

In an action against a corporation to foreclose a trust deed executed by the corporation to secure bonds, the defense being lack of due authorization, plaintiff could introduce evidence raising an estoppel without having pleaded it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

7. Principal and Agent (§ 177*)—Notice to Agent—Scope of Agency.

Where a director of a corporation was the agent of a third party for the purchase of bonds of the corporation, notice to such agent and director of the invalidity of the proceedings for the issuance of the bonds was not imputable to his principal; he receiving such notice in his capacity as director, and not as agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670–679; Dec. Dig. § 177.*]

8. Corporations (§ 482*) — Actions — Evidence—Sufficiency—Notice of Directors' Meeting.

In an action against a corporation to foreclose a trust deed executed to secure bonds, evidence *held* to sustain findings that notices of the directors' meetings at which the bonds were authorized were given, and that there were quorums present.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

9. Corporations (§ 477*)—Bonds and Trust Deed—One Transaction.

Bonds issued by a corporation and a trust deed executed to secure them, the bonds containing full recitals showing the execution and record of the trust deed, were all a part of one transaction, so that any estoppel to deny the validity of the bonds applied also to the trust deed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857–1863, 1865–1869; Dec. Dig. § 477.*]

10. Corporations (§ 473*)—Trust Deed—Failure of Trustee to Act.

A trust deed executed by a corporation to secure bonds provided that on default in interest the principal should, at the election of the trustee, become due, and made it the duty of the trustee to take such action as the holder of one-fourth of the outstanding bonds should request upon such holder agreeing to indemnify the trustee. *Held*, that the rights of a bondholder should not be allowed to fail by the refusal of the trustee to act, but the court should put itself in the place of the trustee; the situation calling for the application of the maxim, "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. § 473.*]

On Rehearing.

11. Corporations (§ 473*)—Trust Deeds—Failure of Trustee to Act.

A provision in a trust deed, given by a corporation to secure bonds, prohibiting any bondholder from enforcing any provision thereof until the trustee named therein, after a written request, had refused, was equivalent to a statement that after such refusal the bondholders could proceed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. § 473.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Leon P. Lowe, substituted for William G. Gallagher, against the Los Angeles Suburban Gas Company and others, in which Caroline W. Dobbins intervened and filed a cross-complaint. From a judgment for cross-complainant, plaintiff and certain defendants appeal. Affirmed. Petition for rehearing denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

See, also, 165 Cal. 805, 134 Pac. 193.

Oscar A. Tripett, W. N. Goodwin, and Schweitzer & Hutton, all of Los Angeles, for appellants. Porter & Sutton, H. M. Barstow, and Lynn Helm, all of Los Angeles, and W. H. Chickering, of San Francisco, for respondents.

CONREY, P. J. This action was filed by William G. Gallagher, as plaintiff, for the purpose of foreclosing upon a trust deed alleged to have been executed by Los Angeles Suburban Gas Company, a corporation, to secure the payment of certain bonds alleged to have been executed by said corporation. Leon P. Lowe, having succeeded to such rights as the plaintiff possessed in the subject-matter of the action, said Leon P. Lowe was substituted as plaintiff instead of William G. Gallagher. The defendant Caroline W. Dobbins filed a cross-complaint alleging ownership by her of 100 bonds of the same issue, and prayed for foreclosure of the same trust deed above mentioned. The court having determined that the Los Angeles Suburban Gas Company received no consideration for the bonds held by the plaintiff, and that it did receive consideration for those held by the cross-complainant, judgment was entered herein against the plaintiff and a decree of foreclosure in favor of the cross-complainant for the amounts due on said bonds. Appeals from the judgment and from an order denying a motion for new trial are now prosecuted by the plaintiff and by the defendants Los Angeles Suburban Gas Company, People's Gas Company, and the People's Gas & Coke Company.

On the 2d day of August, 1901, a certain contract was entered into between Los Angeles Safe Deposit & Trust Company, a corporation, party of the first part, T. S. C. Lowe, party of the second part, and Caroline W. Dobbins and Thaddeus Lowe, parties of the third part. By that contract Mrs. Dobbins and Thaddeus Lowe agreed to purchase land in the city of Los Angeles and erect thereon a gas and coke plant, and that afterwards they would transfer said property to said Los Angeles Suburban Gas Company. In consideration of said property it was agreed, among other things, that there should be delivered to the said parties of the third part first mortgage bonds of said company equivalent in amount at par to the sums by them actually expended in the purchase of said land and construction of said plant. On the 7th day of November, 1901, and thereafter during the period of the transactions here under review, all of the stock of the Los Angeles Suburban Gas Company was owned by Los Angeles Safe Deposit & Trust Company, except that T. S. C. Lowe, L. P. Lowe, Thaddeus Lowe, S. C. Lowe, and Lynn Helm owned one share each; these five persons being the directors of the corporation. On November 7, 1901, there was held what purported to be a regular meeting of the board of directors, at which (according to the minutes) four directors were present; L. P. Lowe being absent. The by-laws of the corporation provided for regular meetings of the board of directors to be held on that day of the month, but did not specify the hour of the day. As hereinafter noted, it is claimed that no notice in writing of the holding of that meeting had been given to the directors. By resolution adopted at that meeting, it was ordered that a meeting of the stockholders be held at a specified hour on November 14, 1901, for the purpose of considering and authorizing a bonded indebtedness of the corporation in the sum of $300,000, and the said meeting of the board of directors was adjourned to meet immediately after said proposed meeting of stockholders. On November 14, 1901, there was held a purported meeting of the stockholders, which, according to the minutes, was at the place where the board of directors usually meet, and pursuant to a call of the board of directors, and by consent of the stockholders thereinafter set forth. The names of the stockholders thereinafter set forth were T. S. C. Lowe, Thaddeus Lowe, and Los Angeles Safe Deposit & Trust Company, and it was further recited that all of the stock of the company was represented (and that T. S. C. Lowe, L. P. Lowe, Thaddeus Lowe, and Lynn Helm were present) at the meeting. A resolution was passed purporting to authorize the creation of said indebtedness and bonds in the sum of $300,000. Immediately after the adjournment of said stockholders' meeting the board of directors reassembled pursuant to adjournment, and the minutes show that all of the directors were present. At this meeting a resolution was offered and declared to have been adopted, whereby, pursuant to said resolution of the meeting of the stockholders and consent of all of the stockholders, it was ordered that bonds in a form therein set forth be issued by the corporation representing said proposed indebtedness, and the California Bank of Los Angeles, Cal., was, by a separate resolution, selected and chosen trustee for the holder of said bonds, and provision was therein made for the execution by the Los Angeles Suburban Gas Company to said California Bank of an instrument mortgaging the property of the corporation to secure the payment of said bonds. The trust deed was executed in due form, and recorded on the 12th day of February, 1903.

On the 4th day of December, 1902, according to the minutes of the Los Angeles Suburban Gas Company, at a regular meeting of the board of directors at which four directors were present and S. C. Lowe was absent, a resolution was offered by Thaddeus Lowe and seconded by L. P. Lowe, and was adopted, wherein recitals were made referring to said contract of August 2, 1901, and declaring that the parties of the third part of said contract had purchased certain real property in the city of Los Angeles, and had erected on said premises a coke and gas plant complete in accordance with the terms of said contract, and had done certain other things therein mentioned, and were now ready to convey to this company, or a party designated by it, the said land and coke and gas works, etc., and accept the bonds of this company therefor, and it was resolved that this company accept the conveyance from the said Caroline W. Dobbins and Thaddeus Lowe of said property therein mentioned, and that the president and secretary of this company be authorized to deliver to said Caroline W. Dobbins and Thaddeus Lowe bonds as therein described, as authorized by this company on the 14th day of November, 1901.

On the 12th day of February, 1903, there was filed with the clerk of the county of Los Angeles a purported certificate of creation of bonded indebtedness of the Los Angeles Suburban Gas Company, signed by T. S. C. Lowe as chairman and Lynn Helm as secretary of the stockholders' meeting before mentioned, and also signed by the above-mentioned five directors. A certified copy of the said certificate was also at about the same time filed in the office of the secretary of state. In April, 1903, Mrs. Dobbins executed and delivered to the Los Angeles Suburban Gas Company a deed in accordance with said contract, and a bill of sale was also executed and delivered by Mrs. Dobbins and Thaddeus Lowe to the same corporation covering certain other property, and thereby completing the performance of said contract of August 2, 1901, as to those matters on the part of the parties of the third part therein. Upon the evidence of these records, together with other records and testimony not necessary to state more extensively at this moment, the court found in favor of the cross-complainant upon the issues presented with respect to the allegation that the proceedings above noted were actual and valid proceedings of the corporation by its board of directors and by its stockholders and by its president and secretary respectively; and that said bonds, being unpaid, were valid obligations of the corporation secured by said mortgage or deed of trust; and that the cross-complainant was entitled to decree as entered herein.

It is contended by the defendants and appellants that the evidence is insufficient to support these findings.

[1, 2] L. P. Lowe testified that he was not present at the meeting of the board of directors on November 7, 1901, and S. C. Lowe testified that he was not present. As above noted, the minutes of the meeting show the absence of L. P. Lowe and the presence of S. C. Lowe. The certificate of creation of bonded indebtedness, which was signed, as above stated, by all of the directors, recites that the meeting was regularly called and held, and shows the presence of four directors; L. P. Lowe being absent. It therefore appears from the evidence, without any contradiction of the fact, that at this directors' meeting at least one director was absent. The testimony of two directors that they did not receive any notice would be sufficient to show that no notice in writing had been given to the directors of the holding of said meeting, unless we can say that the court was entitled to base a contrary finding upon the presumption that a meeting thus held was regularly called, and upon the recital in the certificate of bonded indebtedness that said meeting was "regularly called." If the purported meeting of November 7th was not a valid meeting of the board of directors, the same defect applies to the adjourned session of that meeting on November 14th, unless the court could base a contrary finding upon a like presumption as before and the recital in said certificate of bonded indebtedness that all of the directors of the company were present at the directors' meeting of November 14th. The principal point upon which the appellants are able to rely in support of their claim that a notice of the meeting was necessary grows out of the fact that the by-laws do not name the hour of the day upon which the meeting should be held. Section 320 of the Civil Code declares that:

> "When no provision is made in the by-laws for regular meetings of the directors * * * all meetings must be called by special notice in writing, to be given to each director. * * *"

Where the by-laws name the day for regular meetings, but do not name the hour of the day, notice must be given. Thompson v. Williams, 76 Cal. 154, 18 Pac. 153, 9 Am. St. Rep. 187; San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 537.

[3] The meeting of stockholders on November 14, 1901, was held without the giving of notice to stockholders, and its validity must depend upon the showing either that it was held with the written consent of all of the stockholders, or that all of the stockholders were present. L. P. Lowe and S. C. Lowe testify that they did not sign the consent to holding said stockholders' meeting; that they had no notice of a stockholders' meeting being held at that time; and that they were not present. The minutes of that meeting recite that they were present, and the certificate of bonded indebtedness which they afterwards signed recites that the meeting was held with their consent in writing. These two witnesses are not contradicted by the direct testimony of any witness.

[4] The meeting of the board of directors on December 4, 1902, purporting to be a regular meeting of the board of directors, was held without showing by any record in the minutes the giving of any notice to the members of the board, and the minutes show that one director (S. C. Lowe) was absent.

L. P. Lowe also testified that he was not present at that meeting and his testimony is undisputed, except by the minutes of said meeting. If L. P. Lowe and S. C. Lowe were both absent, then there were only three directors present, and no quorum could be present without counting Thaddeus Lowe as one of the three. The appellants contend that this fact destroys the validity of the resolution passed at that meeting directing the delivery of the bonds in question "to said Caroline W. Dobbins and Thaddeus Lowe." The rule is correctly stated by appellants that a director cannot participate in action of the board of directors of a corporation authorizing a contract or the performance of an act for his own benefit, nor be counted as part of a quorum of the board for the purposes of any such action by the board. Wickersham v. Crittenden, 93 Cal. 29, 30, 28 Pac. 788; Pacific, etc., Works v. Smith, 145 Cal. 352, 78 Pac. 550, 104 Am. St. Rep. 42. The said resolution cannot be accepted as any part of the authority for the delivery of said bonds, if Thaddeus Lowe was interested therein. It clearly appears, however, according to the testimony of Mrs. Dobbins, that, although he was a party named with Mrs. Dobbins in the contract of August 2, 1901, yet, in fact, Mrs. Dobbins with her own money paid the entire cost of the property that was conveyed to the Los Angeles Suburban Gas Company in consideration of these bonds, and the bonds were issued to her. In other words, the contract was so performed, as to consideration actually paid, that the bonds were the property of the cross-complainant alone. This is necessarily implied in the facts found and is sustained by the evidence.

The proceedings which were necessary for the creation of a bonded indebtedness by a corporation at the time of these transactions are contained in section 359 of the Civil Code, as amended in 1893. The form of these proceedings as conducted by the Los Angeles Suburban Gas Company and shown in its minutes and in said certificate is not objected to by appellants. The force of the objection is directed entirely against the validity of the meetings themselves and for the reasons which have been specified.

[5] Assuming now, for the moment, that for want of proper notices the meetings of November 7 and November 14, 1901, were not legally called meetings of the corporation or of its board of directors, we are met by the suggestion that the corporation is not entitled to take advantage of these defects and repudiate the bonds after having accepted and appropriated to its own uses full value thereof, paid out by the cross-complainant, for its benefit, and the proceeds delivered to it. The appellants deny that the deed and bill of sale above mentioned were delivered to the Los Angeles Suburban Gas Company. The trial court found as a fact that they were delivered, and, although there is a conflict in the evidence, the finding is amply sustained by the testimony given. We therefore assume as a settled fact that the consideration was received.

In McKee v. Title Insurance & Trust Co., 159 Cal. 206, 220, 113 Pac. 140, 146, objection was made on behalf of the creditors of Wentworth Hotel Company, a corporation, that the requirements of section 359 of the Civil Code had not been complied with in the proceedings leading to the issuance of bonds of the corporation. The bonds had been issued without obtaining consent of two-thirds of the stockholders, and without filing any certificate of creation of bonded indebtedness, and, in fact, no attempt had been made to comply with section 359 of the Civil Code; but the corporation had received a valuable consideration for the bonds. The court, after stating that a construction which would make such bonds void in the hands of a holder for value at the instance of other creditors would be against equity and justice and should not be favored, called attention to the fact that in section 359 there is no provision that bonds not issued in conformity therewith shall be void either in favor of creditors or at all.

> "So far as such original issue is concerned, the proceedings were evidently intended only as a protection to the stockholders against such issue without the consent of those having a two-thirds interest, and not for the protection of creditors. No stockholder is here asserting any right or making any objection. The assignee in insolvency represents the interests of the creditors only. He is not suing on behalf of the stockholders or in their interest, and there being no fraud, he stands in the shoes of the corporation with regard to the bonds. The corporation has received the money obtained by means of the bonds, and has applied it to the payment of its debts and the completion of the hotel. The money has thus inured to the benefit of the corporation and its stockholders and of the general creditors also, since it has unquestionably given a substantial value to a structure which would otherwise be comparatively worthless. The corporation is therefore estopped to dispute the validity of the bonds, and the creditors are likewise bound thereby. The real point of the objection is that the manner of issuing the bonds was so defective that the transaction was ultra vires and void, notwithstanding that the corporation received and holds the benefits thereof. In regard to a similar claim the New York Court of Appeals said: 'That kind of plunder which holds on to the property but pleads ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state.' Seymour v. Association, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859. The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders only"—citing cases.

[6, 7] Appellants offer two principal reasons why they say that the cross-complaint cannot rely upon an estoppel in this case. The first objection is that no estoppel was pleaded by the cross-complaint. At the trial cross-complainant introduced evidence sufficient to establish a prima facie case. If

she had rested there, and if the defendants here appealing had then introduced evidence showing lack of due authorization, the cross-complainant might then have presented evidence to raise an equitable barrier against defendants' proof of want of authority, and might have done this without pleading an estoppel. The fact that in the trial of this case the plaintiff, after establishing her prima facie case, introduced the other evidence in anticipation of the defense of want of authority, does not affect the merits of the case, nor change the rule applicable with respect to pleading. Blood v. La Serena L. & W. Co., 113 Cal. 221, 229, 41 Pac. 1017, 45 Pac. 252. Next it is asserted that estoppel cannot be relied upon because deceit is an essential element in estoppel and the cross-complainant had actual notice of the fact that, as appellants claim, the execution of said bonds was never duly authorized. The record shows that Thaddeus Lowe was the agent of cross-complainant with respect to the business transacted under said contract of August 2, 1901. At the same time he was a director of the corporation. Personally Mrs. Dobbins did not acquire any knowledge of the details of action or attempted action by the corporation. Under such circumstances, it would not be equitable to enforce against cross-complainant the consequences resulting from the legal rule that knowledge on the part of her agent is to be imputed to her as his principal. The scope of his agency seems to have been extended only to the business of assisting her in the performance of her part of the contract wherein she purchased lands and improved the same and conveyed the property to the corporation. His presence at the meetings of the board of directors and of the stockholders of the corporation was in his capacity as a stockholder or as a member of the board of directors and charged with a trust in favor of the corporation. If, under those circumstances, the corporation accepted a valuable consideration from her, and secured her acceptance of its bonds, the directors of the corporation must be presumed to have known of the alleged invalidity of those proceedings, and the knowledge of Thaddeus Lowe was primarily his knowledge as such director. If, under such circumstances, he concealed the facts from his principal Mrs. Dobbins his other principal (the Los Angeles Suburban Gas Company) should not be permitted to take advantage of that concealment. This position is further established by the fact that the corporation, by the act of all of its directors, including Thaddeus Lowe, certified to the facts relied upon by Mrs. Dobbins when she accepted the bonds and delivered the consideration therefor.

[8] We now return to the matter of the notices given and the question of validity of the meetings held. The finding of fact, that there was a stockholders' meeting, and that there were directors' meetings, at the times above mentioned, implies that notice in writing had been given of the directors' meetings, and that written consent had been given by all of the stockholders for the holding of the stockholders' meeting. In our opinion, the court was entitled to find that these notices were given. Beginning with the presumption of regularity of the proceedings shown in the minutes kept by the secretary of the corporation, the court was not bound to believe contrary testimony of the witnesses L. P. Lowe and S. C. Lowe, in the face of their own written certificate, which contradicted their testimony. There being thus a conflict in the evidence, we base our conclusion upon the facts as found by the court. A like result must follow upon the question as to the number of directors present at the directors' meeting of December 4, 1902. On the one hand we have the official record of the corporation in its minutes, which show the presence of four directors, as against the testimony of one of those four directors, given nine years later, that he was not present at the meeting.

[9] We find no merit in the suggestion that the estoppel, even if good against the bonds, cannot be relied upon to sustain the validity of the trust deed or mortgage. The bonds contain full recitals showing the execution and recording of the "mortgage and trust deed," and the documents are all equally a part of the transaction.

[10] Finally, it is claimed by appellants that the decree entered herein is erroneous in this, that it orders that the mortgaged property be sold for satisfaction of the principal, as well as for the due and unpaid interest upon the bonds. This argument is based upon the provision of the trust deed that, if for a specified length of time default be made in the payment of interest coupons, the whole amount of the principal, etc., shall, at the election of the trustee, be deemed immediately due and payable; and, since the trustee has never made such election and has never instituted any proceeding to foreclose, it is insisted that the remedy of the holder of the bonds is limited to the right to have the property, or so much of it, sold as is required for the satisfaction of accrued and unpaid interest installments. If the trust deed contained no other provision for advancing the maturity of the entire obligation than that above mentioned, the contention of appellants probably would have to be sustained. But it further appears from the mortgage that, under circumstances like those which have arisen in this case and after the holder of one-fourth of the bonds at that time outstanding and unpaid shall have tendered to the trustee satisfactory indemnity against loss, expense, and liability that may be incurred by it in so doing, it shall be the duty of the trustee to take such action pursuant to the terms of the trust deed as the party or parties tendering the indemnity may in writing request. After the default had taken place and the necessary space of time had

passed, the cross-complainant, she being the holder of all of the legally outstanding bonds of this issue, made written demand upon the trustee that it immediately elect to consider the whole amount of principal and interest of said bonds to be due and payable, and that it institute proper proceedings to foreclose said mortgage or deed of trust, or to sell the property thereby conveyed or mortgaged, under the power of sale therein contained, and in said writing offered to protect and indemnify the trustee in such manner as it might require against loss, expense, and damage by reason of such foreclosure and sale. The trustee indorsed on said notice a refusal to comply with the demand and request thus made. Under these circumstances, the rights of the bondholder should not be allowed to fail by reason of the refusal or omission of the trustee to perform its duty. The court should put itself in the place of the trustee, and, on demand of the bondholder, should exercise its power to enforce those rights. The situation is one calling for the application of the maxim:

> "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." Civ. Code, § 3529; Beverly v. Blackwood, 102 Cal. 83, 36 Pac. 378; Cutter v. Burroughs, 100 Me. 379, 387, 61 Atl. 767.

With respect to the plaintiff in the case, the evidence is sufficient to sustain the finding that the Los Angeles Suburban Gas Company received no consideration for the bonds held by the plaintiff. The only evidence tending to show a consideration came in the form of statements by the witness L. P. Lowe, whose cross-examination showed that the facts were not within his personal knowledge, and the court very properly struck out the answers thus given. There is other evidence indicating absence of any consideration.

The judgment and the order denying the motions of appellants for a new trial herein are affirmed.

We concur: JAMES, J.; SHAW, J.

On Rehearing.

PER CURIAM. The appellants Los Angeles Suburban Gas Company, People's Gas Company, and People's Gas & Coke Company have filed their petition for a rehearing of this cause in the Second District Court of Appeal.

[11] The argument presented relates to that part of the decree of foreclosure which permits a sale to enforce payment of the principal of the bonds as well as the accrued interest thereon. In addition to the fact that (under circumstances outlined in the opinion heretofore filed) the trust deed made it the trustee's duty "to take such action pursuant to the terms of this trust deed as the party or parties tendering the indemnity may in writing request," we find that paragraph 12 of the trust deed provides as follows:

> "No bondholder or bondholders shall take any proceedings to enforce the provisions hereof until he shall have requested the trustee in writing to take proceedings and shall have tendered to the trustee satisfactory indemnity as hereinbefore provided, and the trustee shall have refused or neglected after the lapse of a reasonable time to take such proceedings."

The words above quoted are equivalent to a statement that after such request and refusal the bondholders referred to may proceed in some appropriate manner to enforce the provisions of the trust deed. We think that the right to enforce the provisions of the trust deed included the right to enforce payment of the entire debt, and that this right passed to the bondholders complying with the conditions stated when the trustee refused to proceed as requested.

The petition for rehearing is denied.

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24 Cal. App. 381

JAQUES et al. v. BOARD OF SUP'RS OF YUBA COUNTY et al. (Civ. 1154.)

(District Court of Appeal, Third District, California. April 22, 1914.)

1. DRAINS (§ 13*)—RECLAMATION DISTRICT—DE FACTO ORGANIZATION—"DE FACTO CORPORATION"—"DE FACTO."

Where there was an attempt to organize a reclamation district under the laws relating to the organization of such districts, and such district for four years claimed to be and acted as a reclamation district, it was, regardless of the legality of its organization, a de facto corporation; a corporation being a de facto corporation when a number of persons have organized and acted as a corporation, conducting their affairs by the methods and through the officers usually employed by corporations, assuming the appearance of the counterfeit presentment of a legal corporate body, "de facto" meaning "of fact," "indeed," "in point of fact," "actually," "really."

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, pp. 1841–1843; vol. 2, p. 1840; vol. 8, p. 7627.]

2. EVIDENCE (§ 29*)—JUDICIAL NOTICE—GENERAL LAW.

The court will take judicial notice of the general law under which reclamation districts may be organized.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43–46, 48; Dec. Dig. § 29.*]

3. CORPORATIONS (§ 29*)—DE FACTO CORPORATION—ATTACKING VALIDITY.

The validity of the organization of a de facto corporation cannot be questioned by private individuals, but only in quo warranto at the suit of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77–79, 2504; Dec. Dig. § 29.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Application by E. E. Jaques and others against the Board of Supervisors of the County of Yuba and others, for a writ of review to amend the proceedings of the Board of Supervisors of Yuba County relating to the organization of a reclamation district.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment on demurrer for defendants, and plaintiffs appeal. Affirmed.

See, also, 22 Cal. App. 627, 135 Pac. 686.

C. W. Eastin, of San Francisco, for appellants. E. T. Manwell, of Marysville, for respondent Board of Sup'rs. A. H. Hewitt, of Yuba City, and J. E. Ebert, of Marysville, for respondent Reclamation Dist. No. 784.

BURNETT, J. This was an application for a writ of review to annul the proceedings of the board of supervisors of Yuba county relating to the organization of reclamation district No. 784. The defendants appeared and demurred to the petition or complaint upon the grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiffs have not the legal capacity to sue; it appearing that plaintiffs, as individuals, are seeking to attack the validity of the organization and legal existence of a reclamation district, a public or quasi public corporation. Subsequently motions to dismiss the action were made by defendants. After hearing the matter the court rendered its decision sustaining the demurrers and dismissing the action, and the appeal is from the judgment entered in pursuance of said decision.

Several contentions are made by appellants and argued with much force, learning, and ability, but it is deemed necessary to consider only one point, as that is decisive of the controversy.

[1] In the complaint it is alleged:

> "That it is claimed and asserted and at all times since on or about May 6, 1908, it has been claimed and asserted by reclamation district No. 784, defendants herein, that said reclamation district became a public or quasi public corporation and reclamation district on or about the 6th day of May, 1908, under and by virtue of the petition and other proceedings and papers hereinafter mentioned. * * * That said reclamation district No. 784 claims to be, and as hereinafter alleged has for some time last past acted as, and now is acting as, a reclamation district, and claims that certain lands, including the lands of plaintiff herein mentioned, are situated within and comprise the territory of said reclamation district."

The complaint was filed December 2, 1912, and it thus appears that for more than four years the said district had claimed and asserted that it was a reclamation district, and for some time prior to the filing of the complaint it had acted and is still acting as a reclamation district.

Regardless, then, of the legality of its organization, it is, without question, according to the allegations of the complaint, what is familiarly known as a de facto corporation. A corporation is recognized as de facto:

> "When a number of persons have organized and acted as a corporation, have conducted their affairs, to some extent at least, by the methods and through the officers usually employed by corporations, and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body." Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

> "De facto means in law, as well as elsewhere, of fact; in deed; in point of fact; actually; really." McCahon v. Leavenworth County Com'rs, 8 Kan. 437.

In Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773, the United States Supreme Court held that, to constitute a de facto corporation, there are three requisites:

> "(1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) the actual user of the corporate franchise."

[2] The existence of these three requisites clearly appears in the complaint before us. In fact, it is difficult to conceive how they could be more emphatically presented. We take judicial notice, of course, of the general law under which reclamation districts may be organized, and "the attempt to organize" and "the actual user of the corporate franchise" are expressly averred.

[3] But, whatever expressions to the contrary may appear in some of the decisions, it must be deemed settled now in this state that the legal right of such corporation to exist and exercise its corporate powers can be inquired into and determined only by the state in quo warranto proceedings.

In Williams v. Board of Supervisors, 65 Cal. 160, 3 Pac. 667, it appears that Henry Hebb, an owner of lands included in an organized swamp land district, applied to the supervisors to have his land segregated and made a new and independent district, under the provisions of the act of April 15, 1880 (St. 1880 [Code Amdts.] p. 61), amendatory of section 3481 of the Political Code. A protest was filed by Williams, the respondent, who was a landowner in the district. The board granted the petition of Hebb. Williams procured a writ of review from the superior court, and upon a hearing the action of the board was annulled. From the judgment an appeal was taken. The Supreme Court said:

> "The order of a board of supervisors, creating a district for the reclamation of swamp land, is an act of legislation, in the exercise of the taxing or police power of the state, which is not reviewable upon certiorari. Bixler v. County of Sacramento, 59 Cal. 700. The writ of certiorari is, as a remedy, only available for the review of an act judicial in its character."

The judgment was therefore reversed.

In Keech v. Joplin, 157 Cal. 1, 106 Pac. 222, the appeal was from a judgment in mandamus directing the defendant to pay to plaintiff the sum of $500 out of the money in his hands as county treasurer belonging to the general fund of the Newbert protective district, in satisfaction of a warrant for that sum issued to the plaintiff by the directors of said district. Upon the trial the defendant offered to prove that the signers to the original petition for the organization of the district did not own a majority of the lands of the district but only a little over one-third thereof. This proof was offered for the purpose of having the district declared invalid. The main objection presented here to the validity of the organization of the district, it may be stated, is likewise that the petition for the establishment of the district was signed by the owners of less than one-half of the land. The Supreme Court, in the Keech Case, supra, in discussing the ruling of the lower court in excluding the offered evidence, said:

"We do not think it necessary to determine what effect such proof would have upon the validity of the district, or whether it would be admissible in any collateral attack thereon. The present action is an action against the treasurer of the county to compel the payment of a claim. The evidence abundantly shows that the district has been organized and that it has been acting as a district. In other words, that it is a de facto district. It is a public corporation of a similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in quo warranto at the suit of the state. Quint v. Hoffman, 103 Cal. 506 [37 Pac. 514, 777]; Reclamation District v. Turner, 104 Cal. 335 [37 Pac. 1038]."

In Metcalf v. Merritt, 14 Cal. App. 244, 111 Pac. 505, it was held, as stated in the syllabus:

"A reclamation district is a public, as distinguished from a private, corporation. It acts as a state agency, invested with certain limited powers, and restricted to the doing of a particular work, public in its nature," and "the existence of public corporations can only be called in question by the power from which they derive their right to be."

This question received careful consideration in the case of Reclamation District No. 765 v. McPhee, 13 Cal. App. 383, 109 Pac. 1106. Therein it is said:

"In our former opinion we held that the board of supervisors was without jurisdiction to create the district, for the reason that there was a failure to publish the petition for its organization for the statutory period; and further that the validity of the organization could be attacked in this action. Since the opinion was filed, the decision of the Supreme Court in Keech v. Joplin, 157 Cal. 1 [106 Pac. 222], has been called to our attention, which, it is claimed, holds that the organization of the district can only be questioned by quo warranto."

After considering anew the sufficiency of the said publication, the opinion proceeds to the discussion of the question:

"Could the validity of the corporation be attacked in this proceeding?"

The decisions of the Supreme Court were reviewed and the conclusion reached that, in the absence of fraud, quo warranto was the exclusive remedy. A petition for rehearing was filed in the Supreme Court but denied therein. In other words, the position of respondent was approved that an exclusive remedy was afforded by section 803 of the Code of Civil Procedure, providing that:

"An action may be brought by the Attorney General, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the Attorney General must bring the action, whenever he has any reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor."

We must assume, of course, that the Attorney General will do his duty and that appellants will have no difficulty in obtaining redress by the method thus pointed out, if there be merit in their contention.

The foregoing cases seem to set this decisive question at rest, and no further discussion is called for.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 350

CITY OF VENICE v. LAWRENCE, City Treasurer. (Civ. 1493.)

(District Court of Appeal, Second District, California. April 17, 1914.)

1. Municipal Corporations (§ 935*)—Bonds—Proceedings—Irregularity — Curative Act.

All irregularities in proceedings for the issuance of city bonds which the Legislature in the first instance could have dispensed with were cured by Act April 4, 1913 (St. 1913, p. 14), providing that, where any municipal corporation has taken proceedings to issue and sell bonds, all such acts and proceedings leading up to and including the issuance of the bonds if they have previously been sold and all such acts previously had though the bonds had not yet been sold were legalized, ratified, and confirmed, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1951; Dec. Dig. § 935.*]

2. Municipal Corporations (§ 918*)—Bond Issue — Validity — Incurring Indebtedness.

Where a notice of election to authorize a bond issue specified that the election was to vote bonds in the sum of $20,000 to construct an outfall sewer, the estimated cost of which was $20,000, it sufficiently stated that it was proposed to "incur an indebtedness" of that sum for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919–1923; Dec. Dig. § 918.*]

3. Municipal Corporations (§ 935*)—Bonds—Issuance—Date.

Under Act April 4, 1913 (St. 1913, p. 15) § 3, validating certain city bonds, but declaring that the act should not legalize any bonds sold for less than par, nor those the issuance of which had not received the assent of two-thirds of the qualified electors, nor those maturing more than 40 years from the date of issue, the date of the bonds was immaterial so long as they did not run longer than 40 years.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1951; Dec. Dig. § 935.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 929*)—BONDS—EFFECT—TIME.

A municipal bond takes effect only on delivery and bears interest from that date, and not from the date of issue.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1942; Dec. Dig. § 929.*]

5. MUNICIPAL CORPORATIONS (§ 927*)—BONDS—ISSUE—REFUSAL TO SIGN—GROUNDS.

A city treasurer had no authority to refuse to sign a municipal bond, on the ground that the board of trustees might violate their duty by selling the bond for less than par.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1940; Dec. Dig. § 927.*]

Petition by the City of Venice against J. B. Lawrence, Jr., City Treasurer, for mandamus to compel him to sign certain municipal bonds. Alternative writ made peremptory.

Byron C. Hanna, of Los Angeles, for petitioner. Crouch & Crouch, of Los Angeles, for respondent.

SHAW, J. Original application for a writ of mandate to be directed to the respondent requiring him, as treasurer of the city of Venice, to sign a certain municipal bond in the sum of $500; it being one of 40 bonds of like denomination voted by the electors of said city for the purpose of constructing an outfall sewer.

It appears from the petition, all the allegations of which are admitted by a general demurrer interposed thereto, that on January 22, 1912, the board of trustees of the city of Venice duly adopted a resolution, approved by its president, whereby it determined that public interest and necessity demanded the acquisition and construction of a garbage incinerating plant, the cost of which was $23,000, and the construction of an extension to the sewer outfall pipe, the cost of which was $20,000, the cost of which improvements it was declared would be "too great to be paid out of the annual income and revenue of the city of Venice." The resolution contained the following:

> "The proceedings for the incurring of said indebtedness and the issuance and sale of bonds thereunder be conducted in accordance with the provisions of an act of the Legislature of the state of California entitled 'An act authorizing the incurring of indebtedness by cities, towns and municipal corporations for municipal purposes, and regulating the acquisition, the construction and completion thereof' (which act became a law under constitutional provisions without the Governor's approval, February 25, 1901), and in accordance with the provisions of section 866 of an act of the Legislature of the state of California entitled 'An act to provide for the organization, incorporation and government of municipal corporations,' approved March 13, 1883, and all acts in addition thereto and amendatory thereof."

On February 19, 1912, an ordinance was duly adopted calling a special election to be held on April 4, 1912, for the purpose of submitting to the qualified electors of said city the proposition of issuing the bonds and reciting the purposes so embodied in the resolution, for which the indebtedness evidenced by the bonds was to be incurred, and providing, as to the outfall sewer bonds here involved, that they should be of the denomination of $500 each, and bear 5 per cent. interest, one of said bonds to be made payable on the 1st day of February of each year after the date of their issue. The election was duly and regularly held, and more than two-thirds of the electors voting at the election voted in favor of the proposition.

The only grounds upon which respondent seeks to justify his action in refusing to sign the bond presented for his signature as city treasurer are: First. That it was stated in the resolution and ordinance that the proceedings for the issuance of the bonds would be conducted in accordance with two separate acts providing for cities incurring indebtedness in the making of public improvements, the provisions of which acts are inconsistent each with the other, in that, among other things, one authorizes the incurring of an indebtedness only when the estimated cost of the improvements exceeds the ordinary annual income and revenue of the municipality, while the other authorizes the incurring of such indebtedness only in case the amount is in excess of the money in the treasury applicable to the payment thereof; in one the payment of the bonds may extend over a period of 40 years, while in the other the time is restricted to 20 years. Second. That the proposed issuance of the bond is unauthorized, in that the board of trustees did not, as required, determine the cost of constructing the improvement to be "too great to be paid out of the ordinary annual income and revenue of the municipality." This claim is based upon the fact that the resolution included, not only the construction of an outfall sewer at a cost of $20,000, but the acquisition of a garbage incinerating plant at a cost of $23,000; and the determination was not as to each improvement separately, but declared that the combined cost of the two improvements was "too great to be paid out of the annual income and revenue of the city," omitting the word "ordinary." Third. The omission of a sufficient statement in the ordinance as to the amount of the indebtedness which it was proposed to incur in the construction of the improvement. Fourth. That no authority exists for antedating the bonds. The ordinance passed by the board of trustees, pursuant to the authority given, provided that the bonds should be dated as of February 1, 1912, and bear interest at the rate of 5 per cent. per annum. Fifth. Under the terms of the ordinance the bonds are to extend over a period of more than 40 years from their date.

[1] The existence of irregularities in the proceedings inaugurated for conferring au-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thority upon the board to issue the bonds may be conceded. Whether of sufficient import to render the proceedings invalid by reason of noncompliance with the statutory provisions under and pursuant to which they were conducted is immaterial, for the reason that, in our opinion, such defects, in so far as material, were cured by an act of the Legislature entitled "An act to validate municipal bonds, and to provide for the levy and collection of taxes to pay the principal and interest on such bonds," approved April 4, 1913 (St. 1913, p. 14). Section 1 of this act provides:

> "Where in any municipal corporation, proceedings have been taken for the purpose of issuing and selling bonds of such municipal corporation, * * * all such acts and proceedings leading up to and including the issuance of such bonds, if they have heretofore been sold, and all such acts and proceedings heretofore had, although the bonds are not yet sold, are hereby legalized, ratified, confirmed and declared validated to all intents and purposes, and the power of said municipal corporation and of the legislative body thereof, to issue such bonds, is hereby ratified, confirmed and declared, * * * and the bonds hereafter sold shall be, the legal and binding obligation of and against the municipal corporation. * * *"

Section 3 of the act provides:

> "This act shall not operate to legalize any bonds which have been sold for less than par, nor to legalize any bonds the issuance of which has not received the assent of two-thirds of the qualified electors of such municipal corporation, voting at an election held for the purpose of determining whether such indebtedness should be incurred, nor to legalize any bonds which mature at a date more than forty years from the time of their issuance."

It has been repeatedly held that the Legislature may validate past transactions when it could in advance, without contravening constitutional provisions, have authorized the proceedings taken as a precedent condition to the exercise of municipal power in issuing bonds. In other words, as to all steps which the Legislature could, in the first instance, have dispensed with, it may by retroactive statute declare the taking thereof unnecessary. See 2 Dillon on Municipal Corporations (5th Ed.) § 948; City of Redlands v. Brook, 151 Cal. 474, 91 Pac. 150.

[2] Indeed, counsel for respondent, notwithstanding the irregularity in the proceedings, concedes the act quoted as sufficient to validate the bonds, except that he contends the notice of the election failed to state the amount of the proposed indebtedness, by reason whereof there was a failure to comply with section 18 of article 11 of the Constitution, which prohibits the incurring of "any indebtedness or liability in any manner or for any purpose, * * * without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." And while he concedes that the purpose, as specified in the notice of election, was to vote bonds in the sum of $20,000 of the denomination of $500 each for the purpose of constructing an outfall sewer, he insists that the notice did not state in express terms that it was proposed to *incur an indebtedness* of said sum for such purpose. There is no merit in the contention. The notice recited that the estimated cost of the improvement was the sum of $20,000, and the election was called, as stated in the proceedings, for the purpose of submitting "to the qualified electors of said city the propositions of incurring the said several indebtednesses (that of $23,000 for a garbage plant, and $20,000 for the sewer) for the said several purposes * * * set forth in this resolution." Moreover, as was said in City of Oxnard v. Bellah, 21 Cal. App. 33, 130 Pac. 701, where a similar point was urged:

> "It is clear that the authority to issue bonds evidencing a debt was submitted, and that the voters directed the issuance thereof, the effect of which would be to create and establish an indebtedness; and it should follow that a proposition to issue bonds evidencing a new and independent indebtedness is a proposition to incur an indebtedness, and comes within the purview of the statute which provides that the proposition of incurring a debt for the purposes set forth in said resolution, and no question other than the incurring of an indebtedness for the purpose, shall be submitted."

[3-5] Pursuant to the power conferred, the board of trustees adopted an ordinance authorizing the issuance of the bonds, and whereby it was provided that they should be dated February 1, 1912. Respondent insists that thus dating the bonds rendered them illegal, for the reason that they would bear interest from a date prior to that upon which the election was held, whereby authority to issue them was conferred upon the board. The date of the bond is immaterial; the only restriction being that it shall not extend over a period of 40 years. Like a note, the bond would only take effect upon delivery and bear interest from such date. Collins v. Driscoll, 69 Cal. 550, 11 Pac. 244; Bither v. Christensen, 1 Cal. App. 90, 81 Pac. 670. Moreover, it appears that the bond in question is sold at par and accrued interest. However this may be, the city treasurer cannot justify his refusal to sign the bond upon the ground that the board of trustees may violate their duty by selling the bond for less than par.

We are of the opinion that the defects and irregularities in the procedure, to which respondent has directed our attention, and by reason of which he has refused to sign the bond here involved, are cured by the validating act above referred to.

The alternative writ of mandate should therefore be made peremptory, and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

(168 Cal. 12)

PINNEY & BOYLE CO. v. LOS ANGELES GAS & ELECTRIC CORPORATION.

(L. A. 3195.)

(Supreme Court of California. June 10, 1914.)

1. Electricity (§ 11*)—Police Power—Regulation of Rates.

Whether the production of an article is a public service utility depends upon the duty undertaken upon behalf of and owed to the public or some defined portion of it, rather than the use to which the article is put, and the furnishing of electricity to the inhabitants of a city was not exempt from municipal regulation when furnished for power purposes.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

2. Municipal Corporations (§ 625*)—Police Power—Reasonableness of Ordinances.

Ordinances which are unreasonable and oppressive in their attempted exercise of the police power will be declared void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

3. Electricity (§ 11*)—Police Power—Regulation of Rates.

An ordinance fixing the rate for furnishing electricity was not invalid because it prevented agreements for a lower rate, as one of the primary objects of rate regulation is to prevent discrimination, and, while a public utility is bound by the prescribed rate, an individual is not unless he accepts the service or commodity, after which he cannot contest the reasonableness of the rate.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

4. Constitutional Law (§ 242*)—Electricity (§ 11*)—Regulation of Electric Rates —Equal Protection of Laws.

An ordinance fixing the rate for furnishing electricity for a term of one year, passed after consumers had been given an opportunity to be heard, did not deprive a consumer of the equal protection of the law because it provided that no change should be made in the rate during such term, unless upon an application for a reduction thereof by the producer, as the consumer had an opportunity to be heard, a definite time could be fixed within which the rate could not be changed, and the provision for a reduction of rate upon the application of the producer was as clearly designed for the benefit of the consumer as the producer.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 691; Dec. Dig. § 242;* Electricity, Dec. Dig. § 11.*]

5. Electricity (§ 11*) — Contract — Construction and Operation—Law as Part of Contract.

A contract between a producer and consumer of electricity as to the rate will be conclusively presumed to have been entered into in contemplation of the power of the proper public authorities to fix the rates, so that it was not violated by the producer's charging a higher rate subsequently prescribed by the municipality.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Pinney & Boyle Company against the Los Angeles Gas & Electric Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

John D. Pope, of Los Angeles, for appellant. Wm. A. Cheney, Herbert J. Goudge, Le Roy M. Edwards, and Paul Overton, all of Los Angeles, for respondent.

HENSHAW, J. Plaintiff is a corporation which in the conduct of its business uses electrical power to operate its machinery. Plaintiff entered into a contract with the defendant to furnish electricity to be so used. Defendant is a public service corporation engaged, as its name implies, in furnishing gas and electricity to the inhabitants of the city of Los Angeles. During the life of this private contract between the parties litigant the city of Los Angeles regulated and prescribed the rates which defendant, with other public utilities, was permitted to charge for the electricity supplied and the service rendered to consumers. This rate was a higher rate than that fixed by the agreement of plaintiff and defendant. Plaintiff refused to pay the higher rate, insisting that the limit of its liability was the price fixed by contract. Defendant declined to furnish electricity excepting at the rate prescribed by the ordinance of the city of Los Angeles. This litigation followed. Judgment was given in favor of the defendant, and plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The propositions advanced on appeal may be thus summarized: (1) That furnishing electricity for power to be used as plaintiff was using it in its private business is not the performance of a public service which can be regulated by the municipality but is a private use governed solely by convention and agreement of the parties; (2) that the particular ordinance is unreasonable and therefore invalid; (3) that the provision of the ordinance making the maximum and minimum rate the same and at the same time denying consumers the right which it gives to the producer to apply for a change or reduction of rate is unconstitutional and void.

[1] 1. The contention advanced by appellant under this head may be summarily disposed of. Its position is, in effect, that it is the use which the consumer makes of the commodity furnished which constitutes the test as to whether or not the regulatory powers of boards and commissions in dealing with public utilities may be invoked. Such, however, is not the test. Generally speaking, the public utility can and does have no interest in or control over the commodity which it furnishes when it has passed into the possession of the consumer. It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility. Of course, it is true that if A. has erected a power plant and has agreed to sell a portion of his electricity to his neighbor B., he is not devoting his property to a public service. But if A. shall have erected his power plant and shall have offered to sell his power to the whole or a defined portion of the community, he is, to that extent, devoting his property to a public use and has brought it within the regulatory police powers of the state. This we conceive to be not only fundamentally true, but is the declared view of this court in Clark v. City of Los Angeles, 160 Cal. 30, 116 Pac. 722.

No question can exist as to the power of the city of Los Angeles in the matter of the regulation of such public service corporations. It is expressly conferred by article 1, § 2, subd. 30, of the charter of the city of Los Angeles. (Amend. March 25, 1911.)

[2, 3] 2. Under this head appellant asserts the indisputable proposition that courts will declare void ordinances which are unreasonable and oppressive in their attempted exercise of the police power. We need not refer to the cases which are cited, since no one of them deals with the rate-fixing and regulation. Appellant asserts, however, that the only reasonable use of the police power in the matter of rate-fixing is to establish the maximum charge which the public utility may make, leaving it open to the public utility by agreement to fix a less charge for an individual consumer. The untenableness of this position, however, must become apparent when a moment's consideration is given to the fact that one of the primary and most important objects to be attained by rate regulation is the prevention of discrimination. It must be quite clear that to hold that the rate-fixing power goes no farther than to name an amount beyond which a charge may not be made leaves the utmost room for abuse by way of favoritism and discrimination within that limit. It is, in practical effect, a denial of the existence of the rate-fixing power itself. Moreover, while the public utility is bound to render the service or furnish the commodity, an individual member of the public is not compelled to accept the service or use the commodity. If he does so, it is conclusively held that his act is an acceptance of the rate fixed and that he may not thereafter contest the reasonableness of the rate. Brooklyn Union Gas Co. v. City of New York, 188 N. Y. 334, 81 N. E. 141, 15 L. R. A. (N. S.) 763, 117 Am. St. Rep. 868; Griffith v. Vicksburg Waterworks Co., 88 Miss. 371, 40 South. 1011, 8 Ann. Cas. 1130. This salutary rule applies with peculiar force to the condition existing in Los Angeles, where the charter itself provides that any person interested in the rate-fixing may file his objections and be given a hearing thereon before final action. Charter of Los Angeles, § 155, subd. 2; amend. of 1911.

[4] 3. Under the third proposition appellant contends that section 5 of the ordinance is unconstitutional. That section provides as follows:

"It shall be unlawful for any person, firm or corporation * * * to charge, demand, collect or receive any rate or compensation for electric current for lighting or power purposes supplied * * * to the city of Los Angeles, or to any inhabitant thereof, less than the rates fixed by this ordinance, unless an application for a reduction in such rate is made by the person, firm or corporation so supplying such electric current for lighting or power purposes and the consent of the board of public utilities thereto is obtained, in the manner hereinafter provided."

The argument is that the provision allowing the public service utility to apply for a reduction of rates during the life of the ordinance and denying that right to the consumer is clearly discriminatory and a denial to the consumer of the equal protection of the law. Herein reliance is placed upon the decision of Saratoga Springs v. Saratoga Gas Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606. The statute under consideration in that action empowered a commission to fix the maximum price to be charged for gas or electricity in the municipality for a term of three years "and until, after the expiration of such term, such commission shall, upon complaint as provided in this section, again fix the price of such gas or electricity."

> "No opportunity or right," says the opinion, "is given to the corporation to apply, at the end of three years or at any time thereafter, for a new adjustment of the rates. That right is limited solely to the municipal officials or consumers."

The Court of Appeals of New York held that such a statute so fixing the rate for a fixed period of three years and for an indefinite period thereafter, which rate could not be modified or disturbed at the instance of the producer, denied to such producer the equal protection of the law. Appellant argues that the ordinance here under consideration presents the exact converse of this proposition; that it allows the purveyor to make application for reduction within the year's life of the ordinance, but denies that right to the consumer. But the cases are in no real sense parallel, as will appear not only on principle, but from a further consideration of the New York decision. In this case is presented an ordinance fixing the rate for the defined and limited period of one year. Every consumer has been given an opportunity to be heard before the rate was fixed and the right or privilege, whichever it may be called, that is accorded to the public service utility within the year, is a right or privilege making clearly for the benefit of the consumer himself, since that right or privilege is limited to a request for a reduction of the rate, which reduction, if granted, would benefit and not injure every consumer. The New York case, however, was a case where by statute the rate was fixed for an indefinite period of time with no right whatsoever to the public utility to be heard upon application for any modification of the rate. The New York Court of Appeals found no difficulty in upholding the law in so far as it denied the gas company the right to be heard in the matter of refixing the rates for the fixed period of three years. It was the denial of the right to be heard for the indefinite period thereafter, with the right, however, to the consumer so to be heard, which was held to be a denial of the equal protection of the law.

> "For," says that court, "we have no difficulty in upholding the provision that the rate would remain as established for the term of three years. It is urged that circumstances might so alter that before the expiration of the three years a rate which was reasonable at the time it was established would become unreasonable. This is possible. Nevertheless we think the Legislature was justified in enacting some period of repose during which the rate should remain stable."

To sum up on this matter, therefore, it may be said in conclusion that the period of stability and repose fixed by this ordinance is one year. The consumer had an opportunity to be heard before the rate was finally fixed. The provision allowing the public utility to petition for a reduction of the rate is one as clearly designed for the benefit of the consumer as of the company itself. No want of equal protection of the law is here shown. Quite different would be the case if the company were allowed to petition for an increase of rate during the life of the ordinance without an opportunity to the consumer to be heard upon the question of its maintenance or reduction. It appears clear therefore that the contention that the appellant is denied the equal protection of the law under the charter and ordinance here under consideration is unfounded.

[5] A word perhaps should be added touching the asserted violation of the provision of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say that it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised. Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; City of Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; Portland Ry. L. & P. Co. v. R. R. Comm. of Oregon, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; Knoxville Water Co. v. City of Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887; Buffalo East Side R. R. Co. v. Buffalo St. Ry. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284.

For these reasons the judgment appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

168 Cal. 23

GILFALLAN v. GILFALLAN. (L. A. 3145.)

(Supreme Court of California. June 12, 1914.)

1. Specific Performance (§ 68*)—Contracts Enforceable — Sale of Personal Property.

The presumption created by Civ. Code, § 3387, that the breach of a contract of sale of personalty can be adequately compensated by damages, so that equity will not decree specific performance, is a disputable one, and, where facts show that pecuniary compensation will not afford adequate relief, specific performance will in a proper case be enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 199; Dec. Dig. § 68.*]

2. Specific Performance (§ 70*)—Contracts Enforceable — Sale of Personal Property.

Where a contract to sell stock of an oil company was made when the company had no property except land, in which oil had not been discovered, and the value of the land was speculative, so that the stock had no market value, and its value could be ascertained only on the discovery of oil in the land, and in the land adjacent thereto, and the stock was owned and controlled by but few persons, and none of it was for sale, the buyer was entitled to specific performance, because of inadequacy of the remedy at law for breach of contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

3. Specific Performance (§ 51*)—Contracts Enforceable—Sale of Personal Property—Validity of Contract.

A contract for the sale of corporate stock to be paid for by canceling the seller's debts and advancing part of the price to meet expected obligations of the seller, which he otherwise could not pay, will be specifically enforced as against the objection that it is unfair, where it appears that no advantage was taken of the seller's necessities, and the value placed on the stock was agreed on by both parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.*]

4. Specific Performance (§ 30*)—Contracts Enforceable—Certainty of Contracts.

A contract for the sale of corporate stock, which fixes the price, and which provides that the sum due from the seller to the buyer shall be applied on the price, and which declares that the buyer assumes one-half of the seller's indebtedness to a third person, and that the balance of the price shall be deposited subject to call, for the payment of future assessments, and that, in consideration of performance by the buyer, the seller will deliver the stock when released from a pledge to the third person, is sufficiently certain to justify specific performance, though there have been no assessments, for the deposit is due when delivery of the stock is offered, or by the terms of the contract should be offered.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83–85; Dec. Dig. § 30.*]

5. Sales (§ 82*) — Contracts — Payment of Price.

One who buys personal property at an agreed price agrees by implication, under Civ. Code, § 1728, to pay the price, and, where no time of payment is agreed on, he must, as required by section 1784, pay at the time of delivery, and, where the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, if not otherwise provided for, is postponed to the time of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229–233; Dec. Dig. § 82.*]

6. Specific Performance (§ 70*)—Contracts Enforceable — Sale of Stock — Payment of Price.

A contract of sale of corporate stock for a specified price, which recites that the seller "agrees to sell" and the buyer "agrees to buy," and which provides that the debt due from the seller to the buyer shall be applied on the price, and that the buyer agrees to assume one-half of the seller's debt to a third person and deposit the balance to meet future assessments, and that a part of the stock shall be delivered when the debt to the third person shall have been paid out of dividends received from the stock, provided that, if the dividends are insufficient to pay the debt within 18 months, the seller agrees to deliver the stock, is but an executory contract of sale, binding the buyer to pay one-half of the debt to the third person, which cannot be reduced by dividends, and the payment becomes due at the time of the delivery of the stock, and so construed the contract is sufficiently certain to support a decree of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

7. Specific Performance (§ 114*) — Complaint—Sufficiency.

A complaint for specific performance of a contract to sell corporate stock, which alleges that plaintiff has duly and faithfully complied with and performed the provisions of the contract on his part, sufficiently alleges performance under Code Civ. Proc. § 457, of the conditions precedent to a recovery, especially where it further alleges a formal tender of the amount unpaid on the contract and a readiness and willingness to pay all sums due on delivery of the stock.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

In Bank. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by F. C. Gilfallan against M. J. Gilfallan. From a judgment for defendant rendered after sustaining a demurrer to the amended complaint, plaintiff appeals. Reversed.

L. L. Cory, of Fresno, for appellant. Rowen Irwin, of Bakersfield, and Lamberson & Lamberson and James M. Burke, all of Visalia, for respondent.

SHAW, J. The plaintiff appeals from the judgment in favor of the defendant, given after sustaining a demurrer to plaintiff's amended complaint. The object of the action was to obtain specific performance of a contract whereby the defendant agreed to sell to the plaintiff 50,000 shares of stock of the Paraffine Oil Company, a corporation. The oil company was made a party to the action, but it did not appear, and the judgment runs in favor of M. J. Gilfallan alone.

[1] 1. The first point urged by respondent in support of the judgment below is that an action will not lie to enforce specific perform-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ance of a contract to sell personal property. It is true, as is declared in section 3387, Civil Code, that there is a presumption that the breach of an agreement to transfer personal property can be adequately relieved by pecuniary compensation, and that the general rule is that where adequate pecuniary compensation can be made specific performance will not be enforced and the party will be confined to his remedy at law for damages. But it is well settled in this state that the aforesaid presumption is a disputable one and that, where facts are alleged showing that pecuniary compensation will not afford adequate relief, the objection that an adequate remedy at law exists is removed and specific performance will, in proper cases, be enforced. Treasurer v. Commercial M. Co., 23 Cal. 391; McLaughlin v. Piatti, 27 Cal. 463; Senter v. Davis, 38 Cal. 459; Fleishman v. Woods, 135 Cal. 260, 67 Pac. 276; Wait v. Kern River M. Co., 157 Cal. 23, 106 Pac. 98; Sherwood v. Wallin, 1 Cal. App. 536, 82 Pac. 566.

[2] Here the complaint alleges that, at the time of the execution of the contract, the corporation had no property except 40 acres of oil land; that no oil had then been discovered thereon, and its value was speculative and uncertain; that the stock of the company consisted of 300,000 shares of the face value of one dollar each, of which defendant owned 100,000 shares; that the stock had no actual or market value, and its value could be ascertained only on the discovery of oil in the land and in land adjacent thereto; that at the time the action was begun the stock had no fixed, certain, or reasonable market value; that it was owned and controlled by but a few persons; that none of it was for sale; that its value was fluctuating and uncertain, and dependent upon the condition of the oil market from time to time and the development of said land and adjacent lands; and that plaintiff cannot elsewhere obtain the amount of stock agreed to be sold to him by the contract, for any considerable portion thereof. These circumstances remove the aforesaid presumption and bring the case within the rule declared in Treasurer v. Commercial Co., supra, where the court said:

> "In the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance."

The showing is sufficient to justify specific performance, so far as this objection is concerned.

[3] 2. It is next claimed that the contract is unfair. In view of the allegations of the complaint, we do not think this proposition can be maintained. The plaintiff had previously loaned to the defendant $5,000 to enable her to pay her share of the cost and expenses of acquiring the oil land afterwards transferred to the corporation and comprising its entire assets, and to pay assessments previously made upon her shares of said stock. This debt had not been repaid to him. She had also borrowed $5,149.10 from one Minor and had pledged to him 60,000 shares of her stock as security for that debt, which also was then unpaid. The corporation was engaged in drilling a well for the development of the land. It was, it is alleged, not known whether the oil land would turn out to be valuable or valueless. The defendant had no means of her own, and she feared that she would be unable to meet future assessments on her stock and would consequently lose it all. She urgently requested plaintiff to buy one-half of her stock on the terms stated in the contract, and she was fully cognizant of all the facts above stated. The parties at that time estimated the value of the stock at 20 cents a share, which made the stock sold amount to a little less than the price stated in the contract. This being the situation of the parties, the agreement, in effect, was that the plaintiff would buy the 50,000 shares at the price of $10,074.55, to be paid by canceling the defendant's debt of $5,000 owing to him, by his payment of $2,574.55, being one-half of her debt to Minor, and by his payment of $2,500 in cash, delivery of 150 shares of the stock to be made at once, and the remaining 49,850 shares to be delivered as soon as the Minor debt was paid by dividends received upon the stock, or at the expiration of 18 months if the dividends did not sooner discharge said debt, and that in the meantime the sum of $2,500 was to be deposited to defendant's credit for her use in payment of any future assessments on the stock, if any should occur. There appears to be nothing unfair in a purchase of stock at the value placed upon it by both parties to be paid for by canceling the seller's present debts and by advancing part of the price to meet expected obligations of the seller which she otherwise could not pay. No advantage appears to have been taken of her necessities, and we are satisfied that the contract cannot be deemed unfair in the sense here contended.

[4] 3. It is further claimed that the contract itself is so uncertain that it is incapable of performance. This uncertainty is asserted to be in regard to the price to be paid and the time and manner of payment. It is necessary here to set out the contract in full. It is as follows:

> "This agreement, made and entered into this twenty-seventh day of October, 1908, by and between M. J. Gilfallan, of Bakersfield, Kern county, California, and F. C. Gilfallan, of Ebenezer, New York, witnesseth: That whereas, M. J. Gilfallan is the owner of one hundred thousand (100,000), shares of the capital stock

of the Paraffine Oil Company, situated in the Midway district, Kern county, California, the estimated value of said stock being twenty thousand dollars ($20,000); and whereas, the said F. C. Gilfallan, has advanced to the said M. J. Gilfallan, at her special instance and request the sum of three thousand dollars ($3,000.00), and for other good and valuable considerations hereinafter set forth, the said M. J. Gilfallan agrees to sell to, and the said F. C. Gilfallan agrees to buy fifty thousand (50,000) shares of said Paraffine Oil stock from said M. J. Gilfallan, for the sum of ten thousand and seventy-four dollars and fifty-five cents ($10,074.55), said stock to be delivered to F. C. Gilfallan and to be paid for by him as follows:

"In addition to the sum of three thousand dollars ($3,000.00) already advanced to M. J. Gilfallan by F. C. Gilfallan, and the acknowledgment of an indebtedness of the further sum of two thousand dollars ($2,000) due the said F. C. Gilfallan from M. J. Gilfallan which said indebtedness shall be applied as a two thousand dollar ($2,000.00) payment on the purchase price of said stock. The said F. C. Gilfallan hereby further agrees to assume and pay one-half of the sum of five thousand one hundred and forty-nine dollars and ten cents ($5,149.10) (or the sum of $2,574.55), now due and owing to T. H. Minor from M. J. Gilfallan, under and by virtue of that certain agreement made and entered into by the said T. H. Minor and M. J. Gilfallan, and dated at Bakersfield, California, on August 13, 1907, and supplemented by an agreement between the same parties made on the eighteenth day of June, 1908, and to deposit the further sum of two thousand five hundred dollars ($2,500.00) to the credit of M. J. Gilfallan, and subject to her call, for the payment of future assessments which may be placed against said stock, and in consideration of the performance of the above covenants on the part of said F. C. Gilfallan, the said M. J. Gilfallan hereby agrees to deliver to the said F. C. Gilfallan one hundred and fifty (150) shares of said Paraffine Oil stock, at the time of the signing of this agreement, and to deliver to the said F. C. Gilfallan the remainder of said one-half of said stock (or 49,850 shares), when the said indebtedness of five thousand one hundred and forty-nine dollars and ten cents ($5,149.10) due to T. H. Minor, as above set forth, shall have been paid out of the dividends being received from said stock, and the said T. H. Minor shall have returned to the said M. J. Gilfallan the 60,000 shares of Paraffine Oil stock held by him as collateral security for the payment of said sum of five thousand one hundred and forty-nine dollars and ten cents ($5,149.10) as evidenced by the above mentioned agreements heretofore made and entered into between T. H. Minor and M. J. Gilfallan. It is understood and agreed between the parties to this agreement that should the dividends now being paid on said 100,000 shares of stock, and now being applied to pay off the indebtedness of $5,149.10 due to T. H. Minor from M. J. Gilfallan be insufficient to pay off the said indebtedness within the period of eighteen months from this date, then the said M. J. Gilfallan agrees to immediately deliver the above mentioned 49,850 shares of said Paraffine stock to F. C. Gilfallan. It is further understood and agreed that all the covenants of this agreement shall bind the heirs and assigns of the respective parties."

[5] There is no uncertainty as to the price to be paid. It is clearly stated to be $10,074.55. The manner of payment is in part fixed by the contract and in part left to implication of law. Considering the two together, there is no uncertainty. The $5,000 due from defendant to plaintiff was to be applied upon the price. Plaintiff expressly agreed to assume and pay $2,574.55, being one-half of the Minor debt under the terms of defendant's contract with Minor. This left $2,500 of the price, for the payment of which the contract made no provision. The deposit to her call was not declared to be a payment, but a deposit in trust for a specific purpose; that is, to meet future assessments. There having been no future assessments, the trust was left without any object. This, however, leaves no fatal uncertainty with respect to the payment of this remainder. Where one buys personal property at an agreed price, he, by implication of law, agrees to pay the price, and, if no time of payment is agreed upon, the law fixes the time of delivery as the time of payment. Civ. Code, §§ 1728, 1784; Cole v. Swanston, 1 Cal. 54, 52 Am. Dec. 288; Blackwood v. Cutting Co., 76 Cal. 215, 18 Pac. 248, 9 Am. St. Rep. 199; Veerkamp v. Hulburd, 58 Cal. 230, 41 Am. Rep. 265; Armsby Co. v. Blum, 137 Cal. 556, 70 Pac. 669. And if the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, if not otherwise provided for, will be postponed, by implication of law, to the time of such delivery. 2 Mechem on Sales, §§ 1407, 1408, 1409. This rule obviously applies to cases where the time of payment of part of the price is specifically fixed and the time of the payment of the remainder is left unprovided for. The payment of this $2,500 was therefore due when delivery of the stock was offered, or by the terms of the contract should have been offered.

The statement immediately succeeding the provision for the deposit, that "in consideration of the performance of the above covenants" the defendant agreed to deliver the stock as soon as it was released from the pledge, is not inconsistent with this construction. That clause refers only to the delivery of the stock. It does not affect the implied promise to pay on such delivery the part of the price then remaining unpaid.

[6] Greater difficulty is found in ascertaining from the agreement and attending circumstances the intention of the parties with regard to the payment of one-half of the Minor debt. This sum of $2,574.55 is necessary to make up the agreed price. The agreement to assume and pay it is clear, distinct, and entirely unqualified. It is not made to depend upon the circumstance, also appearing in the contract, that the dividends to be paid on the 100,000 shares of stock were to be applied to pay that debt. The fact that such dividends were to be so applied appears by way of recital in the clause specifying the time of delivery of the 50,000 shares sold to plaintiff. 10,000 shares of the 50,000 sold to plaintiff were in Minor's custody under the pledge and could not be delivered, absolutely, until they were redeemed. Recognizing this, the contract provided that the entire delivery, except of 150 shares, should await such redemption, unless the time

should run beyond eighteen months, in which case delivery was to be made at the expiration of that time. The defendant's argument is that the recital that the remainder of the stock sold should be delivered when the $5,149.10 due Minor "shall have been paid out of the dividends being received from said stock," and the subsequent reference to "the dividends now being paid on said 100,000 shares of stock and now being applied to pay off" the debt to Minor, are, in effect an agreement that if the dividends proved to be sufficient to pay that debt, the price to be paid by plaintiff was to be abated in the sum of $2,574.55; in other words, that one-half of the dividends were to inure to the benefit of the plaintiff in the payment of the price, and that this is so contradictory of the previous express agreement that it renders the contract uncertain and consequently unenforceable. We do not think these recitals were so intended, or that, when considered in connection with the context, the circumstances stated, and the law on the subject, they should be so construed. The contract contains no statement that the plaintiff was to participate in the stock dividends prior to the delivery of the stock, or that he was to have any interest therein. Neither does it provide that title to the stock is to pass to him before delivery. In form it is not an executed agreement effecting a present sale of the property, but is an executory agreement to sell; the expression being that the defendant "agrees to sell" and that the plaintiff "agrees to buy." The buyer would not be legally entitled to dividends upon the stock in the absence of any agreement to that effect, until the legal title to the stock had passed to him. Upon an executory agreement to buy and sell personal property, title does not pass to the buyer until delivery is made to him or is due to him and is offered to be made, unless there is something in the contract specifying or implying a different intention, which is not the case here. Civ. Code, § 1141; Hallidie v. Sutter Street R. Co., 63 Cal. 576; 35 Cyc. 275. The dividends paid to the pledgee would therefore inure entirely to the benefit of the defendant, in whom title was vested, and they would operate as a payment by her alone upon the debt to Minor. In contemplation of law, the plaintiff would not have paid anything on the Minor debt by virtue of these dividends. He would still remain bound by the terms of the contract to pay one-half of the amount thereof to defendant as a part of the agreed price. Under the rule mentioned in discussing the $2,500 payment, this payment of one-half of the Minor debt by the plaintiff would become due and payable at the time of the delivery of the stock, since there is no provision for its payment at any other time. The payment thereof by the dividends made performance of the contract immediately possible and removed all uncertainty both as to the amount the plaintiff was to pay and as to the time and manner of such payment.

[7] A further objection is made that the complaint does not show performance on the part of the plaintiff sufficient to entitle him to demand performance of the defendant. The complaint contains the allegation that the plaintiff has duly and faithfully complied with and performed each and all of the provisions of said contract on his part to be kept and performed. Under section 457, Code of Civil Procedure, this is a sufficient allegation of the performance of all the conditions precedent. The complaint further alleges a formal tender to the defendant of the full amount unpaid upon the contract and a readiness and willingness to pay all sums due upon delivery of the stock. These allegations we think sufficient to answer the objection. The court erred in sustaining the demurrer.

The judgment is reversed.

We concur: MELVIN, J.; HENSHAW, J.; LORIGAN, J.

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KOHN v. SACRAMENTO ELECTRIC, GAS & RY. CO. et al. (Sac. 2051.)

(Supreme Court of California. June 4, 1914. Rehearing Denied July 3, 1914.)

1. CORPORATIONS (§ 472*)—BONDS—NEGOTIABILITY.

While Civ. Code, § 3095, enumerates bonds as a class of negotiable instruments, bonds payable to bearer, which recited that they were secured by a mortgage, which was made a part thereof, and which provided a complicated scheme for foreclosure, and that the trustee and bondholders should look solely to the assets secured by the mortgage, which should not embrace claims enforceable by creditors against stockholders, directors, or officers of the corporation issuing the bonds, are not negotiable, for section 3093 provides that negotiable instruments must not contain any contract other than those permitted by the provisions of the chapter of which it is a part, and section 3088, which is a part of that chapter, declares that a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment except that it may provide for the payment of attorney's fees and costs of suit; and bonds are governed by the same rules as notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

2. CORPORATIONS (§ 247*)—STOCKHOLDERS—LIABILITY.

A stockholder's liability may be waived by contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983-997; Dec. Dig. § 247.*]

3. CUSTOMS AND USAGES (§ 10*)—EFFECT.

Custom, while important in assisting in the interpretation of statutes, cannot overcome the positive provisions of statutes.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 11-21, 35-39; Dec. Dig. § 10.*]

4. ASSIGNMENTS (§§ 23, 100*)—EFFECT.

Under the direct provisions of Civ. Code, § 1459, a nonnegotiable written contract for the payment of money or property may be transferred by indorsement as negotiable instruments, but the assignee takes it subject to all equities and defenses in favor of the maker against the assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 40, 41, 177, 180; Dec. Dig. §§ 23, 100.*]

5. Corporations (§ 473*)—Bonds—Purchasers—Notice.

A purchaser of bonds is bound to take notice of all the recitals therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. § 473.*]

6. Corporations (§ 425*)—Bonds—Validity—Equitable Estoppel.

Where a defendant, upon issuing bonds secured by a mortgage, which was referred to and made a part of the bonds, delivered a number to a trustee for the purpose of retiring other bonds, and an officer of the trustee wrongfully obtained possession and sold them to purchasers, who made no inquiry as to his right, defendant is not estopped to set up their invalidity, where they were not negotiable, though payable to bearer, for the officer was not given possession of the bonds by defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

7. Corporations (§ 472*)—Bonds—Negotiability.

The fact that an officer of the corporation issuing bonds believed them to be negotiable will not render them negotiable, where they were not so according to their terms.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Isaack Kohn against the Sacramento Electric, Gas & Railway Company and others and the Mutual Savings Bank and another, which cross-complained. From a judgment for plaintiff and cross-complainants, the first-named defendants appeal. Reversed.

Wm. B. Bosley, of San Francisco, L. T. Hatfield, of Sacramento, and Morrison & Brobeck and Morrison, Dunne & Brobeck, all of San Francisco, for appellants. D. Freidenrich, Gavin McNab, B. M. Aikins, George W. Mordecai, Oliver B. Wyman, J. C. McKinstry, D. C. Murphy, and Lilienthal, McKinstry & Raymond, all of San Francisco, for respondents.

MELVIN, J. This is an appeal from a judgment in favor of the plaintiff and certain cross-complainants in an action based upon bonds and interest coupons of the Sacramento Electric, Gas & Railway Company secured by a mortgage upon the real and personal property of said corporation. California Gas & Electric Corporation and Pacific Gas & Electric Company were made defendants because they successively acquired the interests of the Sacramento Electric, Gas & Railway Company; the California Gas & Electric Corporation having been also absorbed by the Pacific Company. The interests of the two respondent banks and of the plaintiff, Mr. Kohn, are practically identical; all depending upon possession and ownership of bonds and coupons. The Mercantile Trust Company appears as the successor of California Safe Deposit & Trust Company, an insolvent corporation, of which the Mercantile has become the trustee.

There is no substantial dispute regarding the facts. Sacramento Electric, Gas & Railway Company issued 2,500 bonds of the par value of $1,000 each, and they each had semiannual interest coupons attached. Concurrently with the execution of these bonds and to secure their payment, the Sacramento Company executed and delivered to the California Safe Deposit & Trust Company a trust mortgage, hypothecating certain street railways, franchises, lands, and other property. Indorsed upon each of 2,070 of these bonds, bearing serial numbers from 1 to 2,070, was a certificate by said California Safe Deposit & Trust Company that such bond was one of the aforesaid 2,500 bonds secured by the mortgage therein mentioned. Pursuant to the provisions contained in said trust mortgage, 1,805 of said bonds, bearing serial numbers from 1 to 1,805, were duly issued and sold. Two hundred and sixty-five of said bonds, bearing serial numbers from 1,806 to 2,070, both numbers included, were delivered to said California Safe Deposit & Trust Company, as trustee, upon a special trust for the purpose of retiring 315 outstanding bonds of the Central Electric Railway Company which had been absorbed by the Sacramento Company. J. Dalzell Brown, an officer of the California Safe Deposit & Trust Company, feloniously took 65 of these bonds from said corporation, and through the offices of Allen Griffiths obtained certain loans nominally for said Griffiths, but really for Brown's benefit. In this way $25,000 were paid by the plaintiff Isaack Kohn upon the security of 25 of these bonds and coupons which Brown had thus dishonestly obtained. Twenty of the bonds were deposited with the Western National Bank of San Francisco to secure a loan of $17,500 borrowed by Griffiths for and by direction of Brown, and the remaining 20 bonds were delivered to the Mutual Savings Bank as collateral security for another loan to Griffiths for Brown. None of this borrowed money ever was credited in any manner to the Sacramento Electric, Gas & Railway Company or to any of the appellants. When Mr. Kohn accepted the bonds from Griffiths, he made no investigation regarding them except that he asked Griffiths if the bonds were his own or the property of a banking corporation of which Griffiths was an officer. Griffiths replied that the bonds were his own. Neither of the other respondents made any inquiry regarding the bonds at or before the time of taking said securities. To them Griffiths represented, as he did to Kohn, that he owned the bonds. To the respondents from time to time he paid interest upon the promissory notes which he had given them and received the coupons for accrued interest up to and including November 1, 1907. At the time this action was commenced, there were due to the respondents from Griffiths upon his promissory notes the following sums: To respondent Kohn $25,000, with interest from October 22, 1907; to respondent Western National Bank $12,500, with interest from September 30, 1907; and to respondent Mutual Savings Bank $14,500, with interest from October 29, 1907. About May 1, 1908, the respondents demanded payment upon the 65 bonds held by them as collateral security for the notes of Griffiths, and payment was refused by the Sacramento Electric, Gas & Railway Company. In 1908, and before the commencement of this action, Mercantile Trust Company of San Francisco was appointed trustee under the trust mortgage, succeeding California Safe Deposit & Trust Company, which had been declared insolvent. In 1908 Sacramento Electric, Gas & Railway Company notified respondents that the bonds had been feloniously taken from the custody of the California Safe Deposit & Trust Company. The respondents proceeded to foreclose the pledges made by Griffiths and bought in the bonds themselves at the foreclosure sale. The court found, however, that they were pledgees, not owners. The court also found that, "at all times mentioned herein, the bonds and coupons thereto attached, of the kind issued as aforesaid, by Sacramento Electric, Gas & Railway Company, when certified to by the trustee under the trust mortgage or deed of trust, are and were treated and dealt in as negotiable instruments by the mercantile world generally and more particularly by bankers and bond buyers and such is and has at all times been the usage of the mercantile world in California"; that it was the intent of the Sacramento Electric, Gas & Railway Company that the bonds and coupons should be negotiable; that said corporation always so considered them; and that respondents had each acted with reliance upon the representations contained in the bonds and coupons and upon the said usage of the mercantile world. The superior court's conclusions of law were that the bonds are negotiable instruments; that respondents hold them as pledges subject to the amounts owed by Griffiths to respondents; that the Mercantile Trust Company is entitled to the possession of the said bonds, subject only to the lien of the pledges upon which they are held by the respondents; that each of the appellants has the right to redeem the bonds by paying to respondents the amount still owed to the latter by Griffiths on his promissory notes; that respondents are entitled to the foreclosure of the trust mortgage to enforce payment of all coupons and bonds, unless appellants shall exercise their right to redeem; and that appellants are entitled to judgment for the surrender and delivery of the 65 bonds and interest coupons upon effecting redemption from the said lien.

The bonds and coupons are upon their faces payable to bearer. It is set forth upon the bonds that the payment of principal and interest is secured by a mortgage, the date of which is given, and the names of the mortgagor and the trustee are given, as well as a general reference to the mortgaged property. Each bond also contains the following statement: "This bond is issued subject to all the provisions contained in said mortgage." The bond contains a provision that upon default in the payment of interest or default in the payment of taxes or of any agreement or promise set forth in the mortgage, if such default or defaults continue for the time specified in the mortgage, the principal of the bond shall, at the option of the trustee or the holders of a majority of the outstanding bonds, become immediately due and payable. By the terms of the mortgage itself similar optional rights of declaring the principal due, after default, are given, and the mortgage gives to the holders of 80 per cent. of the outstanding bonds the optional right to waive "any default on the part of the electric company."

[1-5] It is the contention of appellants that the bonds being supported by a mortgage containing conditions not certain of fulfillment and notice of the mortgage, and its conditions appearing upon the bonds and coupons themselves, the bonds are not and cannot be negotiable instruments. In other words, appellants rely upon the rule announced in Meyer v. Weber, 133 Cal. 685, 65 Pac. 1110, and emphasized in later decisions, notably National Hardwood Co. v. Sherwood, 165 Cal. 5, 130 Pac. 881, that a note secured by a mortgage on land, both being executed at the same time as part of one transaction, is not negotiable in law, even if negotiable in form, where the purchaser takes it with knowledge of the existence of the mortgage. It is the belief of counsel for appellants that bonds come under the same rule. Both promissory notes and bonds are listed by the Code as among the six classes of negotiable instruments (Civ. Code, § 3095); yet a promissory note loses its negotiability when conditions not certain of fulfillment are introduced into it. Civ. Code, § 3088. There is no essential difference between the two kinds of instruments, and we see no escape from the logic of the position of appellants that a bond like a note, if dependent upon a mortgage, is subject to all equitable defenses against a holder with notice. The bonds sued upon are payable, not upon the general credit of the maker (Civ. Code, § 3088), but out of a specific fund, for it is provided that neither the trustee nor any bondholder shall have recourse to any personal, statutory, or constitutional liability against any stockholder, director, or officer of the Sacramento Electric, Gas &

Railway Company; that the trustee or bondholder shall look for payment "solely to the coporate assets and franchises of the mortgagor"; and that these assets shall not embrace claims enforceable by creditors, a receiver, or the mortgagor itself against a stockholder, director, or officer of that corporation or against a stockholder by reason of any alleged insufficiency in the payment for shares of stock. Such provisions are at war with the idea of negotiability. It is argued that this part of the contract absolving stockholders from individual liability is unconstitutional, but we are of the opinion that a stockholder's liability may be waived by contract. Wells v. Black, 117 Cal. 161, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162.

It is argued that bonds have been so long treated as negotiable instruments that the courts must respect the custom of the country and must make the letter of the statutes bend to it. Custom is often very important, it is true, in assisting courts to interpret statutes properly, but it never overcomes the positive provisions of statutes. Section 3093 of the Civil Code provides that a negotiable instrument must not contain any contract other than such as are permitted by the sections of title 15, c. 1, art. 1, of that Code. The bonds here considered are not negotiable under the law merchant, in view of that test. There are many expressions in statutes and opinions to the effect that bonds are now generally treated as negotiable instruments, but many of these statements have reference to the abolition of the old distinction between sealed and unsealed instruments. In Comstock v. Breed, 12 Cal. 288, it was declared that the old unmeaning distinction between sealed and unsealed instruments had been determined by statute, and that it was "the design of the Legislature to place bonds and notes on the same footing in respect to defenses." It is true that the old common-law rule with reference to assignability of things in action has long since been abrogated and has been succeeded by one more liberal, which, while it permits securities to pass from hand to hand in business transactions, does not make them negotiable to the extent of cutting off the equities of their makers. Section 1459 of the Civil Code thus formulates the modern rule:

> "A nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement."

Certificates of mining stock and controller's warrants pass readily from hand to hand by assignment; yet the transferee takes them subject to all legal and equitable defenses. Barstow v. Savage Mining Co., 64 Cal. 392, 1 Pac. 349, 49 Am. Rep. 705; Craig v. Hesperia Land & Water Co., 113 Cal. 13, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 606, 16 Pac. 507, 5 Am. St. Rep. 476; Wall v. Monroe, 103 U. S. 77, 26 L. Ed. 430. It has been decided by the Supreme Court of the United States that purchasers of municipal bonds are bound to take notice of all of the recitals therein. McClure v. Township of Oxford, 94 U. S. 432, 24 L. Ed. 129. There seems to be no good reason why bonds should be placed in a class governed by different principles than those applicable to notes.

Counsel for the appellants cite with confidence the case of McClelland v. Norfolk Southern R. R. Co., 110 N. Y. 471, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397. That case greatly resembled the one at bar. It was a suit on certain coupons, to which an equitable defense was interposed. The bonds from which the coupons were cut showed that they depended upon a certain mortgage, and the mortgage contained provision for declaring the principal of the bonds due in case of certain defaults, or for postponing all payments of interest or waiving any default upon the option of a majority in interest of the holders of the bonds. The court stated the general rule that bonds payable to bearer are deemed negotiable, but declared that when such instruments contain special stipulations, and the payment of them is subject to contingencies not within the control of the holders, they lose their character as negotiable instruments and are open to any defense existing as between the original parties to the instrument. With the reasoning of the opinion in that case we fully agree. Respondents insist that the later case of Hibbs v. Brown, 190 N. Y. 172, 82 N. E. 1108, virtually overruled McClelland v. Norfolk Southern R. R. Co., but an examination of that case shows that it is not at all in conflict with the earlier decision. It was held that the authorization in the mortgage for the waiver of default in the payment of interest coupons only related to and controlled procedure under the trust indenture itself for the purpose of enforcing payment of coupons and did not for any other purpose work or permit a postponement of the time of payment. It was also held in that case that the bonds had been issued upon the general credit of the corporation, and that the exemption of the stockholders from individual liability did not render the other assets of the corporation a special fund and thus make the bonds nonnegotiable. That case also announces the rule that courts may not override the terms of a statute when finally interpreted, and we feel committed to the interpretation of the pertinent sections of the Civil Code as given in Meyer v. Weber, supra, National Hardwood Co. v. Sherwood, supra, and Taylor v. Jones, 165 Cal. 111, 131 Pac. 114.

[6] If the bonds had been stolen from the

vaults of the Sacramento Company and negotiated, that company would have a complete defense against the holder. But respondents insist that, having intrusted the California Safe Deposit & Trust Company with the bonds under circumstances clothing that company with apparent power of complete disposition thereof, the Sacramento Electric, Gas & Railway Company is estopped to deny the authority of an officer of that company to dispose of them. There are many authorities supporting the doctrine that, where one of two innocent persons must suffer, the loss should be borne by the one whose conduct made possible the fraud or crime by which the other was deceived. The very recent case of National Safe Deposit & Trust Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241, is cited in that behalf. In that case Myers, a trusted employé of the Safe Deposit Company, with the consent of that corporation, obtained certain stock certificates which had been deposited by one Kelley as collateral security for a loan. Each certificate contained an assignment with power of attorney to transfer the stock upon the books of the company. This was signed by Kelley, whose signature was duly attested. It was customary, in the usual course of business, for Myers to procure from one of the officers of the bank, and to deliver to any customer paying a loan, the collateral security pledged for such loan. At his own request he obtained possession of the certificates belonging to Kelley, and by means of the assignment in blank sold them, through the offices of a broker, to Hibbs. The pledgee sued the latter, and the Supreme Court of the United States held that the loss should not fall upon the purchaser in good faith. In that case, however, the court found that the broker obtained the certificates "with all the indicia of ownership" from one "who had possession with the bank's consent and who brought the certificates to him apparently clothed with the full ownership thereof." After discussing the principle that an instrument indorsed in blank and stolen before it had been transferred would be taken subject to the equities, Mr. Justice Day, who handed down the opinion of the court, used this language:

> "The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But, in the case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present, and the estoppel arises. The distinction is not new. On the one side are cases like Knox v. Eden Musee American Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700, where an agent or servant simply had access to a document remaining in the possession of the owner; on the other, cases like Pennsylvania R. Co.'s Appeal, 86 Pa. 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended the fraud from the outset."

In the case at bar Brown was not intrusted with these special bonds. The California Safe Deposit & Trust Company was the trustee. True, Brown was an officer of that corporation, but he did not take the bonds with the consent either of the bank or the electric company. Neither did the bonds bear "every evidence of title and transferability upon them," but they bore the recitals that they were secured by a mortgage and subject to all the provisions of said mortgage. The purchaser was thus put upon his inquiry. If he had made some investigation and had been informed by the electric company that Brown was clothed with full power to act for that corporation, he might then invoke the rule that the more negligent of two innocent persons must suffer for the wrongful act of a third. Civ. Code, § 3543; Helmer v. Parsons, 18 Cal. App. 452, 123 Pac. 356. This distinction is well settled in California. One of the leading cases on the subject is Barstow v. Mining Co., 64 Cal. 389, 1 Pac. 349, 49 Am. Rep. 705, in which it is held that a thief may not impart title to nonnegotiable instruments like certificates of stock. It was there declared that the court was of the opinion:

> "That the principle that the thief of the stolen property (it not being money or negotiable securities) can pass no title should be maintained, unless the facts presented by a case should bring it within the law as stated in McNeil v. Tenth National Bank, 46 N. Y. 325 [7 Am. Rep. 341]: 'Where the owner of property confers upon another an apparent title to, or power of disposition over, it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner.'"

See, also, Swin v. Wilson, 90 Cal. 127, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110; Coolidge v. Austin, 22 Cal. App. 337, 134 Pac. 357.

Upon the facts in this case, and under the authorities cited above, we cannot see that respondents may avail themselves of the doctrine of estoppel.

[7] No other alleged errors require particular attention except the contention that the intent of the payer was to make the bonds negotiable. There was some evidence regarding such intent, but it was not sufficient to nullify the terms of the instruments themselves. The fact that an officer of the company believed the bonds to be negotiable does not alter their terms, which were ample notice, to all persons who might purchase any of the securities, that they were

subject to all of the provisions of the mortgage.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

24 Cal. App. 416

DURBROW v. CHESLEY. (Civ. 1198.)

(District Court of Appeal, Third District, California. May 7, 1914.)

1. APPEAL AND ERROR (§ 439*)—EFFECT OF TRANSFER OF CAUSE — JURISDICTION OF LOWER COURT.

After an appeal was taken and perfected from an order setting aside a default judgment, the superior court was without jurisdiction to permit the matter to be reopened upon fortified affidavits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2197; Dec. Dig. § 439.*]

2. APPEAL AND ERROR (§ 957*)—REVIEW—DISCRETION OF LOWER COURT — SETTING ASIDE DEFAULT JUDGMENT.

An order setting aside a default judgment will not be reversed, except where an abuse of discretion is shown, and any doubt will be resolved in favor of the application to the end of securing a trial upon the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

3. JUDGMENT (§ 143*)—DEFAULT—OPENING—EXCUSE.

An affidavit of defendant's attorney stating that he was prevented from filing an answer in time owing to the fact that, there being other actions between the same parties, he had a conversation with plaintiff's attorney as to consolidating all the actions was insufficient as the basis of an order setting aside a default judgment; it not appearing that plaintiff's attorney consented to the consolidation, and the uncontradicted affidavit of plaintiff's attorney showing that the suggested consolidation came before the court and was denied seven days before the last day given defendant to answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by William Durbrow against J. P. Chesley. From an order setting aside a default judgment, plaintiff appeals. Reversed.

See, also, 138 Pac. 917.

J. R. King, of Gridley, and Carlton Gray, of Oroville, for appellant. E. J. Corkin, of Gridley, for respondent.

CHIPMAN, P. J. This is an appeal from an order setting aside a default judgment. The action was claim and delivery. Summons was duly served on June 28, 1913. On July 9, 1913, the default of defendant was duly entered, and, on the same day, counsel for plaintiff appeared in court and submitted evidence in support of the complaint, and judgment was entered and recorded. Thereafter, and on the same day, defendant's attorney filed a notice of motion to set aside said judgment on the ground of mistake, inadvertence, and excusable neglect, and the court ordered plaintiff and his attorney to appear on July 15, 1913, and show cause why said motion should not be granted. The motion was supported by the affidavit of defendant and by affidavit of his attorney, E. J. Corkin, and was opposed by affidavit of plaintiff's attorney. Defendant's attorney, in his affidavit, stated that summons and complaint were handed him on June 28, 1913, and proceeds:

> "I was prevented from acting in the action owing to the fact that there were other actions between the same party, and I had a conversation with the plaintiff's attorney that all these actions would be consolidated and tried as one action, and that this was the best manner to proceed, and that when this was done all of the actions would be decided together. I further state that I have fully and fairly considered the facts in this action, and believe that J. P. Chesley has a good and substantial defense for the action, and I verily believe the same to be true."

Defendant deposed:

> "That on June 28, 1913, I gave the same [referring to the summons] to E. J. Corkin, of Corkin & Corkin, attorneys, with instructions that the same be answered in due time, and that I presumed that it had been done."

He further states that he believes he has a good and valid defense to the action, and has been so advised by his attorneys.

Plaintiff's attorney deposed that, on June 30, 1913, defendant made a motion in said action that said action and certain other actions (giving their titles) be consolidated; that plaintiff opposed said motion and the court denied the same; "that at the time said motion was denied said defendant had remaining seven days in which to appear in said action; and that since said motion was denied affiant never had any conversation whatever with said E. J. Corkin or with any of the counsel for defendant in regard to consolidating said actions, and affiant never, at any time, had any conversation with any one extending the time for said defendant to appear in said action." The motion was heard on these affidavits, on July 15, 1913, and the court on that day granted the same. Plaintiff, on the same day, filed notice of appeal from the order to this court.

[1] The following August defendant's attorneys served and filed a notice that they would move the court, at a time noticed, "that the order setting aside default judgment, and allowing the defendant in the above-entitled action to file an answer, be reconsidered, and that defendant be allowed to file an amended affidavit of merits, and to reconsider the whole matter, and, upon the affidavits filed, and the amended affidavit to be filed, and all the papers on record in this action to make a new order setting aside the default judgment, and allowing the case to be tried upon the issue alleged in the complaint and denied in the answer on file." The court granted this motion. It is not necessary further to state what appears in the record concerning the hearing of this last motion. In an opinion in the action, filed December 31, 1913, on motion by respondent to dismiss the appeal, it was

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

very clearly pointed out that, after taking and perfecting the appeal from the order or judgment made by the superior court to this court, the superior court lost jurisdiction "to make any order or to carry out any proceedings in such action which would have the effect of vitiating the appeal or preventing the review of all alleged errors brought up by a duly prepared and authenticated record." The question now before us is confined to the record of the proceedings first taken on the motion to set aside the default judgment. The court was without jurisdiction to permit the matter to be reopened upon fortified affidavits or any new showing that was attempted to be made.

[2] It is the rule that an order setting aside a default judgment will not be reversed, except where an abuse of discretion is shown in making it (Merchants' Ad-Sign Co. v. Los Angeles, 128 Cal. 619, 61 Pac. 277); and any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. "The appellate court will, therefore, be less inclined to reverse an order granting, than one refusing, an application to open a default." Jergins v. Schenck, 162 Cal. 747, 124 Pac. 426. See, also, O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. In People v. O'Connell, 23 Cal. 282, the default judgment was set aside on motion without any affidavit or other showing. The order was reversed, the court saying:

> "The facts should be made to appear by affidavit, or other proper proof, showing that the case is one provided for by said section (sec. 68, Practice Act) to authorize the court to make the order."

In Bailey v. Taaffe, 29 Cal. 423, the order setting aside the default judgment was reversed on the ground that the affidavit in support of the motion was insufficient. In speaking of the discretion with which the trial court is clothed in such case, the court said:

> "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice."

It was also suggested, as the proper practice, though not absolutely necessary, that the applicant should exhibit to the court his proposed answer; and if the appellate court is satisfied from the showing, made on the motion, that the court below has come to an erroneous conclusion, the party complaining of the error is as much entitled to a reversal in a case like the present as in any other. In Sherman v. Jorgensen, 106 Cal. 483, 39 Pac. 863, the court said:

> "Inadvertence in the abstract is no plea upon which to set aside a default. The court must be made acquainted with the reasons for the inadvertence; and, if satisfactory, will act upon them and relieve from burdens caused by them; but, if the inadvertence is wholly inexcusable, as if it arises from gross negligence, the court will not look upon it kindly, and will have none of it."

Redding, etc., Min. Co. v. Nat. Surety Co., 18 Cal. App. 488, 123 Pac. 544, was another case where an order opening a default was reversed for insufficient showing in its support.

[3] We think the affidavit of defendant's attorney is wholly insufficient as a basis for the order. In the statement that he had a conversation with plaintiff's attorney concerning the consolidation of certain cases, not identified or shown to have any necessary relation to each other, it does not appear that plaintiff's attorney consented to such consolidation, and in the uncontradicted affidavit of plaintiff's attorney it appears that the suggested consolidation came before the court on defendant's motion and was denied seven days before the last day given defendant by law in which to answer. Conceding that such conversation occurred before the motion last referred to was made and denied, nothing was said during the conversation about extending the time in which to answer the complaint. In fact, had a consolidation of certain cases been contemplated, it would still have been the duty of defendant to answer in time. The most that can be said of the affidavit is that defendant's attorney had a conversation with plaintiff's attorney about pursuing a certain course, but nothing appears to show that any agreement or understanding grew out of the conversation. On the contrary, it appears, as already stated, by the uncontradicted affidavit of plaintiff's attorney that he opposed a consolidation, and the court refused to make the order. The excuse for not answering or otherwise appearing, it seems to us, is wholly wanting in merit, and that the trial court erred in accepting it as sufficient.

The order is reversed.

We concur: HART, J.; BURNETT, J.

24 Cal. App. 408

PEOPLE v. DESMOND. (Cr. 260.)

(District Court of Appeal, Third District, California. May 7, 1914.)

1. Prisons (§ 17½, New, vol. 19 Key-No. Series)—Bringing Firearms into Prison.

An information which charged that accused "did willfully and unlawfully and feloniously bring, and did aid and abet in bringing" into a county jail "a certain firearm, to wit, a loaded revolver," not being authorized by law to do so, charged an offense under Pen. Code, § 171a, making it a felony for any person not authorized by law to bring into any jail any firearms, though it was redundant in charging that accused did "aid and abet in bringing," and also that the revolver was "loaded."

2. Criminal Law (§ 511*)—Accomplice's Testimony—Corroboration—Sufficiency.

In a prosecution for bringing firearms into a jail, evidence independent of the testimony of an accomplice *held* sufficient to connect accused with the crime so as to meet the requirements of Pen. Code, § 1111, requiring proof independent of the testimony of an accomplice to support a conviction.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. § 511.*]

3. Indictment and Information (§ 169*)—Issues—Proof and Variance—Evidence Admissible under Pleading.

Since Pen. Code, § 31, abrogates all distinction between accessories and principals, but makes all concerned principals, the prosecution could, under an information charging accused as principal, and also that he "aided and abetted" in its commission, show that he "advised and encouraged" its commission.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 320, 535; Dec. Dig. § 169.*]

4. Witnesses (§ 268*)—Cross-Examination.

In a prosecution for bringing firearms into a jail, the issue being whether accused was connected in any way as aider, abettor, etc., the court properly refused to permit accused's counsel to ask a witness for the prosecution on cross-examination, "And (accused) did not assist you in any way in getting the gun into the jail, did he?" such being for the jury to answer, and not for the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

5. Criminal Law (§ 1170½*)—Harmless Error—Evidence.

In a prosecution for bringing a gun into a jail, any error in permitting a district attorney to ask an accomplice whether he saw accused load the gun was rendered harmless by a negative answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

6. Criminal Law (§ 1169*)—Harmless Error—Evidence.

Where, in a prosecution for bringing firearms into a jail, a witness for the prosecution had already testified that he had an agreement with accused to get it and deliver it to him, any error in permitting him to state why he brought it into the jail was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

7. Criminal Law (§ 782*)—Trial—Instructions.

Where accused was charged with aiding and abetting or advising and encouraging the bringing of firearms into a jail, an instruction that, if accused procured a third party to get the weapon, he would be guilty placed too great a burden on the prosecution; to "aid and abet" or "advise and encourage" falling short of "procure."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. § 782.*]

8. Prisons (§ 17½, New, vol. 19 Key-No. Series) — Crimes — Bringing Firearms into Prison.

Under Pen. Code, § 171a, making it a felony to bring firearms into a prison, jail, etc., it is immaterial that the revolver brought in was unloaded.

9. Criminal Law (§ 810*)—Trial—Instructions—Ambiguous and Misleading Instructions.

In a prosecution for bringing firearms into a jail, an instruction that, if defendant "did not himself commit the offense," but, knowing it was committed, being present, aided and abetted, or, not being present, advised and encouraged its commission, was not contradictory and meaningless; the expression "did not himself commit the offense" meaning the actual participation in the act of bringing the weapon into the jail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1968; Dec. Dig. § 810.*]

10. Prisons (§ 17½, New, vol. 19 Key-No. Series) — Crimes — Bringing Firearms into Jail—Instructions.

In a prosecution for bringing firearms into a jail, an instruction that defendant need not have been present with the witness S. (an alleged accomplice) on the outside when the revolver was procured and brought into the jail, but, if defendant aided and abetted and received the revolver and concealed, etc., he was guilty, was not erroneous.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

William Desmond was convicted of bringing firearms into a jail, and he appeals. Affirmed.

B. S. Crittenden, of San Jose, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The information under which defendant was convicted charged that:

> "On or about the 11th day of February, A. D. 1913, he did willfully and unlawfully and feloniously bring, and aid and abet in bringing, into the county jail of the county of Santa Clara a certain firearm, to wit, a loaded revolver, and that the said defendant was not then or there or at all authorized by law so to do."

The accusation was brought under section 171a of the Penal Code, which makes it a felony for "any person not authorized by law" to bring "into any state prison, jail or reformatory in this state * * * any firearms, weapons or explosives of any kind." It is apparent, therefore, that the information sets forth an offense condemned by the statute. It is true that some redundancy is manifest, but this does not invalidate the information nor affect its sufficiency. For instance, the expression "and aid and abet in bringing" and the following term, "loaded," were unnecessary. "All persons concerned in the commission of a crime, * * * and whether they directly commit the act constituting the offense, or aid and abet in its commission or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed" (section 31, Pen. Code), and the distinction between an accessory before the fact and a principal in cases of felony has been abrogated, and both may be charged as principals (section 971, Pen. Code; People v. Nolan, 144 Cal. 75, 77 Pac. 774). In other words, having charged the defendant as principal, it was open to the district attorney to prove that the former actually committed the offense, or that he aided and abetted in its commission, or advised and encouraged its commission. It is also apparent that the statute does not require the weapon to be "loaded." In considering this case we may therefore disregard these superfluous features of the information.

[2] The claim is made seriously that the evidence is insufficient to support the verdict. More specifically, it resolves itself into the contention that there is not sufficient corroboration of the testimony of witness J. J. Savage, who was admittedly an accomplice. In this we think appellant is in error. Savage and one Frank Cody had been arrested and committed to the county jail for an offense at Gilroy, and they were taken back to that place and sentenced to the county jail for petit larceny, and again returned to the custody of the sheriff on February 11, 1913. They were not searched at the time they were so returned. Subsequently Deputy Sheriff Buffington discovered in the sewer in the jail a pistol loaded with five shells. Savage testified that prior to said February 11th he had a conversation with defendant and that:

> "Desmond asked me about a gun; said that if he had a gun he could smoke his way out of the jail; he expected to get the cookhouse job when the cook went out. * * * Why, he told me that he would like to have the gun. I told him the gun would be worth some money. He said, 'How much?' I said, 'Three or four dollars.' He said, 'Bring it up; that is priceless.' So I went back to Gilroy, brought the gun up. * * * Q. And to whom did you deliver it? A. I delivered it to Desmond."

The record contains two statements made voluntarily by the defendant; one to Buffington, and the other to the sheriff and the district attorney. In the former he admitted that he had the weapon in his possession for some days and, in reply to the statement of Buffington, "Bill, what in the world was you doing with that gun for ten days; they say you were going to smoke up the joint and shoot your way out; Bill, would you have done that?" he answered, "Well, I don't know whether I would or not or I might have done it or I talked of doing it." In the other statement which was taken down and transcribed by the official reporter, these questions and answers appear:

> "Q. Well, now, did you have any understanding with him that he would give it to you when he came in, or how did he happen to come up and give it to you? A. He spoke to me two or three times about the gun before he brought it in at all. Q. And was it understood that you would take care of it for him? A. Well, the chances are if he got it in that he would give me the gun, and he did; the day after he got in he came and gave it to me. Q. Why wouldn't he keep it himself? A. I don't understand why. He asked me if I would use it, and I told him I didn't know; that possibly I may. * * * Q. When he brought it he brought it right to you? A. He did, sir. Q. That had already been agreed that before he went down if he brought it in he would give it to you? A. Yes."

We think the foregoing statements of defendant tend to connect him with the commission of the offense, and are sufficient to meet the requirement of section 1111 of the Penal Code. It is true that, when asked categorically, defendant denied that he encouraged, advised, or requested Savage to obtain the pistol, but the jury had the right to act upon the portion of his testimony that was more unfavorable to his cause.

[3] We can see nothing of merit in the contention that by reason of the evidence showing that defendant simply "advised and encouraged" the commission of the crime a variance was thereby created; the information containing the allegation that he "aided and abetted" in the offense. As we have already seen, he was also charged as a principal, and we can see no good reason why by virtue of said unnecessary allegation as to aiding and abetting, the people should have been precluded from showing any facts that would place the defendant in the category of principal as defined by the Code. If it had been charged simply that he committed the offense, there would be no doubt that the people would be permitted to prove that he actually brought the weapon into the jail or "aided and abetted in" or "advised and encouraged" the commission of the act, and, under the information here, we think the scope of inquiry was equally as broad. If the information had charged that the defendant had committed the offense *by* aiding and abetting in its commission there would be some force in appellant's contention, but no such situation is presented. We have not overlooked the claim of the Attorney General that there was evidence that the defendant "aided and abetted" in the commission of the offense, but we are satisfied the other feature is covered by the information.

The alleged errors in the rulings upon the admissibility of evidence are so inconsequential as hardly to merit attention.

[4] The objection was properly sustained to the following question asked of Savage on cross-examination: "And Mr. Desmond did not assist you in any way in getting the gun into the jail, did he?" That was for the jury to answer, and not for the witness. He was interrogated fully as to the facts, and, if his opinion as to whether the defendant's acts amounted to assistance would be admissible, it is clear that it would have been of no aid to the jury.

[5] The district attorney asked Savage this question: "Did you see Desmond load the gun?" But, even if the court erred in overruling the objection, the error was without prejudice, for the answer was: "I did not."

[6] It was clearly proper for the witness to testify that he delivered the pistol to Desmond. The conduct of defendant in receiving it would, of course, be a circumstance tending to connect him with the crime. It is obvious that no harm was done by the answer to the question: "Why did you bring that pistol into the jail, Mr. Savage?" The answer which he gave would necessarily be inferred from the facts to which he testified. Since he declared that he had an agreement with the defendant to get it and

deliver it to defendant, it would quite naturally follow that his purpose in bringing the pistol into the jail was to deliver it to Desmond, and whether the question was technically objectionable or not the answer could not possibly add anything to the criminating effect of his other testimony.

[7, 8] Complaint is made of this instruction:

> "If you believe from the evidence beyond a reasonable doubt that the defendant procured the witness Savage to bring a revolver into the county jail, as charged in the information, and that this revolver was not loaded, but that the revolver was delivered to the defendant in the county jail by Savage accompanied by loaded shells that might be used to load the weapon, and that these shells were delivered to the defendant by Savage, along with the revolver, then I charge you that it is not necessary for you to find that the revolver when so delivered to the defendant was actually loaded at the time in order to find him guilty under the information."

The instruction, while not happily phrased, could not have prejudiced defendant. The word "procured" implied a greater burden for the prosecution than the statute demands. To be guilty of the offense charged it was not necessary for the defendant to have "procured" or induced Savage to perpetrate the act charged. To "aid and abet" or to "advise and encourage" falls short of "procure." But the substantive part of the instruction is the direction in reference to the cartridges and the unloaded pistol. What precedes is mere matter of inducement, as the manifest purpose of the instruction was to inform the jury that the circumstance of the pistol being unloaded was not sufficient to prevent a verdict of guilty if cartridges accompanied the delivery of the pistol. Of this appellant cannot justly complain, since the statute makes no distinction between a "loaded" and an "unloaded" weapon. The instruction is hypothetical in form, and does not assume any fact in dispute.

[9] Instruction 12 is subject to criticism for inaccuracy. Therein the jurors were directed that:

> "If you believe from the evidence beyond a reasonable doubt that the defendant did not himself commit the offense charged in the information, but that such offense was committed, and that the said defendant, knowing that such crime was to be committed, and being present, aided and abetted in its commission, or, not being present, advised and encouraged its commission, it is your duty to find him guilty of the crime charged."

If he had been charged simply as a principal, no fault could be found with said instruction. Having been accused, however, as a principal, and also as an aider and abettor, the appellant reduces the instruction to this absurdity: If you believe the offense was committed, but that the defendant did not commit it or aid and abet in its commission, but you believe furthermore that the defendant did aid and abet in its commission, you must find him guilty. We think it manifest, though, that the court intended by the expression, "did not himself commit the offense charged in the information" the actual participation in the act of bringing the weapon into the jail, and we are satisfied it was so understood by the jury. Otherwise the instruction would be contradictory and meaningless, and in that view would not warrant a reversal of the cause.

[10] Appellant inveighs with considerable warmth against this instruction:

> "It is not necessary that the defendant should have been present with the witness Savage on the outside of the county jail of Santa Clara county at the time the revolver is alleged to have been brought into said jail by said Savage, but, if you believe from the evidence beyond a reasonable doubt that said revolver was brought into said jail as charged in the information, and that the defendant knowingly aided and abetted in the bringing in of said revolver, and was present when the same was so brought in, and received said revolver from said Savage and concealed the same, you are justified in finding the defendant guilty."

We do not find any substantial basis for appellant's criticism. The instruction does not invade the province of the jury. No fact is assumed, and the only valid objection is that the instruction required of the people more than the law exacts. If the jurors believed the offense was committed, and that defendant aided and abetted in its commission, it was not necessary for them to go further and believe that he "concealed" the revolver in order to convict.

In this connection it may be said, also, that the action of defendant in concealing the weapon under the circumstances detailed was some evidence that he aided and abetted in the commission of the crime.

We have considered said instructions as though not given on request of appellant, although as to that the record is silent.

We have failed to discover any injustice in the conviction of defendant, and the judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(168 Cal. 58)

UNION INV. CO. v. SAN FRANCISCO GAS & ELECTRIC CO. (S. F. 6360.)

(Supreme Court of California. June 19, 1914.)

GAS (§ 20*)—INJURY FROM ESCAPE OR EXPLOSION—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a gas company for damages from the destruction of plaintiff's building by fire alleged to have been caused by the negligent escape of gas, where the only facts proven were the defendant's insecure fastening of a gas pipe in the building and the burning of the building, *held* insufficient to establish a causal connection between defendant's negligence and its destruction.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 16, 17; Dec. Dig. § 20.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Union Investment Company against the San Francisco Gas & Electric

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Bates, of Alameda, for appellant. Wm. B. Bosley, John P. Coghlan, and Stanley Moore, all of San Francisco, for respondent.

MELVIN, J. Plaintiff was the owner of a building which was nearing completion. It was located on a lot in San Francisco. For several days prior to February 13, 1909, and on that day, defendant had been installing gas pipes in the basement of plaintiff's building. The said building extended from Valencia street to San Jose avenue, and from the latter thoroughfare defendant had laid a three-inch gas main which passed under the sidewalk into the basement and was carried a distance of 35 feet along joists to the floor of a light well, where it turned and was conducted near the wall of the light well to a height of 15 feet. The light well, which was about 10 feet square, was almost in the center of the building and extended the whole distance to the roof, but was itself open to the sky. Two of the storerooms of the building had been thrown into one. This large apartment was completed and had been occupied by the United States government as a branch post office for about two weeks before February 13, 1909. No other rooms in the building had been plastered and none was occupied. On the morning of February 13, 1909, about 2 o'clock the building caught fire and was almost entirely destroyed; the four walls and a portion of the room occupied by the post office being all that was left. Nearly two years later plaintiff brought this suit for damages, alleging in its complaint that defendant had negligently and carelessly omitted to fasten and construct the pipes in said building in a substantial manner or to inspect said pipes; that the main pipe fell from its support on the morning of February 13, 1909, thereby breaking the coupling and allowing large quantities of gas to escape into the plaintiff's building; and that the fire which destroyed the building was caused by the ignition of this escaping gas. The amount demanded by way of damages was $18,000. After hearing all of the evidence for the plaintiff, the court granted a nonsuit. Plaintiff appeals from the judgment of nonsuit and from the order denying a motion for a new trial.

The appellant's counsel insists that a prima facie case was established. The court found that the defendant negligently failed to strap its gas supply pipe and rested said pipe on two wooden arms, 1x3 inches, nailed to the wooden uprights of the building. There was some evidence on the part of the firemen that this was a "gas fire"; that is, that, when they arrived and found the building in flames, they recognized the fact that the gas was escaping and burning. From these circumstances appellant's counsel reasons that, the existence of a "gas fire" being shown, the burden is on the defendant to prove that the escaping and burning gas was not the cause but the result of the fire which consumed the building. In this behalf counsel cites such cases as Judson v. Giant Powder Co., 107 Cal. 552, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, and Linforth v. S. F. Gas Co., 156 Cal. 60, 103 Pac. 320, 19 Ann. Cas. 1230. In the first case it was held that proof of the explosion and consequent damage to plaintiff's property shifted the burden to defendant to prove its freedom from blame, because dynamite factories do not blow up when they are properly operated. In that case there was no doubt of the explosion itself. In the Linforth Case there was proof, partly furnished by the defendant's witnesses, that the explosion which wrecked the property of Mr. Linforth was caused by gas. The explosion being proven and its origin having been established as escaping gas, the burden shifted to defendant to show that something other than its careless installation and imperfect maintenance of the pipes caused the leak which produced the explosion. So in this case, if the origin of the fire had been established as escaping gas and its ignition, the same rule would apply. To complete that part of its case it would be necessary for plaintiff to show, either directly or circumstantially: First, that the pipe was not properly secured; Second, that its weight caused it to break away from its supports and to fall; Third, that in falling it broke from its connections, thus permitting the gas to escape into the building; Fourth, that the escaping gas was so diffused that it passed through small spaces in a door leading into the post office; Fifth, that it was there ignited, because the only burning gas jets in the building were in the post office; Sixth, that it was so diffused and ignited within 70 seconds, because it was proven that the jets in the post office would continue to burn that length of time after the shutting off of the supply at the main.

Mr. Clute, president of the plaintiff corporation, testified that, when he examined the ruins some days after the fire, he went into the basement and found the pipe broken off. The whole theory of plaintiff's case was based upon the supposed fact that the break in the pipe preceded the starting of the fire. The testimony tended to show that the gas was burning at the jets in the post office while the building was in flames. One of the firemen, George H. Thomas, said, while he was on the witness stand, that he could not be positive, but his recollection was that the gas at the jets was burning when he reached the building. At that time the fire had "a big start" and was "burning rapidly." Three of plaintiff's witnesses described flames around the connections of the meter through which the gas supply for the post office passed. This was located on the wall of the light well about 35 feet from the place where the pipe was broken. The fact that such flames were seen is absolutely at variance with plaintiff's theory that the liberated gas from the broken pipe caused the fire. Mr. Anderson, an expert witness produced by plaintiff testified, with reference to the lights around the meter:

> "If the light was burning for any length of time and kept burning persistently, of course the main could not be broken. However, there could be gas burning there during the course of the fire, because the gas pipe would be broken and the gas would exude from the gas pipes."

Part of plaintiff's theory was that the gas escaped from the broken main and entered the post office through openings in a door. The proof was that the glass part of the door had been broken but the opening had been boarded up with tongue and groove lumber, which left a space an inch and a half wide on the side of the boards. At the bottom of the door was an aperture through which mail was sometimes thrust. Through these openings the gas must have passed if the fire was caused as plaintiff contends. It must have traveled very rapidly to have caused an ignition before the lights would disappear because of lack of gas in the pipes due to the cutting off of the supply. In order that there might have been an ignition without a serious explosion, it would have been necessary that the amount of gas in the room should have greatly exceeded the amount of air. The expert so testified. He also gave this answer to the question which is quoted below:

> "Q. And if that window was boarded up—had boards nailed across it—and the only aperture was the space through which letters could be stuck that was underneath this door, you would not expect the gas to get into that room in such quantities and with such rapidity that there would be only a small explosion, would you? A. Under the conditions as you have mentioned, the window being pretty thoroughly boarded up, and no other access to that flame, why the answer certainly is that there would not be."

Yet there was no evidence of any explosion, and the testimony showed that the post office was less damaged than any other part of the building.

It will thus be seen that there was an utter failure to establish a causal connection between the only facts that may be taken as proved, namely, the insecure fastening of the pipe and the burning of the building. All the rest of plaintiff's case rested on inference piled upon inference. The building may have been set on fire by an incendiary, or a lighted cigarette dropped by a workman may have ignited débris which smoldered for hours before bursting into flame. These theories are pure conjectures; yet they are no more unsubstantial than the attempted proof that the defendant's negligence was the proximate cause of the fire. The fact that the pipe was insecurely fastened, coupled with the other facts that it was found broken after the fire and that gas was burning in the building during the conflagration, does not establish plaintiff's case. The learned judge of the trial court said:

> "As there is no evidence in this record from which I can say whether it was the burning of the building that broke the pipe or the breaking of the pipe that caused the building to be burned, the plaintiff has not made out a case."

And to quote Puckhaber v. Southern Pacific Co., 132 Cal. 364, 64 Pac. 480:

> "By proving defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out."

The connecting links between the negligence and the catastrophe are wholly lacking in this case.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 43

O'CONNOR v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6184.)

(Supreme Court of California. June 18, 1914.)

1. Street Railroads (§ 91*) — Injuries to Persons on Track — Liability — Negligence.

Where a street car motorman with a straight clear track ahead of him and nothing to obstruct his view of a vehicle driven in the same direction, close to the track, was running his car at a rate of speed prohibited by ordinance, and, without lessening such speed, having his car under control, or giving any warning of its approach, ran into the vehicle, the company was guilty of negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190–192; Dec. Dig. § 91.*]

2. Street Railroads (§ 112*)—Injuries to Persons on Track—Actions—Evidence.

That a street car motorman ran down a vehicle proceeding in the same direction is cogent evidence of negligence, which is rarely capable of explanation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

3. Street Railroads (§ 99*) — Injuries to Persons on Track—Contributory Negligence.

A person driving along a public street close to street car tracks was required to exercise reasonable care, such as a reasonably prudent man would have exercised under the circumstances.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209–216; Dec. Dig. § 99.*]

4. Negligence (§ 136*)—Questions for Jury.

As a general rule, whether a person has exercised ordinary care is for the jury to determine from all the circumstances surrounding him at the time.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

5. Street Railroads (§ 99*) — Injuries to Persons on Track—Contributory Negligence.

It was not negligence per se, or at all, for a person to drive along the public street within a foot or 14 inches from street car tracks.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209–216; Dec. Dig. § 99.*]

6. Street Railroads (§ 85*)—Rights of Company and Public in Street.

A street car company has no exclusive right to the portion of the street covered by its tracks, but only a right to use it in common with the public, and other vehicles have a right to travel over the entire street, including the space between the tracks, though other portions of the street are not crowded or in bad condition, subject only to the limitation that they may not unnecessarily interfere with or obstruct a car in its movement on the tracks.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

7. STREET RAILROADS (§ 117*) — INJURIES TO PERSONS ON TRACK—ACTIONS—QUESTIONS FOR JURY.

It is not negligence per se for one driving on a street close to street car tracks to fail to keep a constant watch behind for an approaching car, and where one so driving looked for a car when he turned into that street, it was a question for the jury to determine, from a consideration of the reciprocal rights of the parties and the facts and circumstances of the case, including such driver's right to expect and rely upon some warning from an approaching car, whether he was negligent in failing to again look behind him while driving a distance of about 500 feet.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*]

8. TRIAL (§ 255*)—INSTRUCTIONS—NECESSITY OF REQUESTS.

While the trial court, in charging that the violation of a city ordinance, forbidding street cars to run at a greater speed than 10 miles an hour, was negligence per se should have defined the expression "negligence per se," the failure to do so was not error, in the absence of any request for an instruction defining such term.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. § 255.*]

9. STREET RAILROADS (§ 91*) — OPERATION — NEGLIGENCE "PER SE."

The violation of a municipal ordinance forbidding street cars to run at a greater speed than 10 miles an hour was negligence "per se," or, as those words mean, "of itself."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190–192; Dec. Dig. § 91.*

For other definitions, see Words and Phrases, vol. 6, p. 5226.]

10. TRIAL (§ 256*)—INSTRUCTIONS—NECESSITY OF REQUESTS.

Since an instruction that the violation of a city ordinance was negligence per se was correct so far as it went, the failure to accompany it by an instruction that such violation could not be considered unless it contributed proximately to plaintiff's injury was not error, in the absence of a request for such an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. § 256.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John J. O'Connor against the United Railroads of San Francisco. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley W. Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

LORIGAN, J. This is an action for personal injuries in which plaintiff had a verdict and judgment. Defendant appeals from the judgment and an order denying its motion for a new trial.

The first claim of appellant for a reversal is based on the refusal of the trial court to grant its motion for a nonsuit. Plaintiff, on the afternoon of February 13, 1909, was driving a hotel bus with a gentle team of horses along the southerly line of Mission street, between Fifth and Sixth streets, in the city of San Francisco. He was traveling along slowly, the wheels of the bus being a foot or 14 inches from the southerly railroad track of the defendant. While he was so proceeding a car coming rapidly along the southerly track of the defendant in the rear of the bus collided with its rear wheel, lifted the end of the bus and turned it in such a way as to throw plaintiff from it into the street, from which fall he sustained grievous injuries. It was admitted that an ordinance of the city of San Francisco limited the speed of cars on Mission street to 10 miles an hour. The evidence shows that the car which struck the bus was proceeding at from 12 to 15 miles an hour and its speed had not been slackened when the accident occurred, and that no warning or signal of its approach was given by the motorman by the ringing of a bell or otherwise. It further appeared that the plaintiff had made no effort while driving along to turn into the track, but was outside of it at the distance mentioned, and that had he been warned of the approach of the car it would have taken but a moment to have moved further into the street from the track; that the impact of the car with the bus was of such force that it carried the bus forward against a heavy mail truck 15 or 20 feet in front of it, and likewise forced the truck a considerable distance forward before the car was stopped. The plaintiff had turned into Mission street at Eighth street intending to turn off Mission street at Fourth street; that when about 25 feet east of Sixth street he looked back to see if a car was approaching and saw none; that he did not look back again; that there was nothing to prevent him from seeing back as far as Seventh or Eighth street, and the distance traveled by him after he looked back and up to the time the collision occurred was about 500 feet.

Appellant bases its motion for a nonsuit upon two grounds: First, that the plaintiff did not make a sufficient case showing negligence on the part of defendant; and, second, that the evidence affirmatively and indisputably shows that the plaintiff was guilty of contributory negligence.

While appellant based its motion in the trial court on both grounds and urges both now, its particular insistence here is that the trial court should have granted the motion on the second ground—contributory negligence. In that regard it is claimed the evidence shows that plaintiff, after placing himself in dangerous proximity to the track, failed to take any precaution by looking back to see whether a car was approaching, but relied entirely on some warning of its approach to be given by the motorman in order to get his bus out of danger, and, in general, failed to use such ordinary care as the situation he was in demanded of him; that this constituted in law contributory negligence precluding a recovery, and that the trial court should have so declared and granted the nonsuit on that ground.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[1, 2] If this claim of the appellant as to contributory negligence is not well taken, or if, in other words, under all the circumstances of the case the question whether the plaintiff did or did not exercise ordinary care was properly a matter to be determined by the jury, then there is nothing in the first ground of the motion for a nonsuit, namely, that the evidence does not show negligence on the part of the defendant. The evidence shows that plaintiff was driving along a public street where, as we shall point out in discussing the matter of contributory negligence, he had a right to travel, even though it brought him close to the track of the defendant; that the motorman had a straight, clear track ahead of him with nothing to obstruct his view of the position of plaintiff or to prevent him perceiving the danger of a collision; that he was running his car at a prohibited rate of speed, and without lessening such speed or having his car under control, and without any warning of its approach ran down from behind upon the vehicle of the plaintiff. Under these facts the defendant was clearly guilty of negligence. It must be apparent that in operating a street car over a public street a motorman cannot, under ordinary circumstances, run down a vehicle proceeding in the same direction without having been negligent in the operation of his car. The mere fact that he does so furnishes cogent evidence of negligence which is rarely capable of explanation. Richmond Traction Co. v. Clarke, 101 Va. 383, 43 S. E. 618; Vincent v. Norton, etc., Ry. Co., 180 Mass. 104, 61 N. E. 822; Thompson on Neg. § 1404. In this case no explanation of the conduct of the motorman was offered. It is true that at the trial both the motorman and conductor were beyond the jurisdiction of the court and could not be produced by defendant. But the fact remains that there was no explanation.

Now as to contributory negligence. This is based on the claim that plaintiff in proceeding along the street placed himself in such proximity to the track of defendant that danger of collision with a car operating thereon might occur; that he should have taken the precaution which the situation demanded of him of looking out for the approaching car which collided with his bus, the approach of which was discernible for a long time after plaintiff commenced driving along the track, and which plaintiff might have observed if he had looked back; that he took no precaution in this respect, but depended solely on the care of the motorman to give him notice of any approaching car; that this was want of ordinary care, on the part of plaintiff, constituting contributory negligence.

[3-6] It is undoubtedly true that plaintiff was required to exercise reasonable care in driving along the public street in the vicinity of the track of the defendant; such care and diligence as a reasonably prudent man would have exercised under the circumstances. As a general rule, whether a person has exercised ordinary care or not is to be left to the jury, to be determined by them from all the circumstances surrounding him at the time. But it was not negligence per se for the plaintiff to drive along the street as he did in proximity to the track of the defendant. This of itself did not constitute negligence at all. The streets of a municipality are for the use of the traveling public and the right of a street car company is only to use it in common with the public. The fact that the company has been granted a right to lay tracks and operate cars along the streets gives it no exclusive right to travel even over that portion of a street covered by its tracks. Other vehicles have a right to travel over the entire street, including the space between the tracks. Nor is this right restricted to the times when other portions of the street may be crowded or in bad condition. Nor is a traveler in doing so in any sense of the term a trespasser. As a member of the public he is entitled as matter of right to use the entire street subject only to the limitation that, as the use of the street by the car company is confined to its tracks, a traveler may not unnecessarily interfere with or obstruct a car in its movement thereon. The car company is entitled in the interest of the public service to a free and unobstructed passage at all times of its cars over its tracks when necessary, and when such movement is being made free vehicles must yield a clear right of way to it for that purpose. Shea v. Potrero & Bay View R. R. Co., 44 Cal. 414; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Scott v. San Bernardino Valley Traction Co., 152 Cal. 610, 93 Pac. 677; Lawyer v. Los Angeles Pacific Co., 161 Cal. 53, 118 Pac. 237. Hence, within the rule of these authorities, negligence on the part of the plaintiff cannot be raised from the mere fact that he was driving in proximity to the track of the defendant because he had a clear legal right to do so subject to the limitation that we have stated.

[7] Nor did the fact that he did not keep a constant watch behind for an approaching car while driving near the track show want of ordinary care on the part of the plaintiff or constitute negligence per se. The same rule as to "looking" applied to the drivers of vehicles about to cross the track of a steam railroad at highway crossings does not ap-

ply to those driving along street railroad tracks laid upon public highways. The distinction is clearly pointed out in Clark v. Bennett, supra. Nor is the conduct of one driving along or near a street railroad track in the same direction that a car coming from behind may approach measured by the same rule as to looking that governs one about to drive across the street railroad track substantially at right angles. The reason for the distinction is obvious. The conditions are quite different. In the one case it is practically an easy matter for the driver intending to cross, as his sight is directed ahead or to either side, to readily discover whether any car is approaching, and, if so, the distance and speed of its approach, and so avoid any danger. In the other, one driving along a public highway in the same direction in which a car may approach from behind is necessarily engaged in looking in front of him to have a care that he does not collide with some other vehicle ahead enjoying also the common use of the highway. Obviously, one cannot be expected to look simultaneously forward and back along the street. Naturally in the exercise of ordinary care his duty would be to look ahead of him so as to avoid collision with those in advance of him. They have the right to expect that he shall do so and as all travelers owe reciprocal rights to each other, he, too, has a right to expect this from those approaching from behind, no matter in what capacity they are using the street. Here the plaintiff after he entered Mission street and commenced to proceed along it in proximity to the track of defendant had looked back along the street to see if a car of the defendant was approaching, and saw none. At that time his observation showed that he was in no danger from any car near at hand, and it was not until some time afterwards that the defendant's car collided with him. The fact that he did not look back again did not per se constitute negligence. What amount of vigilance was requisite to constitute reasonable care upon the part of the plaintiff, and whether he exercised it while driving along the street, was to be determined by the jury not alone from what he did in the way of looking, but from a consideration of the reciprocal rights of the parties on the highway and all the facts and circumstances in the case, which would include whether he had a right to rely upon some warning or signal being given him by the motorman of any car approaching from behind in order that he might drive away from his position in proximity to the track. While it is true that one cannot rely entirely and wholly upon the care of another and neglect the precautions which in a particular situation he should exercise, still, when he has a right to trust to the reasonable expectation that another will discharge some duty peculiar to such situation, it is proper that such fact should be taken into consideration by the jury in connection with such precaution as the plaintiff did take, and the jury determine therefrom whether or not under the circumstances his conduct was negligent or not. That one driving a vehicle over or in proximity to a street railroad track has a right to expect and rely upon some warning to be given him by the motorman of a car approaching him from behind, and that this right should be taken into consideration by a jury as an element in determining the question of contributory negligence on the part of a plaintiff, is well established.

In Scott v. San Bernardino Valley, etc., Co., supra, 152 Cal. 610, 93 Pac. 679, it is said:

> "A street car cannot go on the street except upon its rails, and hence it has the better right to that space, to which others must yield when necessary, but otherwise its rights are not superior to that of any other person who has occasion to use the street. * * * The reasonable care which is required must be measured by all these conditions, rights, and circumstances. The foot passenger or driver of a horse has a right to expect that those in charge of street cars will operate them in the manner and run them at the speed which is customary at the particular place, and that they will give the usual warnings and signals, and take the usual precautions to avoid injury to others. Orcutt v. Pacific C. R. Co., 85 Cal. 299 [24 Pac. 661]; Driscoll v. Cable R. R. Co., 97 Cal. 553 [32 Pac. 591, 33 Am. St. Rep. 203]. In a crowded street it is often necessary and not inconsistent with reasonable prudence for a person to cross the street in front of street cars, in motion or at rest, at a point so near that it would be prima facie an act of negligence, if attempted at another place where the streets are less crowded and the cars usually run faster. The rights and obligations of all persons using a public street are, in this respect, reciprocal. Each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others. He cannot rely wholly on the care of others, nor, on that account, neglect to use the precautions which the particular situation demands of him. But he frequently must, to some extent, depend on others in such situations, and his conduct must be considered in view of that fact in determining whether or not it is negligent. His care, or want of care, in such cases is generally a matter to be determined by the jury from all the circumstances surrounding him at the time."

In Lawyer v. Los Angeles Pacific Co., supra, in reversing a judgment of nonsuit it is said:

> "Appellant insists that the question whether or not he was guilty of contributory negligence was one of fact for the jury, and that under the evidence his conduct was not such that the court could say as matter of law that he was guilty of negligence. Being between the tracks of an electric railroad upon a public street is not negligence per se. The street is for the use of the public, although the car, which can be operated only on the track, has the better right to that part of the thoroughfare to which pedestrians must yield when necessary. The rights of a company operating street cars are otherwise not superior to those of persons who may be walking on the street. * * * The person walking upon that part of the street near the tracks of an electric railway has a right to believe that those in charge of the street cars will operate them in the usual manner and will take the customary precautions. The rights and duties of the pedestrian and the motorman in a case like this

are reciprocal, and the conduct of either must be considered in the light of all of the circumstances of the particular case in determining whether or not it amounted to negligence. Here the plaintiff had the right to expect that defendant's servant would sound the warning bell as the car approached, particularly because he had just passed a cross street."

Other authorities declaring the same principle are Hickey v. Brooklyn Heights R. R. Co., 148 App. Div. 693, 132 N. Y. Supp. 946; Capitol T. R. Co. v. Crump, 35 App. D. C. 181; Bectenwald v. Met. St. R. R. Co., 121 Mo. App. 595, 97 S. W. 557; Mertz v. Detroit El. Ry. Co., 125 Mich. 11, 83 N. W. 1036; Normand v. Hudson Valley Ry. Co., 133 App. Div. 474, 117 N. Y. Supp. 1076.

In the light of these authorities applied to the facts disclosed by the evidence here it was the duty of the trial court, as it did, to leave to the jury for determination not only the question of the negligence of the defendant, but the further question of whether plaintiff was or was not guilty of contributory negligence.

[8] It is further claimed by appellant that the court erred in giving an instruction requested by plaintiff, wherein, after stating that an ordinance of the city of San Francisco prohibited the running of cars on Mission street at a greater speed than 10 miles an hour had been introduced in evidence and might be considered by the jury, concluded it with "I charge you that the violation of the ordinance constitutes negligence per se." It is insisted that the phrase "negligence per se," particularly the Latin words "per se" therein, should have been defined to the jury; that the use of these Latin words in the instruction without explaining what they meant, was calculated to mislead them. It is further claimed that the instruction as given is an incorrect statement of the law. As to the first point. While the phrase "negligence per se" has in legal science a fixed and well-defined meaning with which the legal profession is familiar, it is claimed by the appellant that the average jurors may not be familiar with it, and that its meaning should have been explained by the court so that they might comprehend and understand it. This doubtless was the proper course for the court to have pursued, but its mere failure to do so should not be held here to constitute error. It is highly probable in this case, as is common in cases of this character, that this phrase was made use of by counsel on both sides in their discussion of the motion for a nonsuit in the presence of the jury and in their argument to the jury on the submission of the cause on its merits, and that hence the jury did understand its meaning, and the court was aware of this fact when it instructed them. Be that as it may, however, when the instruction was given if counsel for appellant had any doubt whether the jury understood it, or that its meaning might be misapprehended, they should have either asked the court to explain it, or prepared an instruction themselves doing so. They should not be permitted to now urge error on the theory of possible ignorance or possible misapprehension of the jury as to the meaning of the phrase or the words used in it when they could so easily and readily have removed any conjecture about it.

[9, 10] Likewise, there is no merit in the other point made by appellant that the quoted portion of the instruction is an incorrect statement of the law. As an abstract proposition of law the violation of a local ordinance is per se, or, as these words mean, "of itself," negligence. The point which appellant really makes, however, is that though such violation would amount to negligence in the abstract, the court should have accompanied the declaration of the abstract rule with a qualification that such violation could only be considered by the jury if they found that it contributed proximately to the injury of the plaintiff. But as the instruction so far as it went correctly stated the law, it is to be said of the claim now made, as is said of the other objection to the instruction, that counsel for appellant should have either asked the court to instruct the jury as to the qualification which the court would have done, or have presented an instruction embodying it which the court undoubtedly would have given.

Appellant challenges the correctness of other instructions given by the court and its action in modifying and refusing instructions tendered by it. We have examined the claims made in this respect, and do not think any of the objections as to the action of the court are tenable.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.

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168 Cal. 18

Ex parte BURCH. (S. F. 6866.)

(Supreme Court of California. June 11, 1914. Rehearing Denied July 11, 1914.)

1. VENUE (§ 63*)—CHANGE FOR DISQUALIFICATION OF JUDGE—NOTICE OF MOTION.

Notice of motion under Code Civ. Proc. § 397, subd. 4, for change of place of trial for disqualification of the judge must be seasonably served on the parties interested, where movant knows a judge called in by the disqualified judge will be presiding.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104–108; Dec. Dig. § 63.*]

2. VENUE (§ 49*)—CHANGE FOR DISQUALIFICATION OF JUDGE—CALLING OTHER JUDGE.

A motion to change the place of trial for disqualification of the judge is properly refused, where a qualified judge has, under Const. art. 6, § 8, been called in from another county, though by the disqualified judge.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 71, 72; Dec. Dig. § 49.*]

In Bank. Application by J. K. Burch for a writ of prohibition. Alternative writ dismissed.

James H. Boyer, of San Francisco, for petitioner. J. E. Pemberton, of San Francisco, for respondent.

MELVIN, J. This is an original proceeding for a writ of prohibition.

The petitioner, J. K. Burch, alleges that on January 15, 1914, an action was commenced in the superior court of the county of Lake by E. H. Wilson as plaintiff against Lyon Fraser, sheriff of said county, and J. K. Burch, defendants; that the purpose of the action was to quiet plaintiff's title to certain real property and to restrain Fraser, as sheriff, from executing a sheriff's deed of said property to said Burch; that Hon. M. S. Sayre, judge of the superior court in and for the county of Lake, was disqualified from trying the case by reason of financial interest in the subject of the action; that on the 15th day of January, 1914, Hon. M. S. Sayre, as judge of said court, made an order requesting Hon. George H. Buck, judge of the superior court of San Mateo county, to preside at the trial of the said action and all proceedings therein; that pursuant to the order Judge Buck held court at Lakeport, the county seat of Lake county, on that same day, and made an order restraining Fraser from executing a sheriff's deed to Burch; that on January 20, 1914, at the city and county of San Francisco, counsel for the defendants served on counsel for plaintiff an affidavit and notice of motion to transfer the action to the county nearest and most accessible to Lake county; that demand for transfer of the action was also served on counsel for plaintiff and then filed; that no counter affidavit or paper of any sort was filed by the plaintiff or any one; that on January 24, 1914, after the filing of all of the said papers, counsel for defendants in open court and in the presence of Judges Buck and Sayre read the notice of motion, affidavits, and demand, and moved said superior court to change the place of trial of said action of Wilson v. Fraser and Burch to the nearest and most accessible county; that an order was entered denying said motion; and that Hon. George H. Buck threatens to proceed, and, unless restrained, will proceed, with the trial and further matters connected with the action of Wilson v. Fraser and Burch.

The answers of respondents both admit the disqualification of Judge Sayre, and contain allegations that the action of Wilson v. Fraser and Burch is one of many commenced during the last 12 years involving title to the same property mentioned in that suit; that it has been Judge Sayre's custom, solely for the convenience and accommodation of the parties in said actions, to request Judge Buck to preside during the trials and proceedings therein; and that Judge Buck has heard and disposed of many matters in said litigations, without objection or exception, and frequently by stipulation of all parties concerned. Judge Sayre's answer further sets forth the fact that on hearing of the case of Wilson v. Fraser and Burch, he made the usual request of Judge Buck; and that he knew nothing of the desire of defendants to have the action transferred until the 24th day of January, 1914, when, as a spectator in the superior court of Lake county, where Judge Buck was presiding, he heard counsel for the defendants read his motion.

The answer of Hon. George H. Buck is of the same tenor. He mentions the fact that several times during the past few years he has held court in Lake county at Judge Sayre's request in actions and proceedings concerning title to the property involved in Wilson v. Fraser and Burch. He also avers that he was invited by Judge Sayre, in the month of January, 1914, to hold a session of the superior court in Lake county for the purpose of taking up some matters concerning the real property mentioned; that he accepted the invitation and attended to some of the pending litigation; that thereafter, on January 24, 1914, he again held court in Lake county for the purpose of taking up matters long pending, in connection with litigation commenced many years before, concerning the property mentioned in these proceedings; that a few days before January 24, 1914, he was informed by telephone that counsel for defendants would move for a change of venue; that on January 24th he held a session of court in Lake county and took up matters which he, as judge of the superior court, had theretofore set for that date; that the motion was made; and that he denied it upon the ground: (1) That, as less than ten days had elapsed between service of notice and hearing of motion, no sufficient notice had been given, all the attorneys having their offices in San Francisco, and no order shortening time having been entered; and (2) because a qualified judge was presiding in the superior court of Lake county.

An alternative writ of prohibition has been issued, and we shall now determine whether it shall be made permanent or shall be dismissed.

[1] Bohn v. Bohn, 164 Cal. 533, 129 Pac. 981 (cited by respondent), was a case in which the change of place of trial was requested by reason of the residence of the defendant in a county other than the one in which the action had been commenced. Motions made for the reason that a judge is disqualified are usually addressed to the court regarding matters peculiarly within the knowledge of the judge presiding, and generally do not require service of notice of the motion on the judge. Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848. But here the moving party knew that Judge Buck would be presiding in the superior court of

Lake county on January 24, 1914, the day on which the motion was made, and there was no presumption of law that Judge Buck would be familiar with the facts constituting the disqualification of Hon. M. S. Sayre. It was necessary, therefore, that the notice of motion should have been properly served upon the parties interested, and Bohn v. Bohn is authority for the first reason given by Judge Buck for denying the motion. Evidently counsel for defendants considered notice of the motion necessary, for he gave it to opposing counsel. If he had desired to have the time for serving the notice of motion shortened, doubtless he could have secured the proper order, but it does not appear either that he did so or that he asked for a continuance so that he might comply with the provisions of section 1005, Code of Civil Procedure. It may be contended that section 398, Code of Civil Procedure, alone applies to the motion here considered, and that the notice contemplated by section 397 of that Code is not necessary. Subdivision 4 of the latter section indicates, however, that the Legislature intended such notice to be given. Livermore v. Brundage, supra, does not hold that such a motion need not be noticed at all. It merely decides that the judge who is disqualified need not be served. The motion was properly denied for the first assigned reason.

[2] We are also of the opinion that, even ignoring the infirmity of the notice given by counsel for defendants, the motion should have been denied. This court has plainly declared that a litigant who makes a motion of the sort here considered and finds a qualified judge presiding is not prejudiced by the refusal of that judge to transfer the action or proceeding to another county, even though the judge who thus assumes the duty of trying the action or hearing the proceeding had been called from another county by the disqualified judge of the county in which the action or proceeding was pending. In denying the motion for a hearing in this court of the case of People v. Ebey, 6 Cal. App. 774, 93 Pac. 379, four of the justices signed an order of the court containing the following language:

> "In denying the application we desire to say that we do not give our assent to the view of the learned District Court of Appeal that the judgment should be reversed because the judge who tried the case was the judge of the superior court of another county requested to preside in the superior court of the county in which the case was pending by the judge thereof, who was himself disqualified to try the case. Under the plain and unambiguous language of our constitutional provision (section 8, art. 6), a judge of any superior court may preside in the superior court of any county at the request of the judge of the superior court thereof, and, while so presiding, may act in any matter in which he is not disqualified."

In Imperial Land Co. v. Imperial Irrigation District, 137 Pac. 234, this court suggested two methods whereby a qualified judge may be secured to preside at a trial in a county in which the only resident judge of the superior court is disqualified; one by calling a judge to hold an extra session; another by securing from the Governor a designation of an unbiased judge from another county for the particular case. While the question before us in this case was not there under discussion, the court was contemplating some of the various methods by which a qualified judge may be obtained for the trial of a cause, and clearly section 398 of the Code of Civil Procedure was not regarded as prescribing the only way to accomplish that result. The motion was properly denied for the second reason assigned by Judge Buck.

Let the alternative writ of prohibition be dismissed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

(163 Cal. 152)

PIXLEY et al. v. SAUNDERS, Tax Collector.
(S. F. 6024.)

(Supreme Court of California. July 3, 1914.)

DRAINS (§ 66*)—SANITARY DISTRICT—"MUNICIPAL AFFAIR."

Const. art. 11, § 12, provides that the Legislature shall have power to impose taxes on counties, cities, towns, or other public or municipal corporations for municipal purposes, but may by general laws vest in the corporate authorities thereof the power to tax for such purposes. Section 13 declares that the Legislature shall not delegate to any special commission any power to make, control, or in any way interfere with any county, city, town, or municipal improvement, or to levy taxes or assessments, or perform any municipal functions whatever. *Held*, that the drainage of a district by a system of sewers was not a "municipal affair," and hence the inclusion of a portion of the territory of a sanitary district duly organized as provided by Sanitary District Act March 31, 1891 (St. 1891, p. 223), within the boundaries of an incorporated town did not withdraw the property so included from the jurisdiction of the sanitary district authorities for the purpose of assessing such taxes as were essential for the payment of bonds issued by the district and the furtherance of its activities.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

In Bank. Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Herbert Farington Pixley and others, minors, by J. F. D. Curtis, their guardian, against John A. Saunders, as Tax Collector. Judgment for defendant, and complainants appeal. Affirmed.

Robert Harrison, of San Francisco, for appellants. Thomas P. Boyd, of San Rafael, for respondent.

PER CURIAM. Upon the last submission of this case to the court in bank the following opinion was then adopted:

Plaintiffs, who are the owners of a tract of land in Marin county known as the Pixley ranch, brought this action to restrain the tax collector from selling said property for delinquent taxes levied thereon by the authorities of sanitary district No. 2 of Marin county. From a judgment upholding the validity of the tax, an appeal is taken. And there is also an appeal from the order dissolving the injunction whereby the tax collector was restrained from proceeding to sell the property pendente lite.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The learned judge of the superior court who presided at the trial of the cause put his "judgment and decree" in the form of an opinion setting forth the law which he considered applicable to the case. As we agree with his views, we adopt his opinion, which is in the following language:

"This is an action brought by the owners of a tract of land in Marin county, known as the Pixley ranch, to restrain defendant, as tax collector, from selling said ranch for delinquent taxes levied thereon by sanitary district No. 2 of said county. The cause was submitted to the court upon an agreed statement, from which the following facts appear:

"In January, 1902, sanitary district No. 2 of the county of Marin was duly and regularly organized under the provisions of the Sanitary District Act of March 31, 1891 (St. 1891, p. 223), and the tract here involved was embraced within the boundaries of the district at said time. Thereafter, in 1905, the sanitary district made a bond issue for $25,000 for the purpose of constructing a sewer, and at the time of the levy of taxes for 1910 there remained outstanding and unpaid $19,500 of the principal of said bonds.

"On March 2, 1908, the town of Larkspur was regularly incorporated as a municipal corporation of the sixth class, and said Pixley ranch was at said time, and now is, included within the territorial limits thereof. Since its incorporation, the town of Larkspur has regularly levied and collected taxes upon said Pixley ranch for all town purposes, which taxes have always been paid.

"In 1910, the assessor of the sanitary district made his assessment of the property of the district, including therein the Pixley ranch, and upon the return thereof the sanitary board of the district levied a tax of 86 cents for $100 for the fiscal year 1910–1911. Of this levy 71 cents was levied for the bond fund of the district to that year's proportion of the principal of, and interest on, outstanding bonds, and the remaining 15 cents was for running expenses. The amount of the tax on the Pixley ranch was $121.90, which plaintiffs refused to pay. Defendant, as tax collector of Marin county, thereupon published his notice of sale for delinquent taxes in the usual manner, fixing June 26, 1911, as the date on which he would sell said ranch, unless said taxes, together with the costs and penalties provided by law, were paid.

"Plaintiffs' complaint was filed June 13, 1911, setting forth the facts substantially as above stated, and alleging that, by reason of the inclusion of the Pixley ranch within the limits of the town of Larkspur, the property had passed out of the control and jurisdiction of the sanitary district, that the proposed tax sale was therefore without authority, that the same would constitute a cloud upon the title of plaintiffs, and praying for a permanent injunction restraining defendant from proceeding further with the sale. By stipulation of the parties an injunction pendente lite was granted, and the cause was briefed and submitted to the court upon the pleadings, and the agreed statement of facts above referred to.

"Plaintiffs' position, briefly stated, is this: That the power of providing for sewers is peculiarly a municipal affair, over which each municipality must exercise exclusive control within its own limits; that the Sanitary District Act of March 31, 1891, was a legislative makeshift intended solely to afford to unincorporated territory an opportunity to provide for its sanitation until such time as it might, by annexation or incorporation, acquire the larger powers of a municipal corporation; that, immediately upon the annexation or incorporation of any portion of the territory of a sanitary district, such annexed or incorporated tract becomes part of another imperium, and is relieved from the control of the sanitary district to which it formerly owed allegiance.

"Defendant, on the other hand, contends that the Sanitary District Act was intended to be general in its application, and to apply to any district which by reason of the natural configuration of the land therein might advantageously be served by a single system of sewer construction, whether wholly unincorporated or not.

"The endeavor to arrive at a conclusion between these diametrically opposed contentions is attended with considerable difficulty, in view of the loose manner in which the Sanitary District Act is framed. While the act has been under consideration by the Supreme Court in several cases, the precise question here involved has never been determined.

"In Woodward v. Fruitvale Sanitary District, 99 Cal. 554, 34 Pac. 239, the validity of the organization of a sanitary district covering wholly unincorporated territory was in question. The constitutionality of the act was challenged upon the ground that its terms were broad enough to permit the organization of sanitary districts to embrace municipalities, and that it was therefore in conflict with the provisions of sections 12 and 13 of article 11 of the Constitution, which read as follows:

" 'Sec. 12. The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

" 'Sec. 13. The Legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town or municipal improvement, money, property, or effects whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever.'

"The court in that case, speaking through Searles, Commissioner, declined to pass upon the constitutional question thus raised, for the reason that the district there involved did not embrace any incorporated territory. There is a strong intimation, however, in the following language that a sanitary district may not embrace any territory belonging to municipal corporations (99 Cal. p. 562, 34 Pac. p. 242): 'It may well be that, if in the formation of a sanitary district an incorporated city or town shall be included, in which the authority conferred upon the sanitary board is delegated to the municipality, it will be held that the law under consideration was not intended to apply to such city or town. The illustration is only used by way of comparison, * * * and not to indicate an opinion upon a case which may never arise.'

"In the case of People ex rel. Cuff v. City of Oakland, 123 Cal. 598, 600 [56 Pac. 445], it was contended that the territory embraced in a sanitary district could not be annexed to a municipality. The court there said: 'If the statute permits territory embraced in or covered by a sanitary district to be annexed to a city—a municipal corporation of a higher class and capable of exercising the same functions as well as others essential to municipal government—such statute contemplates, ex necessitate rei, a cession of the powers of the inferior corporation to the greater, and a consequent dissolution of the former as a result of the annexation.'

"It is to be noted, however, that in this last case no sanitary district was a party to the action, and the language used was therefore dicta.

"In the recent case of 'The Petition of the East Fruitvale Sanitary District,' 158 Cal. 453, 459, 111 Pac. 368, 371, the effect of the annexation of the whole of a sanitary district to a municipal corporation was under consideration. The court there held that the necessary effect of such annexation would be the dissolution of the sanitary district, but it declined to pass upon the question as to the effect of the annexation of a part only of a sanitary district. While the rule laid down in the Cuff Case was held by the court to be correct in the case of the annexation of an entire sanitary district, the court says: 'The Sanitary District Act contains one or two expressions which might seem to indicate that a sanitary district may cover in whole or in part territory within the boundaries of a municipal corporation. Thus section 5, in granting the power to enter upon a street or road for the purpose of making excavations, declares that in "case such street or road shall be in an incorporated city or town, the consent of the lawful authorities thereof shall first be obtained." Section 21 provides that upon the dissolution of the district its property shall vest "in any incorporated city or town that may at said time be in occupation of a considerable portion of the territory of the district." It may be readily conceived that the Legislature had in mind the possibility that a region, including territory both incorporated and unincorporated, might be so situated as to require a single and comprehensive scheme of sewer construction, or that, in laying a sewer for a sanitary district outside of any city or town, it might be necessary to pass through the streets of some municipality in order to reach an outlet. The provisions referring to "incorporated cities or towns" may have been intended to apply in such cases, and, so read, they may be given full effect without holding that the act contemplated the formation or the continued existence of a sanitary district entirely within the boundaries of a municipal corporation.'

"The question here involved is thus left open by the Supreme Court. Turning to the act itself, we find, in addition to the quotations from sections 5 and 21 referred to in the East Fruitvale Case, that the title of the act is as follows: 'An act to provide for the formation, government, operation and dissolution of sanitary districts, "in any part of the state,"' etc. Section 1 provides: 'Whenever twenty-five persons in any county of the state shall desire the formation of a sanitary district within the county. * * *' These expressions certainly do not indicate an intention to limit the operation of the sanitary district act to any particular class of territory, and, taking this general language, together with the reference to section 21 to 'any incorporated city or town that may (at the time of dissolution of the district) be in occupation of a considerable portion of the territory of the district,' it may be fairly inferred that the Legislature intended that sanitary districts might embrace both incorporated and unincorporated territory.

"There are many practical considerations which lead the court to adopt this view of the legislative intent. In many instances in California the limits of the incorporated towns are small, and just beyond these limits the territory is quite thickly populated. It is of vital importance to these towns that the sanitation of such adjacent districts be good, especially where the natural drainage from such outlying territory runs through the towns; yet no municipality is authorized to construct sewers to serve territory lying outside of its own boundaries. The following language from the case of Wilson v. Board of Trustees of Sanitary District [133 Ill. 443, page 466], 27 N. E. 203, page 207, supports this view: 'If the General Assembly may vest the power (to provide sanitation) in cities, towns, and villages, and may also create a corporation in the country and invest it with the power, it would seem to inevitably follow that it may create a corporation including both city and country, and invest it with the power. It must be evident that often, to render the exercise of such power by cities effective, it would have to be exercised over large rural districts adjacent to cities, as in case of large malarious swamps, lying within the vicinity of cities, and in other instances where the air and water to be used by the city population would be poisoned and laden with germs of disease by causes existing beyond the city limits. In such cases the preservation of health in the city would require that municipal authority should be exercised beyond the city limits, and it would violate no principle of constitutional law to create a district, and invest it with powers of taxation for sanitary purposes coextensive with the territory to be controlled. If districts may be thus organized, the question of the propriety of their organization in this, or any other, particular instance belongs to the General Assembly, and not to the courts; and it has been repeatedly held in other states that they may be thus organized. Reeves v. Treasurer of Wood County, 8 Ohio St. 333; Thompson v. Treasurer of Wood County, 11 Ohio St. 678; Anderson v. Drainage Co., 14 Ind. 199 [77 Am. Dec. 63]; O'Reiley v. Drain Co., 32 Ind. 169; Sessions v. Crunkilton, 20 Ohio St. 349; Woodruff v. Fisher, 17 Barb. [N. Y.] 224; Hartwell v. Armstrong, 19 Barb. [N. Y.] 166; Drainage Co. Cases, 11 La. Ann. 338; Dean v. Davis, 51 Cal. 406; Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389 [46 Am. Rep. 637]; State v. Stewart, 74 Wis. 620, 43 N. W. 947 [6 L. R. A. 394].'

"Again, the general rule as to the disposition of property upon the annexation of a portion of one public corporation to another public corporation is that the property lying in the annexed territory belongs wholly to the corporation to which it is annexed, and the annexed territory is freed from all obligation for the debts of the corporation to which it formerly belonged. This rule is based upon the principle that the Legislature has the right to alter the lines of subordinate governmental agencies at will, and the propriety of its action in so doing cannot be questioned. In the ordinary case of a school district or other public corporation, the rule works no injustice, because the property thus transferred to a new jurisdiction is itself unaffected by the change. But it would be impracticable to apply the same rule to the sewer system of a sanitary district, because all of its parts are so related to each other that the severance of one part would necessarily impair or destroy the usefulness of the remainder. For example, if the territory at the outlet of a sanitary district were annexed to a municipality, the rest of the system, if deprived of its outlet under the rule referred to, would be practically useless.

"A concrete instance of the actual conditions to be considered is the case of the San Anselmo Valley in this county, a narrow valley draining into Green Brae slough. Sanitary district No. 1 of Marin county was organized in 1899 to serve the whole of this valley, which includes the territory now known as Kentfield, Ross, and San Anselmo. A single, comprehensive sewer system was installed, which has taken care of the sewage of the whole valley up to the present time. In 1907 the town of San Anselmo was incorporated, embracing territory at the upper end of the valley, and a year later the town of Ross was also incorporated; its northern boundary coinciding with the southern boundary of San Anselmo. The incorporation of these two towns left a large tract of unincorporated territory at the outlet of the district known as Kentfield. All three parts of the district have worked harmoniously under the jurisdiction and control of the sanitary district, conceding to it full power in all matters pertaining to sanitation. If it were intended that each of these towns upon its incorporation should be withdrawn from the control of the district in matters of sanitation, taking with it the portion of the system lying within its boundaries, we would have a sanitation where San Anselmo would have a sewer system stopping at its southern boundary several miles from any outlet, and Ross would have control of an intermediate portion, also without an outlet. Kentfield would have a small portion of the system, upon which would be saddled the whole of the debt incurred for the construction of the entire system, under the common-law rule that upon the severance of territory from a public corporation the debt remains with the old corporation. Each of the two upper towns would thus be compelled to acquire by purchase or condemnation a separate outlet for its sewage, and as a result there would be three separate sewer systems where one had theretofore sufficed. The outlet from San Anselmo having to pass necessarily through Ross, we would have that town owning property within the limits of Ross; and, should Kentfield incorporate (as is now proposed), it would have in its territory two lines of sewers owned by other towns. In the event that the portion of the outlet of the San Anselmo system lying in Ross should require repairs, the town of San Anselmo would have to get the permission of the town of Ross to open the streets under which the San Anselmo sewer ran, and there would be a constant conflict between the different authorities.

"The condition above described leads inevitably to the conclusion that, while generally the question of sanitation is a municipal affair, in many instances it is one of broader scope, which cannot be adequately handled by the municipal authorities of a single town. Therefore it cannot be said to be a 'local' or 'municipal' affair within the inhibition of sections 12 and 13 of the Constitution above quoted, and it falls within the class of public purposes such as irrigation and reclamation, for which the Legislature has the undoubted authority to provide governmental agencies or districts by general law.

"In this connection it is interesting to note that, although municipal corporations of the fourth and sixth classes have the power to acquire waterworks and supply water for irrigation purposes (Municipal Corp. Act, § 622; section 862, subd. 3), it was held in the case of the Madera Irrigation District, 92 Cal. 296, at 344, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, that the system of irrigation contemplated by the irrigation district act was not a 'municipal purpose' within the scope of the organization of a city or town. So here it is evident that the sanitation of a whole valley, embracing several towns, is not a 'municipal purpose.'

"For the reasons above stated, it is the conclusion of the court that in enacting the Sanitary District Acts the Legislature had in mind the sanitation of any territory which might conveniently be served by a single system, whether wholly unincorporated or not, and that a sanitary district formed under said act preserves its identity and retains its powers over the whole territory, except in the event of its complete absorption by a municipality."

After further consideration we have adopted the above opinion.

The judgment and order are affirmed.

BEATTY, C. J., does not participate in the foregoing.

(168 Cal. 32)

BUTLER v. SAN FRANCISCO GAS & ELECTRIC CO. (JOHNSON, Intervener.) (S. F. 5985.)

(Supreme Court of California. June 18, 1914.)

1. FRAUDULENT CONVEYANCES (§ 298*)—EVIDENCE—SUFFICIENCY.

In an action by the assignee of money due under a building contract, in which a judgment creditor of the contractor intervened, evidence *held* to warrant a finding that the assignment was made for the purpose of defrauding such creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892–895; Dec. Dig. § 298.*]

2. FRAUDULENT CONVEYANCES (§ 64)—GROUNDS OF INVALIDITY—INTENT TO DEFRAUD CREDITORS.

A contract whereby a building contractor assigned or conveyed all his rights under a building contract to a third party for the express purpose of defrauding a judgment creditor of the contractor was void, and could in no way prejudice the rights of such creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 159–161, 164, 165; Dec. Dig. § 64.*]

3. EXECUTION (§ 348*)—PAYMENT BY DEBTOR OF JUDGMENT DEBTOR.

Under Code Civ. Proc. § 716, providing that after the issuing of an execution, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, the conditions which justify a payment by a debtor are that an execution has been issued, and not returned, and it not being essential to the validity of such payment that there should have been any levy at all.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1064–1067, 1071–1074, 1082–1088; Dec. Dig. § 348.*]

4. ASSIGNMENTS (§ 10*)—RIGHTS ASSIGNABLE—BUILDING CONTRACT—MONEY DUE OR TO BECOME DUE.

A building contract prohibiting an assignment by the contractor or the subletting of any portion of the work without the written consent of the owner and requiring the contractor to personally supervise the work did not prevent the contractor from assigning money due or to become due under the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 17, 18; Dec. Dig. § 10.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Frank I. Butler against the San Francisco Gas & Electric Company, in which Henry T. Johnson intervened. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Wm. H. Chapman and John J. Roche, both of San Francisco, for appellant. Wm. B. Bosley and Leo H. Susman, both of San Francisco, for respondent. R. V. Whiting, of San Francisco, for intervener.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

LORIGAN, J. This cause was transferred to this court after judgment affirmed by the District Court of Appeal.

On December 30, 1909, William A. Butler, brother of the plaintiff, entered into a written contract with the defendant gas company to furnish the labor and material and do the brick and terra cotta work on a certain building to be constructed for the defendant; the latter agreeing to pay him therefor the sum of $2,940. The contract expressly provided that no assignment of it should be made by said Butler nor any portion of the work sublet by him to any subcontractor without the written consent of the defendant, and that said Butler should personally supervise and direct the work contracted for. On February 12, 1910, said William A. Butler and his brother, the plaintiff herein, entered into the following contract:

> "This agreement made this twelfth day of February, 1910, between Frank I. Butler, party of the first part, and William A. Butler, party of the second part, both of the city and county of San Francisco, witnesseth: That the party of the first part does hereby agree for and in consideration of $2,940, to furnish all labor and material required to do all the brick work and set all terra cotta, for building of the addition of the central station 'C' of the San Francisco Gas & Electric Company, east of Fourth street, all in accordance with the plans and specifications furnished by D. H. Burnham & Co., architects, and included in the contract entered into by the said W. A. Butler and the said San Francisco Gas & Electric Company. In consideration of this agreement the said W. A. Butler will pay or cause to be paid to the said Frank I. Butler the above-mentioned sum when it becomes due from the said San Francisco Gas & Electric Company."

Under this last contract the work was commenced by the plaintiff, although it was personally supervised and directed by said William A. Butler, and was completed and accepted by the defendant on April 14, 1910. No question is made but that the work provided to be done was done satisfactorily. On March, 19, 1910, the defendant paid to William A. Butler $1,350 pursuant to the terms of its contract with him, which left a balance to become due under the contract of $1,440 ($150 having been deducted by mutual consent), of which $705 was payable April 14, 1910, the remainder of $735 payable 35 days thereafter, or about June 4, 1910. On April 7, 1910, plaintiff in writing notified defendant that he was the subcontractor for the work, that he had received from William A. Butler $1,350, the first payment thereon, and that another payment would be due thereon in a few days, as his work would then be finished, and notified defendant to withhold the money due on its contract with William A. Butler for the plaintiff. This notice was accompanied with a copy of the contract set forth above between plaintiff and the said William A. Butler. The defendant was not requested to, nor did it, give its consent to the contract entered into between the Butlers, nor did it know of such contract or that William A. Butler had not personally performed the work under his contract with it until this notice and a copy of the contract was served on it on said April 7, 1910, when the work was substantially completed.

The intervener herein, Henry T. Johnson, had on November 7, 1909, obtained a judgment against said William A. Butler for $862.25. An execution was issued thereon on March 23, 1910, and served on defendant, levying upon any moneys due or owing by defendant to said William A. Butler. On April 18, 1910, William A. Butler by written instrument assigned to plaintiff all moneys due or to become due by reason of his contract with defendant, but of this assignment defendant had no notice until the present action was brought. On April 25, 1910, plaintiff served another notice on defendant similar to that of April 7, 1910, but on April 28th thereafter the defendant paid to the sheriff under the levy on the execution heretofore referred to the sum of $705, and took the receipt of the sheriff therefor. On May 12, 1910, plaintiff filed a claim of lien for $1,440 against the property of the defendant upon which the work had been performed, and thereafter commenced this action. Prior to the filing of the second amended complaint herein, and about October 18, 1910, another writ of execution was issued on the judgment against William A. Butler obtained by the intervener, Johnson, and was served on defendant to satisfy a balance claimed to be due on said judgment of $164.30, but no part of this was paid by the defendant.

The second amended complaint set forth three causes of action: To foreclose a mechanic's lien; to recover upon the notices served on the defendant to withhold the money due; to recover upon an assignment to plaintiff from William A. Butler of all moneys due him under his contract with defendant.

The defendant gas company in its answer set up as a defense the violation of the clause in its contract with William A. Butler, and further that the contract between said William A. Butler and the plaintiff had been knowingly and fraudulently entered into by them for the purpose of defrauding a judgment creditor—the intervener, Johnson—out of the fruits of his judgment against said William A. Butler by a transfer from said William A. Butler to the plaintiff of the moneys which might become due from the defendant under its contract with said William A. Butler; set up the payment by defendant of $705 to the sheriff under the execution as heretofore stated, and the further levy on the money in its hands for the balance claimed to be due said Johnson on his judgment; and admitted that there was due William A. Butler under his contract any balance remaining, after deducting these amounts.

A complaint in intervention was filed by the intervener, Johnson, in which said William A. Butler was made a party defendant and to which he appeared and answered. The intervener also attacked the validity of the contract between William A. Butler and the plaintiff, on the ground that it was entered into between them for the purpose of cheating and defrauding him of the fruits of his judgment obtained against William A. Butler, and asked for a judgment requiring the defendant gas company to pay over to the sheriff upon the execution levied on the money in its hands the balance due said intervener.

The court found that the contract entered into between William A. Butler and the plaintiff was, in legal effect, an assignment of the contract between said William A. Butler and the defendant and utterly void, as in contravention of the clause in the original contract prohibiting any assignment thereof; that being void for this reason plaintiff succeeded to no rights whatever under it either to support a lien or any other claim against the defendant; that the assignment of April 18, 1910, from William A. Butler to plaintiff of all moneys due or to become due arising out of the contract between William A. Butler and defendant was equally void by virtue of the prohibitory clause in the original contract. The court further found that the contract between the Butlers was made pursuant to a collusion and conspiracy on their part to defraud the intervener as a judgment creditor of William A. Butler; sustained the payment of the $705 made by the defendant to the sheriff on the levy of the execution; and found that there was still due the intervener $156.67 as a balance on his judgment against William A. Butler, and that there was unpaid from defendant to William A. Butler the sum of $578.33. The judgment was that the intervener had a lien on the moneys in the hands of the defendant due and unpaid from it to William A. Butler to the extent of the balance due on his judgment, and that plaintiff take nothing by his action.

Plaintiff appeals from the judgment, and insists that the view of the trial court that the contract entered into beween himself and William A. Butler was in legal effect, an assignment of the original contract, and hence void, is erroneous. He insists further that the finding of the court that this contract between himself and William A. Butler was fraudulently entered into for the purpose of defeating the claim of the intervener as a judgment creditor of William A. Butler, and so sustaining the payments made by the defendant under the execution levied thereon, is not supported by the evidence; and, in any event, that as to the balance of the contract price admitted to be due by defendant to William A. Butler plaintiff, as his assignee, was entitled to a judgment for it in his favor.

As to the nature of the contract between himself and William A. Butler, the position of the appellant is that that contract does not purport to be an assignment of the original contract, and does not have that legal effect; that it does not pretend to transfer the legal title to plaintiff or create any privity between the plaintiff and defendant; that it is purely an independent contract whereby plaintiff undertook to furnish the materials and do the work contracted for by William A. Butler for the sum which was to be paid by it to William A. Butler; that the fact that the price to be paid coincides in both contracts is entirely collateral, and does not make his contract with William A. Butler an assignment or detract at all from its force as an independent contract. While stating this contention as to the nature of the contract, we do no feel required to determine it. In the view we take on this appeal, a construction in harmony with the contention of appellant could only be important on the question of a lien in his favor, and then only with reference to a portion of the last payment admitted by defendant to be due William A. Butler for the work performed, because, under the particular finding of the court, to be immediately referred to, that is all which, in any event, the plaintiff would be entitled to recover. And, if entitled to a judgment for that amount, it is apparent in this case that he will be just as fully protected by a personal judgment against the defendant as through a lien. The question must, as we say, be limited to the right of plaintiff to recover this balance of the last payment for the work, because, whatever the nature of the contract between plaintiff and William A. Butler may have been, the finding of the court that it was fraudulently made for the purpose of defeating the rights of the intervener as a judgment creditor of William A. Butler, if supported by the evidence, fully warranted the trial court in sustaining the payments made by the defendant to the sheriff after the levy of execution, and providing also for the further payment of the balance due on the judgment.

[1, 2] The court found that the contract entered into between the Butlers was made "for the purpose of cheating and defrauding the said Henry T. Johnson [the intervener] out of the fruits of his said judgment and render it impossible" to levy and enforce execution upon any money which would become payable from defendant to William A. Butler; that the two Butlers knowingly, willfully and fraudulently colluded and conspired together, and executed their contract to accomplish that purpose. Appellant challenges this finding. But as fully sustaining it it is only necessary to quote the testimony of one witness, Kendall Dazy, as to a conversation had with plaintiff as follows:

> "The substance of the conversation was that Mr. Frank I. Butler called at the treasurer's office, with which I am connected, the treasurer's office of the gas company, to see about getting payment of $150 on the architect's certificate of D. H. Burnham & Co., which he had in his possession, and, inasmuch as there had been

some litigation on the question, I took Mr. Butler up to Mr. Susman's office, because I did not know the status of the matter, and I thought Mr. Susman could tell Mr. Butler the status and just when he could get this, if at all. Mr. Butler stated to Mr. Susman that at the time the contract was transferred it was done for the reason that, if Mr. William A. Butler completed the contract, Henry T. Johnson would levy on the moneys coming to him, and it was for the purpose of preventing the levy by Mr. Johnson that the contract was tranferred to Frank I. Butler. Frank I. Butler stated that, if he had known the trouble that would occur on account of the transfer of this contract, he would not have taken it over."

Substantially the same testimony was given by Mr. Susman. Plaintiff testified that he did not remember such statements, but the court accepted the testimony of the other witnesses, as it had a right to do, and this justified the finding which appellant questions. The law applicable under such a finding is clear. The original contract between William A. Butler and defendant was, while effective, an asset of the former which was capable of being subjected to the claim of the intervener as a creditor in satisfaction of his judgment. Treating the contract between the Butlers as an independent contract, it was nevertheless one under which plaintiff took over the work agreed to be done by William A. Butler for a consideration the same in amount as the former had contracted to do the work for, and which was entered into and performed for the express purpose of defrauding the intervener as a creditor out of any right which he may have had against William A. Butler, his debtor, had the latter completed the original contract. No right, legal or equitable, can arise out of a fraudulent transaction of this kind which would prejudice the substantial interests of a creditor. Any such contract or arrangement entered into with the intent to hinder, delay, or defraud a creditor is void as to him.

> "One who knowingly takes a conveyance or assignment to aid or abet a scheme to defraud creditors cannot hold the fraudulent instrument, or any interest under it, as against the creditors to secure the amounts paid for it, or for the satisfaction of taxes or incumbrances he had paid upon the property it affects." Burt v. Gotzian & Co., 102 Fed. 937, 43 C. C. A. 59.

The effect of such attempted transfer is clearly stated in First National Bank of L. A. v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64, as follows:

> "The Code expressly declares that such a transfer 'is void against all creditors of the debtor.' 'A void thing is as no thing.' So far as existing creditors are concerned, the title and ownership of the property remains in the fraudulent grantor as fully as though no transfer had been attempted. In 1 Freeman on Executions, § 136, it is said: 'As against the fraudulent transferee the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale (on execution) is not a mere equity—not the right to control the legal title and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all.' This language was quoted and approved by this court in Judson v. Lyford, 84 Cal. 507 [24 Pac. 286]. See also, Bull v. Ford, 66 Cal. 176 [4 Pac. 1175], where the same point was decided."

As the contract between the Butlers was void as far as the creditor Johnson was concerned, the debt due from the defendant was to be treated as a debt due from it to William A. Butler, subject to be levied upon by the judgment creditor, and which the defendant was justified in paying over to the sheriff upon such levy. Section 716 of the Code of Civil Procedure provides that:

> "After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid."

[3] Under this section the defendant paid the sheriff $705, which became due April 16, 1910, as a payment under its contract with William A. Butler. It is true that when the execution was levied on March 23, 1910, this payment was not due, but this fact had nothing to do with the validity of the payment made by defendant after it had become due. It was not essential to the validity of the payment that there should have been any levy at all. Under the section the conditions which justified the payment by the debtor are that an execution against the property of the debtor has been issued, and not returned. A levy has nothing to do with the right of the debtor to pay to the sheriff. The case of Skelly v. Winchester School Dist., 103 Cal. 652, 37 Pac. 643, is directly in point. There it was held that, although the defendant, being an instrumentality of the state, could not be the subject of garnishment, yet, under the provisions of said section 716, it was authorized voluntarily to pay the amount of a debt due to its creditor to the sheriff while the sheriff has in his hands an execution issued upon a valid judgment against the creditor of the district.

Likewise as the interest of William A. Butler in the original contract was unaffected as to the rights of the creditor Johnson on account of this fraudulent transaction with plaintiff, this afforded sufficient justification for the trial court to direct that there be paid by the defendant to Johnson the sum of $156.67 as the balance due on his judgment.

[4] It will now be observed that deducting these amounts—$705 and $156.67—from the $1,440 due under the original contract leaves the sum of $578.33 unpaid and in the hands of the defendant. The defendant admitted that it was indebted under the original contract for that amount, but contends that it owes it to William A. Butler, and not to the plaintiff, and this is the effect of the judgment rendered by the trial court. In this conclusion we are of the opinion that the trial court was in error. Assuming, as the court found, that the contract between the

Butlers was void as an attempted assignment of the original contract, then the work under it must be deemed to have been done by William A. Butler, and on this theory the payments thereunder were due to him alone. But one of the causes of action set up by plaintiff as the basis of a recovery against defendant was an assignment by William A. Butler to him of all moneys due or to become due under the original contract which was made after the work was fully performed and accepted by the defendant. The theory of the trial court was that this assignment of these moneys due under the original contract was void, as controverting the clause of the contract against assignment. But it is apparent from the terms of the prohibition against assignment that this went only to the performance of the work itself, which was to be personally supervised by William A. Butler. It did not apply to the benefits accruing on performance of the work. He was to perform the work before any liability could exist for the final payment. That work was done, and all that was assigned was the final payment earned, but not yet due. The mere assignment of moneys due or to become due, although the contract may not be assigned, is held not to be an assignment of the contract. National Surety Co. v. Maag, 43 Ind. App. 16, 86 N. E. 862; In re Wright, 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193; Dickson v. City of St. Paul, 97 Minn. 258, 106 N. W. 1053; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

The assignment of the payments being valid, the court should have entered a judgment in favor of the plaintiff for this balance of $578.33. It had all the parties before it, so that complete disposition of the matter could be had. The claims of Johnson, the intervening creditor, were satisfied. Defendant had admitted that it owed the money. One or the other Butlers was entitled to it. William A. Butler was before the court, having answered the complaint in intervention. He made no claim to the money, and clearly under his assignment was estopped from doing so. It is true, as found by the court, that the defendant had no notice of this assignment until this action was brought. This, however, would only affect the matter of costs. But under the circumstances we do not think the defendant is entitled to any consideration in that matter. While it had no notice until this suit was brought of this particular assignment, it had several notices served upon it which showed that plaintiff was quite persistently claiming that he was entitled to the money from the defendant, and that as between the Butlers, who were the only ones, except the creditor Johnson, who made claim to a portion of it, he was entitled to it.

As we have said, we do not think it is necessary to pass upon the question as to the nature of the contract between the Butlers, whether, in effect, an assignment or an independent contract. This would only be necessary if we thought the matter of a lien in favor of the plaintiff was important. But it is not. Plaintiff, for the reasons heretofore given, would not in any event be entitled to recover a greater sum than the amount of the balance of the final payment due by the terms of the original contract. The defendant admitted that indebtedness and its willingness to pay it to William A. Butler. No question arises but that it is amply able to make the payment and to whoever the court determines is entitled to it.

The judgment is reversed, with directions to the lower court to enter a personal judgment in favor of plaintiff against the defendant for $578.33, and costs.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

(168 Cal. 53)

PEOPLE v. SWEARINGTON. (Cr. 1819.)

(Supreme Court of California. June 18, 1914.)

1. Criminal Law (§ 823*)—Instructions—Reasonable Doubt.

An instruction in a criminal case as to direct and circumstantial evidence, and that if the testimony was sufficient to convince the jury beyond a reasonable doubt and to a moral certainty that accused committed the act charged, although the fact was surrounded in a degree by a doubt, they should convict, though possibly objectionable standing alone, because of its failure to make clear the distinction evidently contemplated between a reasonable doubt and any other doubt, was not erroneous, where the court had fully instructed on the subject of reasonable doubt and charged that a reasonable doubt was not every possible or fanciful doubt which might be suggested to the minds of the jurors, and that a mere surmise or conjecture did not constitute such a doubt, as the jury must have understood that the court, in referring to a doubt which would not prevent a conviction, was referring to a possible or fanciful doubt, surmise, or conjecture.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

2. Convicts (§ 5*)—Crimes—Evidence—Conspiracy.

On the trial of a life convict for assault with a deadly weapon, the prosecution had a right to prove a conspiracy between accused and other prisoners under which the assault was made, if such a conspiracy existed, and the admission of unsuccessful inquiries with a view to establishing a conspiracy evidently made in good faith and subsequently stricken out was not erroneous.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. Criminal Law (§ 1171*)—Trial—Improper Remarks by Counsel.

On the trial of a life convict for assault with a deadly weapon, the remark of the district attorney, in response to the testimony of another prisoner, that he did not tell the guard that the prosecuting witness struck accused first because the guard would not have believed him, that that was unfortunate for the witness, though improper, was not prejudicial to accused, where the court immediately ordered it stricken out and instructed the jury to disregard it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Samuel E. Swearington was convicted of assault with a deadly weapon while undergoing a life sentence in a state prison, and he appeals. Affirmed.

Chas. B. Harris, of New York City, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

LORIGAN, J. Under section 246 of the Penal Code, held to be constitutional by this court in People v. Finley, 153 Cal. 58, 94 Pac. 248, and affirmed by the Supreme Court of the United States in the same case (Finley v. State of California, 222 U. S. 28, 32 Sup. Ct. 13, 5 L. Ed. 75), the appellant was prosecuted by information charging him, while undergoing a sentence for life imprisonment in the state prison at Folsom, with having committed, with malice aforethought, an assault with a deadly weapon upon one William Robinson. He was tried and convicted, and, as the section provides shall be done upon conviction of such offense, sentence of death was imposed upon him. He appeals from the judgment and from an order denying his motion for a new trial.

The evidence shows that on August 25, 1912, defendant and Robinson, both prisoners at Folsom, the former undergoing a life term for murder, were both in the main corridor of the prison where Robinson was reading a paper; that, without any warning or any altercation between them, defendant assaulted Robinson with a knife, inflicting grievous wounds upon his side, back, and arms, and was persisting in his attack when restrained by one of the prison guards. The reason for the attack, as stated by the defendant to the officers of the prison immediately after the assault, was that Robinson had informed on one of the other prisoners with reference to a contemplated effort to escape, and he wanted to teach him a lesson.

No question is made of the sufficiency of the evidence to sustain the verdict, but on behalf of the appellant it is urged for a reversal that the court erred in one of its instructions to the jury and in several particulars erred in its rulings upon the admissibility of evidence. Misconduct on the part of the district attorney is also assigned as error warranting a reversal.

[1] The instruction claimed to be erroneous was proposed by the prosecution and given by the court. It is as follows:

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which, *if sufficiently strong to establish guilt beyond a reasonable doubt and to a moral certainty*, you may lawfully find *an accused* guilty of crime. One is direct or positive testimony by an eyewitness of the commission of the crime. The other is proof by testimony of a chain of circumstances pointing adequately strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, statements made previous to the commission of the crime, and after its commission, and, in short, any acts, declarations, or circumstances admitted in evidence, tending to connect the defendant with the commission of the crime. *All that is required is this: If the testimony in this case is sufficient to convince you, beyond a reasonable doubt and to a moral certainty, that the defendant did commit the act charged, although the fact be surrounded, in a degree, by a doubt, then it is your duty to convict the defendant.*"

The attack is directed against that clause in the italicized portion of the instruction, "although the fact be surrounded, in a degree, by doubt." Appellant insists that this language, without any explanation on the part of the court as to what was meant by it, told the jury in effect, and contrary to well-established principles of law, that, if there was a degree of doubt, they must convict the defendant. While this instruction, if it stood alone, might be open to the criticism that it did not define what does and what does not constitute reasonable doubt, a distinction evidently contemplated by the language of the instruction, this was so clearly defined by other instructions previously given in connection with the one under consideration that the jury could not have but understood what the court meant by the language it employed. The court had already instructed them on the subject of "reasonable doubt"; had given them the old and approved instruction clearly and explicitly defining it; that it consisted of a doubt of the guilt of the accused existing after a full comparison and consideration of all the evidence in the case. It further instructed them, as is usual, that the term "reasonable doubt" did not mean every possible or fanciful doubt which might be suggested to the minds of the jurors; that a mere surmise or conjecture did not constitute "reasonable doubt," and used similar and further language in marking the distinction between what amounted to reasonable doubt and what did not. With these instructions given on the matter of "doubt," reasonable or otherwise, the instruction in question was given, and it is to be considered as the court intended it should and as the jury naturally would consider and interpret it, in connection with and in the light of the previous instructions on the matters referred to in it. It will be observed that the instruction attacked was dealing with two classes of evidence which might be considered by the jury—direct or positive evidence and circumstantial evidence—and correctly informed them in the opening sentence of the instruction that either class, "if sufficiently strong to establish guilt beyond a reasonable doubt and to a moral certainty," would lawfully warrant a jury in finding one accused of crime guilty. Then, after defining direct or positive evidence and also circumstantial evidence, the court closed the instruction on those subjects with the direction as to the duty of the jury with respect to either class of evidence and used the language which appellant criticises. But, taking the entire latter portion of the instruction in the light of previous definitions, the jury could not have misunderstood what was meant by it. They were again thereby instructed as in the opening clause that in order to convict the defendant they must be satisfied, "beyond a reasonable doubt and to a moral certainty," of his guilt. It was not necessary for the court to again define reasonable doubt. It had already done so by previous instructions, and when in this connection the court said that, if so convinced, they should convict the defendant, "although the fact be surrounded in a degree by doubt," the jury, having in mind also the previous instructions of the court, must have understood this language to refer to that "doubt" which did not amount to a "reasonable doubt"; some possible or fanciful doubt, surmise, or conjecture, which might suggest itself in any case, but which, not arising from a consideration of the evidence, would not, as the court had theretofore instructed them, amount to or constitute a reasonable doubt of guilt.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Under the entire portion of the instruction attacked, the court was simply pointing out to them that any "doubt" which they might entertain or act upon must be a reasonable doubt as had been previously defined and no other.

As to the assignments of error made by appellant of the rulings of the court with respect to the admission of evidence, these are not of sufficient moment to require a detailed discussion nor except that this is a capital case would they call for any discussion at all.

[2] The prosecution was permitted to ask some questions of witnesses over the objections of defendant on the claim that it intended to prove a conspiracy between the defendant and some other prisoners under which the assault was made by defendant on the prosecuting witness. In this connection, in addition to other inquiries, the prosecution sought to show the relations between defendant and other prisoners claimed to have been in the conspiracy and a prisoner named Smith. Appellant claims this was error. But a sufficient answer to this is that the prosecution had a right to prove such a conspiracy if it existed, and the inquiries made by the prosecution were properly directed to that end. It failed, however, to elicit any evidence sustaining it, and all the evidence that was introduced on the subject was stricken out on motion of the appellant. The witnesses who were called by the prosecution as to the relationship of Smith to the conspiracy knew nothing which would throw any light on that subject and gave no answers which were in any way prejudicial to the defendant. The fact that unsuccessful inquiries were made with a view to establishing a conspiracy, and which were evidently made in good faith, cannot be assigned as an effort to prejudice the case of the defendant.

[3] A prisoner testifying on behalf of the defendant stated that Robinson had struck the defendant before the latter assailed him. On being asked by the district attorney why he had not told the prison guard who took the knife from defendant that the prosecuting witness Robinson had struck the defendant before he assaulted him, he replied that he had not done so because the guard would not have believed him if he had, to which the district attorney responded, "That is unfortunate for you." This remark of the district attorney, was, of course, improper. But as the court immediately ordered it stricken out and at once instructed the jury to disregard it, the defendant cannot be said to have been prejudiced thereby.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

24 Cal. App. 396

PEOPLE v. CRAWFORD. (Cr. 236.)

(District Court of Appeal, Third District, California. May 7, 1914. Rehearing Denied by Supreme Court July 6, 1914.)

1. Rape (§ 54*)—Evidence—Sufficiency.

A conviction of rape on a female under the age of consent may be sustained by her uncorroborated evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

2. Rape (§ 57*)—Evidence—Sufficiency.

Where a female child under the age of consent testified to facts showing rape, and then contradicted herself numberless times and denied the guilt of accused, the weight of her testimony was for the jury, and a conviction would not be disturbed.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.*]

3. Criminal Law (§ 706*)—Trial—Conduct of Prosecuting Attorney.

Where the prosecuting witness in a trial for rape was a hostile witness, and persistent efforts were required by the district attorney to exact of her a statement inculpating accused, her father, the action of the district attorney was not misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

4. Witnesses (§ 380*)—Examination — Hostile Witness.

Where the prosecuting witness in a trial for rape was a hostile witness and gave testimony damaging to the state's case, it was proper to allow the state to prove her inconsistent statements, made while testifying before the grand jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210–1219; Dec. Dig. § 380.*]

5. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Where the court charged that the jury had the exclusive duty of weighing the evidence and determining the credibility of witnesses, and that in determining the credibility of a witness they could consider his character, conduct, and manner on the stand and his relation to the controversy and to the parties, a further instruction, that if any witness willfully swore falsely to any material matter it was the duty of the jury to distrust his entire evidence, was not objectionable as curtailing the function of the jury to determine the credibility of the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

6. CRIMINAL LAW (§ 1141*)—APPEAL — PRESUMPTIONS.

The court on appeal cannot presume error in the instructions, and accused, complaining of instructions, must show that they were not given at his instance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. § 1141.*]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

William Crawford was convicted of crime, and he appeals. Affirmed.

Geis & Geis, of Willows, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Sexual intercourse under the age of consent was the offense charged in this case, a conviction was secured on the uncorroborated testimony of the prosecutrix, who is the daughter of defendant, and he was sentenced to 30 years in the penitentiary.

Appellant calls attention to the admonition given to the jury, and which is deemed proper in such cases, to view the testimony of the prosecutrix with caution, and claims that it must have been entirely disregarded in the determination of his guilt. It is declared that discredit and distrust naturally arise from the consideration of the manifold inconsistencies and irreconcilable contradictions of the witness and that the jury's conclusion can only be accounted for on the ground of passion and prejudice. To this deplorable result, it is urged, the unfairness of the district attorney contributed in no small degree, and appellant goes even further, in the claim that when fairly considered the record does not furnish sufficient support for the verdict.

The following portions of the transcript relating to the testimony of the girl are probably sufficient to indicate the basis of appellant's contentions. In her direct examination this appears:

"Q. Did your father have and accomplish with you the act of sexual intercourse? Mr. Geis: We object to that; that calls for the conclusion of the witness. The Court: Overrule the objection. A. Yes, sir. * * * Mr. Purkitt: Tell in your own language just what occurred. A. I can't tell you. Q. Yes you can, you can tell how it happened. The Court: Ask her the question, where he was, and what he did, and what she did. Q. (by Mr. Purkitt) Where were you? A. Down at the river. Q. Were you in the house or tent? A. In tent."

In answer to further questions she said her father came into the tent and got on top of her, and she raised her clothes, and this followed:

"Mr. Purkitt: Just tell us what went on. A. I don't know what you mean. Q. Did he get his parts into you? A. No, sir; he did not."

And she further declared that he "never did." She answered similarly in reference to another occasion, and then the record proceeds:

"Q. Did it hurt you any that time? A. No, sir; not very bad. Q. Did it hurt you some? A. No, sir; not to speak of. Q. Did it hurt any? A. No, sir. Q. Why did you say not to speak of? A. Oh, it didn't hurt me."

The district attorney then, for the purpose of refreshing her memory, as he stated, called her attention to her testimony before the grand jury as follows:

"Q. Now Ada, are you willing to make a clean breast of the entire affair? A. Yes, sir. Q. I would now ask you who was the man who had intercourse with you? A. My father."

Further questions and answers of the examination before the grand jury were then read, over objection, from which it appears that she minutely detailed the acts of appellant showing the complete offense as set out in the indictment. Then follows:

"Mr. Purkitt: Did you testify to that, that way, before the grand jury? A. I don't understand more than half of it. The Court: The question is whether you said that before the grand jury? A. I don't remember whether I said that or not, but he didn't."

The witness was then interrogated further about the charge, and, her answers apparently being a disappointment to the district attorney, he asked her where she had been, and if she had talked with anyone or received any letters or telephones about the case. Nothing of consequence was discovered, and the record continues:

"Q. What reason do you give for changing your testimony? A. Changing it? Q. Yes. A. I don't know. Have I changed it any? Q. Yes, you have changed it. What reason do you give? A. I didn't know I had changed it any."

Her attention was then directed to the fact that she had made a written statement at the time she was before the juvenile court and, in reply to a question by the district attorney whether her testimony now is the same, she replied:

"Yes, it is; I think it is. I might have not said every word the same, but them."

She was then again taken over the same ground with the same result, and the district attorney read what purported to be a written statement by her at the time of the said juvenile court examination, and this follows:

"Q. Did you write that? A. Yes, I wrote it. Q. That's so, is it? A. I made a mistake there; he never raised my clothes. I did that myself. Q. Why did you put that in here? A. I don't know. I didn't think, I guess, or something. I don't know why I did it. Q. You are willing now to take that onto yourself? A. Yes, sir. Q. All the blame on yourself? A. I am, because he never raised my clothes at all."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Again she was asked if she had talked with any one who told her to change her testimony, and she answered:

"No, sir. I never spoke a word to anybody only just Mrs. Stochhinni, and she didn't say anything. Q. How came you to change it? A. I don't know. I never had no notes or letters nor nothing only just that one letter. I haven't talked to nobody. Q. How came you to change it? A. I don't know how I did. Q. Didn't you change it to protect your father? A. No, sir. Q. If your testimony to-day is correct, why did you give that testimony before the grand jury that you did that I just read to you? A. I don't know why I did."

The district attorney then read further from her testimony before the grand jury, and in response she said:

"Well, he didn't. Q. Why did you say then that he did? A. I don't know why I did. Q. That's all the explanation you want to give? A. Yes, sir. Q. Just read this over and see if that is correct, will you? Just read it quietly to yourself and see if that's correct. (Witness reads paper.) That's correct what you wrote there? A. No, sir; it isn't. Some of it isn't."

She was again taken over the ground covered by the charge, and the concluding portion of this part of the examination was as follows:

"Q. He did get on top of you? A. No. Q. Why did you tell me awhile ago that he did? This is no plaything here. We want the truth. Now tell us just what took place there. A. I was turned over to him, just the same as being on top of me, pretty near. Q. Why did you say awhile ago that he was on top of you? A. Ain't that the same thing? Q. No, I don't think it is the same thing. You were laying down, and he was on top of you, you said a minute ago, and now you say he was sidelings. A. He was laid down and so was I. * * * Mr. Purkitt: What do you mean by changing your testimony, coming up here now and changing it? Has anybody made any signs to you at all? A. No, sir. Q. Wouldn't you feel better to tell me the whole facts as they occurred there, straightforward, in your own way? A. I have told you. Q. You haven't told us all. A. Yes, I have. Q. Well, we will go all over it again if it takes a week."

The defendant then objected to the threatened course of the district attorney, and the court said:

"In order that the district attorney may get the former testimony and look through his notes, we will take an adjournment until tomorrow morning at 9:30."

Thereupon counsel for defendant asked for the strict enforcement of the rule that the witness "be not permitted to talk with any person connected with this case in any way at all." To this the learned trial judge responded:

"The court will take care of this witness. Court is adjourned."

On account of illness of defendant's counsel, the trial was continued the next day till the day after. The district attorney began again with the witness at the beginning of the story, and, after the girl had stated that her father came into the tent and got into bed with her and the other children, the record proceeds:

"Q. What did he do? A. He got on top of me. Q. Then what? A. That's all, I guess. Q. Tell us what he did when he got on top of you. Tell the jury what he did when he got on top of you. A. He had intercourse with me, I guess. Q. You know what he did, don't you? A. Yes. Q. And he did insert his private parts into you? A. Yes, sir. Q. Anything come from him? A. Yes, sir."

In response to questions she then related two other similar occasions in Tehama county, and the direct examination here concluded as follows:

"Have you any reason to give the jury why you didn't tell us this day before yesterday? A. Yes, sir. Q. What was it? A. I thought I could protect my father some way. Q. At the time you had intercourse at Jelly's Ferry or here, did he say anything to you? A. Yes, sir. Q. What did he say? A. He told me not to tell."

In cross-examination she was interrogated at great length about her testimony before the grand jury and she declared it was untrue as far as it tended to criminate Mr. Lunceford and exculpate her father. She also stated again that she falsified to protect her father. She admitted also that she told Judge Farnham and one time Judge Finch and also the district attorney that it was Lunceford. Then follows this:

"Q. Did your mother ask you to tell the story that you told here? A. She told me in the first place that she was going to make trouble over it. Q. Did she ask you to tell the story in order that she might get hold of the children? A. Yes, sir. Q. Did she tell you before you told her that your father had had intercourse with you, or afterwards? A. Afterwards."

Her attention was then directed to the particular circumstances surrounding the alleged intercourse, and these questions and answers appear:

"Q. Do you remember anything at all about that evening, simply save and except the fact that you had intercourse? A. No, sir. Q. Did you have a light in your room or your tent? A. No, sir. Q. Was it dark in there? A. Yes, sir. Q. What was said? A. Nothing was said at all. Q. Not a word spoken? A. No, sir. Q. He got up and went out and not a word said? A. Yes, sir. * * * Q. This might have been somebody else, might it not? A. It might have, I don't know. Q. You wouldn't tell who it was? A. No, sir. Q. Just somebody came in there and had intercourse with you and went out? A. Yes, sir. Q. And it was dark and you couldn't see who it was? A. No, I couldn't see who it was. Q. That was the only time that anybody ever had intercourse with you in this county, wasn't it? A. Yes, sir. Q. You wouldn't pretend to say, would you, who it was? A. No, sir. Q. It might just as well have been some person else over there? A. Yes, sir. Q. You don't want to be understood as saying it was your father? A. No, sir. Q. Because you don't know? A. I don't know. Q. It might have been Lunceford? A. Might have, I don't know who it was."

Then on redirect the following appears:

"Mr. Purkitt: Then on the 15th of April your father did have intercourse with you down at that place? A. Yes, sir. Q. You know it was your father, do you? A. No, sir; I couldn't say for sure it was him because it was dark there and I couldn't see. Q. Now, Ada, cutting off the matter at Jelly's Ferry, we will commence again and go all over this, so we can't be mistaken."

The district attorney then called her attention to her former statements and the record proceeds:

"Mr. Purkitt: Now at the time your father came in in April, was the time he came and had intercourse with you down at the camp? A. Yes, in the night. I guess it was him. I don't know who it was. It was dark and I couldn't see. Q. Who have you been talking to since you got out of here? Don't you know it was your father? A. I don't know. Q. You know he had been doing it to you, and you know he was the fellow that had done that down there? A. I don't know whether it is or not. Q. Now at the time you told your mother this story, did she tell you to tell the truth about it? She told you to tell just exactly how it was, didn't she? A. Yes, she told me to tell what I did. Q. And tell the truth about it? A. She didn't say to tell the truth, but she told me to say that it was. She didn't say whether to say the truth or not. Q. She said to say what happened? A. Yes, for me to say it was Papa. Q. You had already told her before that that it was Papa, hadn't you? A. Yes, sir."

Several times thereafter she was asked if she didn't know it was her father, and she reiterated the answer, "I don't know whether he did or not." The redirect examination finally concluded with these questions and answers:

"Mr. Purkitt: Let's fix the time, was it in March or was it in April, 1913, that your father had intercourse with you on the Estes ranch, at the fish camp in Glenn county, Cal.? A. April. Q. At that time he inserted his private parts into your private parts? A. Yes, sir. Q. And something came from him? A. Yes, sir."

But the ordeal was not yet over for the unfortunate girl. She was taken upon recross and stated several times that she did not know who it was; that she wouldn't state it was her father. Each counsel seemed determined to have the last word with her, so there was a re-direct examination. In that, among other things, this appears:

"Q. You remember testifying this morning the time when I was asking you the questions that the shorthand reporter read back to you? A. Yes. Q. Since then you have changed your testimony, have you? A. Yes, sir. Q. Have you changed that to protect your father? A. No. Q. Why have you changed it? A. I have changed it because it is right what I have told you. Q. Well, we will have to go all over this again."

The district attorney then read her former statements directly charging her father, and she admitted they were correct. On her re-recross examination she qualified them as before, stating she did not know it was her father, and, with one or two questions by the court, the long examination of the witness came to an end.

[1, 2] To exhibit clearly the ground of appellant's charges it seemed necessary thus to set forth at considerable length the record of the proceedings.

We cannot, of course, say that the jury disregarded the admonition to consider with caution the testimony of the prosecutrix. In view of the gravity of the offense, the serious consequences of conviction, and the palpable inconsistencies and contradictions of the witness, it would be a reflection upon the honesty or intelligence of the jurors to hold or to suggest that they did not scrutinize that testimony with the utmost care.

It is equally certain that the decision as to the sufficiency of the evidence must be against appellant. It is settled that a conviction may be had upon the uncorroborated testimony of the prosecutrix. She testified positively to acts from which only one inference could be drawn, to wit, that the defendant is guilty of the offense charged. We cannot say that said testimony is inherently improbable. While it excites wonderment and horror, it is no different in that respect from other shocking crimes that are of frequent occurrence. Nor are we authorized to say that because the witness contradicted herself time and time again, and denied many times while on the witness stand that her father had carnal connection with her, her testimony of incrimination is unworthy of belief and legally insufficient to uphold the verdict. That would be to invade the exclusive province of the jury to weigh the evidence and determine the credibility of the witnesses. The test here is not whether the witness is truthful, but whether it can be said that her testimony in favor of the verdict is inherently untrue. The jury may legally base their verdict upon statements which they believe of a witness known to be testifying falsely in material parts of his testimony. It is apparent and must have been to the jury that the testimony of the prosecutrix is surcharged with falsehood, and that circumstance casts suspicion and discredit upon the entire recital; but it did not require the rejection of what was believed to be true. It can be readily understood how the jury must have viewed the situation and made allowance for the natural desire of the child to protect her father. No doubt the jurors believed that, while it was not strange nor incredible that the prosecutrix would falsely avow her father's innocence, it was almost unthinkable that she would falsely charge him with the crime.

[3] Nor is it singular that great importunity and persistent effort were required to exact of her a statement inculpating the defendant. Ready willingness on her part to lay the unspeakable crime at her father's door would be more surprising than her apparent reluctance to tell the truth. At any rate, there is legal evidence to support the verdict, and we cannot say that it is insufficient for that pupose. People v. Kaiser, 119 Cal. 458, 51 Pac. 702; People v. Preston, 19 Cal. App. 675, 127 Pac. 660, 665. In the latter case it is said:

"But whatever the nature or character of the contradictions or inconsistencies she might have been guilty of in detailing her story, it was after all for the jury to decide whether such contradictions or such inconsistencies were of such significance as to have the effect of impeaching her statement as to the fact of the asserted sexual intercourse. In such a case as this, the appellate courts are not authorized to substitute their judgment for that of the jury and the trial court as to the weight and effect of the evidence."

It may be said, also, that while the district attorney was very persistent in his examination of the witness, we must presume that he was animated solely by a desire to elicit the truth and that his conduct does not appear to merit condemnation.

[4] Objection was made by defendant to the questions addressed to the witness as to her testimony before the grand jury. In People v. Bushton, 80 Cal. 161, 22 Pac. 127, 549, it is said:

"It is contended that the court below erred 'in allowing purported testimony of the prosecuting witness Hernandez, given at the coroner's inquest, to be read in the presence and hearing of the jury, and in allowing the coroner to give evidence of the purported testimony given before him by Hernandez on that occasion, and that it erred in not striking out such evidence as hearsay.' The evidence referred to was introduced for the purpose of impeaching the witness Hernandez, who had been put upon the stand by the prosecution, and testified in such a way as to prejudice the people's case, and inconsistently with the testimony given by him at the coroner's inquest. It was proper, for this purpose, to call the attention of the witness to what he had testified before the coroner, and read the same in the presence of the jury, and upon his denial of said testimony, to prove that he did so testify. Code Civ. Proc. §§ 2049, 2052."

But such evidence is not admissible where the witness has simply failed to testify to all that the party calling him expected or desired. People v. Mitchell, 94 Cal. 550, 29 Pac. 1106.

"Upon this subject, this court has never gone further than to hold that, where a witness called by a party has given damaging testimony against him, * * * the party calling him may show that the witness previously made statements inconsistent with his present testimony, and this ruling is apparently upon the theory that the party was surprised by the adverse testimony given by his own witness." People v. Creeks, 141 Cal. 532, 75 Pac. 103; People v. Cook, 148 Cal. 345, 83 Pac. 43.

It is apparent that this case falls clearly within the rule as thus limited. The child had given damaging evidence against the people in that she had virtually denied a fact that was essential to conviction. She had plainly shown herself to be a hostile witness, and under the decisions it was admissible to prove her inconsistent statements made on other occasions.

[5] The only other point of serious import relates to the following instruction given by the court:

"If any witness examined before you has willfully sworn falsely in this case to any material matter, *it is your duty to distrust his entire evidence.* I do not intimate to you that any witness in this case has testified falsely. These matters are exclusively within your province as jurors and are not to be determined by the court."

We have italicized the portion of the instruction to which the exception is taken. The claim is that the court thereby curtailed the exclusive function of the jury to determine the credibility of the witnesses; in other words, that if they followed such instructions the jurors, when they reached the conclusion that a witness had sworn falsely as to a material matter, must reject his entire testimony, although they might believe that in other material matters the witness had spoken truly. Respondent contends that taking the instructions together the jury could not have been misled. In this connection attention is called to various instructions setting forth the right and duty of the jury to pass upon the evidence, among others, the following:

"The court instructs you that to the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses. In determining the credibility of a witness the jury may take into consideration the character, conduct, and manner of the witness upon the stand, their relation to the controversy and to the parties, if any, their bias or impartiality, the reasonableness or unreasonableness of the statements made, the strength or weakness of their recollection, viewed in the light of all the testimony and facts and circumstances in the case. It is the province of the jury to determine the weight and credibility to be given the testimony of the prosecutrix as well as that of all other witnesses testifying in the case."

As stated in People v. De Lucchi, 17 Cal. App. 103, 118 Pac. 935, the criticised instruction is not "a strictly correct statement of the law." It would be better to have given the familiar apothegm of the statute, "that a witness false in one part of his testimony is to be distrusted in others." But, considering the instructions together, the jury must have understood that while they were to look with suspicion upon the entire testimony of a witness who had willfully sworn falsely to a material matter it was their exclusive right to weigh the evidence and to judge of the credibility of this as of other witnesses. We think the jury could not have understood that they were instructed to reject all the testimony of such witness, but that while they were to regard it with suspicion it was their exclusive province to determine the truth or falsity of the statements. We may adopt here what was said by Mr. Justice Sloss, in People v. MacDonald, 140 Pac. 256, as follows:

"It would be a better practice, in matters of this kind, to adhere to forms of expression that have had the direct sanction of appellate courts. At the same time, we do not think the instruction, read in its entirety, was substantially prejudicial to the appellant's rights."

[6] Another answer might be made to appellant's contention here, and that is that it does not appear that the instruction was not given at the request of defendant. We cannot, of course, presume error, and, if the criticised instruction was not given at his instance, defendant should have had it so appear.

We have carefully examined the record,

but have found no error that would warrant a reversal of the judgment or order denying the motion for a new trial, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

24 Cal. App. 420

SMILIE v. SMILIE. (Civ. 1222.)

(District Court of Appeal, Third District, California. May 9, 1914.)

1. APPEAL AND ERROR (§ 1002*)—QUESTIONS REVIEWABLE—FINDINGS ON AFFIDAVITS.

The court, on appeal from an order denying a change of venue to the county of the alleged residence of defendant, is bound by the rule controlling it, where oral testimony is presented for review, and, where there is any conflict in the affidavits, those in favor of the ruling of the trial court must be considered as established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 912*)—QUESTIONS REVIEWABLE—FINDINGS ON AFFIDAVITS.

Error is not presumed, but all intendments are in favor of the action of the trial court, and affidavits on behalf of the successful party, opposing a motion for a change of venue, are deemed to establish the facts directly stated therein and also the facts which may be reasonably inferred from the direct statements.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3689; Dec. Dig. § 912.*]

3. DIVORCE (§ 66*)—VENUE—"RESIDENCE" OF PARTIES.

Where, on a motion of a wife to change the venue of an action by her husband for divorce from A. county to S. county, it appeared that the wife resided with her husband in A. county until June 28th, when, without his consent, against his will, and through no misconduct of his, she departed and went to reside with a sister in S. county, and there remained until June 30th, when she left for another county, taking with her all her personalty, and had not returned to S. county August 21st, that she had said nothing about her intention to take up her residence in S. county, and that when she left her husband's home she left there some of her personal effects, the court properly refused to change the place of trial, for it did not appear that the wife had a residence in S. county within Pol. Code, § 52, prescribing the rules to be observed in determining a person's residence, which indicates permanency of occupation as distinct from lodging or boarding or temporary occupation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 227–231; Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 7, pp. 6151–6161; vol. 8, p. 7788.]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Robert Howard Smilie against Florence Lucia Smilie. From an order denying the motion of defendant to change the place of trial, she appeals. Affirmed.

C. E. McLaughlin, of Sacramento, for appellant. Schwartz & Powell, of Oakland, for respondent.

CHIPMAN, P. J. Motion to change the place of trial from Alameda county to Sacramento county. The motion was based upon the demand and the affidavit of defendant; the ground of the motion being that, at the commencement of the action, defendand was and ever since has been a resident of Sacramento county.

The action is for divorce, the complaint alleging extreme cruelty, and was filed July 15, 1912.

The affidavit states:

"That since the 28th day of June, 1912, said defendant, Florence Lucia Smilie, has resided in and intends to continue to reside in the county of Sacramento, state of California; that ever since said 28th day of June, 1912, said defendant, Florence Lucia Smilie, has been a resident of said county of Sacramento."

The remaining portion of the affidavit relates to the statement to her counsel of the facts connected with the case and the advice given that she has "a sufficient and substantial defense on the merits to said action."

In a further affidavit defendant sets forth the following facts:

"That on the 28th day of June, 1912, said defendant, Florence Lucia Smilie, commenced to reside at 1118 Twelfth street, in the city of Sacramento, county of Sacramento, state of California, at which point all her property and personal effects have since been; and since said 28th day of June, 1912, said defendant has continued to reside in the city of Sacramento, county of Sacramento, state of California, except while temporarily absent for the benefit of her health and as advised by her physician, at Tahoe Pines, on Lake Tahoe, in the county of Placer; that at all times while so temporarily absent she has in good faith intended to and still intends to return to her said residence in the city of Sacramento, on or about the 1st day of September, 1912; that ever since said 28th day of June, 1912, defendant has in good faith intended to and still intends to have and fix, and she has fixed, her home and habitation and residence in said city of Sacramento, county of Sacramento, state of California, where she in good faith intends to reside in the future."

Counter affidavits were filed by plaintiff as follows: Mrs. A. M. Smith deposed:

That her address is 1118 Twelfth street, Sacramento, Cal. "That she is personally acquainted with Florence Lucia Smilie, the defendant in the above-entitled action; that the said defendant came to the residence of affiant on the 28th day of June, 1912, from her previous residence in Berkeley, Alameda county, Cal. That the said defendant remained in the house of affiant from the said 28th day of June, 1912, to the 30th day of June, 1912, and went to Lake Tahoe in the county of Placer, state of California, and that since said 30th day of June, 1912, the said defendant has not been at, nor has she returned to, the residence of affiant. That said defendant took with her at the time she left, on the said 30th day of June, 1912, all of her personal belongings, and that she left no personal belongings, clothes, or other things at the residence of affiant (contrary to defendant's statement). That affiant believes that, if the said defendant had returned to the city of Sacramento, she would have come to the residence of affiant and stayed there with her, for the reason that the sister and brother-in-law of said defendant have been living in the residence occupied by affiant for a period of several years last past. That during the time that the said defendant was with affiant as aforesaid, the said defendant made no reference of any kind or statement to the effect that she intended to take up her permanent residence and place of abode in the city of Sac-

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ramento. That the same defendant at such time told affiant that she was going on through to Lake Tahoe. That affiant thereupon asked the said defendant if her husband, plaintiff above named, was to join her at Lake Tahoe, and the said defendant replied that he was not coming just at present; and further affiant saith not."

Plaintiff made affidavit, on August 20, 1912, as follows:

"That he is the plaintiff in the above-entitled action. That on the 29th day of February, 1912, at the time of the marriage of affiant and defendant, defendant was a resident of the state of Minnesota. That immediately thereafter affiant and defendant came to the county of Alameda, state of California, to the home of affiant to reside. That defendant then and there became a resident of said county of Alameda, and continued to be a resident thereof up to and including the time of the commencement of this action, and was a resident thereof on the 15th day of July, 1912, the day upon which this action was commenced. That on the 28th day of June, 1912, defendant left the home of affiant without the consent of affiant, and against his will and through no fault or misconduct of affiant. That when defendant left the home of affiant, she took with her certain of her personal effects, and left certain other of her personal effects at the home of affiant. That about the said time, defendant's mother, in the presence and hearing of defendant, said to plaintiff, in substance: 'Can we leave these boxes here until we decide what we are going to do, or where we are going to locate, and, when we notify you, will you send them to us?' That defendant then and there made no comment. That neither defendant nor her mother has ever notified affiant where to send said boxes. Affiant is informed and believes, and therefore alleges: That, when defendant left his home, she went to the city of Sacramento, in said state of California, remained at a boarding house in said city of Sacramento for about one day, and went immediately from there to Lake Tahoe, in the county of Placer, state of California. That ever since said time defendant has continuously remained in and about said Lake Tahoe. That she was at Lake Tahoe at the time of the commencement of this action, and was there at the time of the making of her affidavit, on this motion for change of venue. That on the 15th day of July, 1912, defendant wrote a letter to affiant from Lake Tahoe in which she stated that she would return to Sacramento about the month of September, and would then and there be willing to see affiant and discuss their affairs. That at all of the times herein mentioned affiant has been and now is a resident of the county of Alameda, state of California. That at all times from the arrival of affiant and defendant in the county of Alameda, state of California, up to and including the 15th day of July, 1912, defendant was domiciled in the county of Alameda, state of California, which was during all of said time the residence of affiant, her husband."

Pursuant to the motion and upon the foregoing affidavits, the hearing was had, and the motion was, on August 23, 1912, denied. Defendant appeals from the order.

[1] "In the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established." Doak v. Bruson, 152 Cal. 17, 19, 91 Pac. 1001, 1002, and cases there cited.

[2] The court states a still further rule, important to be observed in controversies of the present character, namely:

"And as error is not presumed, and all intendments are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements."

See, also, Bradley v. Davis, 156 Cal. 267, 268, 104 Pac. 302.

[3] The Political Code, § 52, prescribes certain rules which are to be observed in determining the place of residence of a person, to wit: There can be only one residence and it cannot be lost until another is gained; that the residence of the husband is the residence of the wife; and that the residence can be changed only by the union of act and intent. Intention to change one's domicile is ineffectual unless accompanied by an actual change in the place of abode. There must be, as the statute declares, a concurrence of act and intent. Sheehan v. Scott, 145 Cal. 684, 79 Pac. 350.

On the 28th day of June, 1912, defendant resided with her husband in Alameda county, and on that day, as plaintiff deposes, she left his home without his consent and against his will and through no misconduct of his, and, as defendant deposed, "commenced to reside at 1118 Twelfth street, in the city of Sacramento, where her sister and brother-in-law were residing at the residence of deponent Mrs. Smith." She remained there June 29th and departed on the 30th for Lake Tahoe, and, as Mrs. Smith deposed, taking with her "all her personal belongings, and that she left no personal belongings, clothes, or other things at the residence of affiant," and had not returned up to the date of Mrs. Smith's affidavit, August 21, 1912. Mrs. Smith also deposed that defendant while with her said nothing about any intention to take up her residence at Sacramento, but "that she was going on through to Lake Tahoe." Contrary to defendant's statement in her affidavit, plaintiff deposed that when she left his house "she took with her certain of her personal effects, and left certain other of her personal effects at the home of affiant"; that defendant was present and made no comment when her mother made the following request of plaintiff: "Can we leave these boxes here until we decide what we are going to do, or where we are going to locate, and, when we notify you, will you send them to us?" and that neither defendant nor her mother "has ever notified affiant where to send said boxes"; that, on July 15, 1912, the day the complaint was filed, and, of course, before she had any knowledge of it, "defendant wrote a letter to affiant from Lake Tahoe in which she stated that she would return to Sacramento about the month of September, and would then and there be willing to see affiant and discuss their affairs."

In re Donovan, 104 Cal. 623, 38 Pac. 456, was a case where the person concerned testified that "he came to California to live," and it was claimed that the court was bound by the direct evidence of the witness. Referring to section 52 of the Political Code, the court said:

> "He had been in this state but three days, and nothing could be inferred from his presence for so short a time as to his intention in coming, and it was for the court to determine from the whole of his testimony what his intention was."
>
> "Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. If a person actually 'lives' in a certain place with the intention of remaining there indefinitely, that place must be said to be his residence. In other words, the abiding is animo manendi when residence is acquired." Marston v. Watson, 20 Cal. App. 465, 468, 129 Pac. 611, 612.

So far as defendant's acts show what her intention was with reference to establishing a residence, we think the trial court found sufficient in the affidavits to justify an inference that Sacramento had not become her abiding place, and that as to the acts indicating her intention there was sufficient conflict to bring the decision of the lower court within the rule above stated.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

24 Cal. App. 389

Ex parte CLARK. (Cr. 516.)

(District Court of Appeal, First District, California. May 5, 1914.)

1. **Municipal Corporations (§ 633*)—Criminal Prosecutions—Statute—Validity.**

An action to recover a penalty for the violation of an ordinance, making it unlawful to sell intoxicating liquors, was, by Const. art. 6, § 20, providing that the style of all process shall be "The People of the State of California," required to be prosecuted in the name of the people; Municipal Corporation Act (St. 1883, p. 272) § 867, in so far as it authorized such action to be prosecuted in the name of the municipality, being in violation of the above section of the Constitution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1390–1399; Dec. Dig. § 633.*]

2. **Criminal Law (§ 1*)—Nature of Crime—Quasi Criminal Act—"Action."**

In view of Code Civ. Proc. § 24, declaring that actions are of two kinds, civil and criminal, and section 22, defining "action" as an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong or the punishment of a public offense, there is no such intermediate grade between civil and criminal breaches of legal obligation as a quasi criminal act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 1, pp. 128–140; vol. 8, p. 7563.]

3. **Municipal Corporations (§ 635*)—Violation of Ordinance—Criminal Prosecution.**

A violation of an ordinance of a city, adopted as a police regulation, and making unlawful the sale of intoxicating liquors, was an offense against the public generally, and hence required to be prosecuted in the name of the people under Const. art. 6, § 20, requiring all process to run in the name of "The People of the State of California."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1400, 1401; Dec. Dig. § 635.*]

Application by Ella Clark for a writ of habeas corpus. Writ granted, and petitioner discharged from custody.

Burns & Watkins and E. D. Edwards, all of Fresno, for petitioner. H. A. Savage and M. G. Gallaher, both of Fresno, for respondent.

RICHARDS, J. The questions involved in this case arise upon the application of Ella Clark for a writ of habeas corpus, alleging the unlawfulness of her confinement in the county jail of Fresno county. The undisputed facts of the case are set forth in the petitioner's application for the writ, and are substantially these: The city of Sanger is a municipal corporation of the sixth class, and has been organized and exists as such under the provisions of the Municipal Incorporation Act of the state of California applicable to cities of its class. St. 1883, p. 269. Subdivision 1 of section 862 of that act empowers such cities "to pass ordinances not in conflict with the Constitution and laws of this state or of the United States." By subdivision 14 of the same section such cities are empowered "to impose fines, penalties and forfeitures for any and all violations of ordinances; to fix the penalty at fine or imprisonment or both; but no such fine shall exceed $300, nor the term of imprisonment exceed three months." By section 867 of the same act it is provided that "the violation of any ordinance of such city or town shall be deemed a misdemeanor, and may be prosecuted by the authorities of such city or town in the name of the people of the state of California, or may be redressed by civil action at the option of such authorities." The city of Sanger, assuming to be acting under the foregoing provisions of the Municipal Incorporation Act, passed an ordinance for police regulation relating to the sale of intoxicating liquors, and kindred subjects, by the terms of which the sale of intoxicating liquors in the city of Sanger was declared to be unlawful, and the specific penalty of $40 was imposed for the breach thereof, which penalty it was provided should be recoverable in a civil action against the violator of the ordinance, which action the city of Sanger was authorized and empowered to maintain and prosecute in its own name. The ordinance further provided that:

> "Whenever judgment is given and entered in any such action in favor of the city of Sanger for the recovery of the amount of such penalty and costs, the same may be enforced by execution, as provided in section 684 of the Code of Civil Procedure of the state of California,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which section of said Code is hereby adopted in so far as the same is applicable; and if the judgment in any such action direct that the defendant therein be arrested, execution may issue against the person of such judgment debtor after the return of execution against his property unsatisfied in whole or in part, and require the officer to whom the same is directed to arrest such judgment debtor and commit him to the county jail of Fresno county, state of California, until he pay such judgment according to the terms thereof, or be discharged according to law."

On the 11th day of October, 1913, the city of Sanger commenced six actions, each entitled "The City of Sanger, a Municipal Corporation, Plaintiff, versus Ella Clark, Defendant," in the recorder's court of said city. The complaint in each of said actions set forth an alleged violation of the terms of the foregoing ordinance and consequent liability of the defendant to the penalty of $40 in each case prescribed therein; a summons in each case in the usual form of process in civil actions was issued and duly served upon the defendant in the way provided for the service of civil process. The defendant in due time appeared and entered a general denial in each case, and a trial in each, apparently in the usual form of a civil trial, was had before the court, at the conclusion of which the court took the several cases under advisement, and on the following day rendered its judgment against the defendant in each case in the following form:

"That plaintiff do have and recover the sum of $40 and costs, taxed at $17.50, from the defendant Ella Clark; and that execution for said amount and costs issue according to law; and that in the event said execution is returned unsatisfied I do direct that the city marshal or other authorized officer arrest this defendant Ella Clark, and commit her to the county jail in the county of Fresno and to the custody of the sheriff of said county, until she pay the penalty of $40 hereby adjudged to be due the plaintiff, or is discharged according to law."

Upon each of these judgments a civil execution was issued and was presently returned unsatisfied, and thereupon the recorder rendered and entered in each case a further judgment in the following words:

"Execution in this action having been regularly returned wholly unsatisfied, it is by this court ordered and adjudged, as a punishment for the offense committed at the city of Sanger, county of Fresno, on September 10, 1913, as above set out, that said defendant, Ella Clark, be committed to the county jail in the county of Fresno and to the custody of the sheriff of said county for the period of 40 days, unless she sooner pay said penalty or the part remaining to be paid at the time payment is made, or otherwise discharged according to law."

Thereupon a commitment was issued by the court in the first of these cases, and delivered to the sheriff of the county of Fresno, who, acting thereunder, arrested the petitioner and imprisoned her in the county jail, from which arrest and imprisonment she now seeks to be relieved through her application for this writ. The commitments in the other five cases were also delivered to the sheriff, who holds the same subject to execution in their order upon the person of the defendant.

[1] The chief contention of the petitioner herein is that her arrest and imprisonment are illegal for the reason that she has been proceeded against and is being imprisoned in a civil action not involving fraud or a willful tort, or a militia fine in time of peace, but which, though civil in form, is criminal in nature, because solely involving the imposition of a penalty for the commission of a misdemeanor, which proceedings, the petitioner contends, were instituted and conducted by the city of Sanger in its own name and in the form and with the process of civil actions, in violation of the provisions of the Constitution, and the laws of the state passed thereunder, regulating the prosecution of persons for crimes.

Section 20 of article 6 of the state Constitution provides that "The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." The Penal Code provides that "Crimes are divided into felonies and misdemeanors" (section 16), and further provides that "A criminal action is prosecuted in the name of the people of the state of California, as a party, against the persons charged with the offense." Section 684. The Supreme Court of California has construed the foregoing provisions of the Constitution in several cases, and in relation to several different forms of proceeding, having for their ultimate consequence the imposition of a penalty in the form of imprisonment or other punishment involving disgrace. In the case of City of Santa Barbara v. Sherman, 61 Cal. 57, which involved an action prosecuted in the name of the city of Santa Barbara for the violation of an ordinance, the penalties of which were fine and imprisonment, the court held that the action was essentially criminal, and hence must be prosecuted in the name of the people. In the case of Kilburn v. Law, 111 Cal. 237, 43 Pac. 615, a proceeding instituted under section 772 of the Penal Code in the name of a private party for the removal of certain bank commissioners from office, the court held that, being instituted for the punishment of an offense in its nature criminal, the proceeding must be prosecuted in the name of the people. In the case of Fitch v. Board of Supervisors, 122 Cal. 285, 288, 54 Pac. 901, the court held that section 8 of the act of the Legislature adopted March 7, 1881 (St. 1881, p. 55), which provided for the institution of an action by "any interested party" against the board of supervisors to enforce the penalty of removal from office for their failure or refusal to perform the specific duties prescribed in the act, was void because in violation of the said provision of the Constitution requiring all prosecutions to be in the name of the people of the state of California. In these several cases the Supreme Court has applied this provision of the state Constitution indifferently to cases, whether they arose under city ordinances or state statutes, where the evident purpose and ultimate effect of the proceeding was to punish the defendant for an unlawful act; that this would seem to be the true test by which the validity of the proceeding must be determined, regardless of the form or circumlocutions of the statute or ordinance, there cannot be much serious question, especially when the real and vital object of the constitutional provision is divined. In requiring that all criminal actions must be prosecuted in the name of the people the framers of the Constitution had evidently in mind those safeguards which the law has invoked for the protection of the liberty, property, or honor of persons accused of public offenses—the right of trial by jury in proper cases; the right to stand mute and not to be required to be a witness against oneself; the right to have the presumption of innocence prevail until overcome by proof of guilt beyond reasonable doubt and to a moral certainty as contrasted with the mere preponderance of evidence required in civil cases; the right or compulsion to be personally present in certain stages of the proceeding, and to be there informed both audibly and visibly as to the nature and seriousness of the offense, and the need as well as the right to the benefit and aid of counsel. It was doubtless to insure these salutary safeguards for the benefit of persons sought to be penalized for either felonies or misdemeanors that this general and all-embracing clause was inserted in our state Constitution.

Counsel for the respondent has urged that the same provision is to be found in the state Constitution of Iowa, and which has been construed by the Supreme Court of that state to apply only to prosecutions before the higher tribunals referred to in the article of the Constitution of that state wherein the provision occurs, and hence not to be applicable to proceedings in inferior courts arising out of the violation of municipal ordinances. The Supreme Court of this state has not caught this distinction; nor do we think that there is reason for its application to this provision of our state Constitution; for the article therein which embraces this section refers to the judicial power of the state as vested, not only in its courts of general jurisdiction, but also "in such inferior courts as the Legislature may establish in any incorporate city or town." Const. art. 6, § 1. In this connection also it is urged by the respondent that the offense for which the defendant has been prosecuted is not such a public offense as to entitle it to the application of this section of the Constitution for two reasons: First, because it comes within that class of minor infractions of ordinances which are denoted in the decisions of several states as "quasi criminal"; and, second, because it is not an offense against the public generally, but only an infraction of the special enactment of the city of Sanger in the enforcement of which that municipality alone is interested.

[2, 3] As to the first of these refinements it may be said that no such intermediate grade between civil and criminal breaches of legal obligations is known to our law. Section 24 of the Code of Civil Procedure states that: "Actions are of two kinds: Civil and criminal." While section 22 of the same Code provides that:

> "An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

There is no room between the terms of these two sections of the Code for quasi criminal acts or actions for their prevention or redress.

> "A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it; it is still a criminal case." Thurston v. Clark, 107 Cal. 285, 289, 40 Pac. 437.

Nor do we think that the second refinement of the respondent can be drawn from the facts of this case. The defendant is being proceeded against for an infraction of an ordinance of the city of Sanger, adopted as a police regulation, and making unlawful the sale of intoxicating liquors in that city. The inhibited act is in its very nature an offense against the public welfare, and has always been so regarded when ordinances forbidding its commission have come under review; besides, it is expressly made a misdemeanor by the terms of the Municipal Incorporations Act; and in addition to this the defendant is actually being deprived of her liberty by being incarcerated in the county jail at public expense, in which fact or condition the general public is interested in a twofold sense. We think the offense to be clearly public in its nature, and the proceeding as clearly criminal in its character. We think, also, that the requirement of the Constitution that prosecutions shall be in the name of and by the authority of the people is one which goes to the very substance and not mere shadow of those essential rights to which the individual is entitled when proceeded against for an alleged infraction of a law having for its penalty the deprivation of personal liberty.

This view of the chief question at issue renders unnecessary a consideration of the other question presented by petitioner, relating to the concurrent operation of the five other judgments and commitments obtained in the similar and simultaneous cases brought against the defendant under the terms of the ordinance under review.

For the reasons stated the petitioner is discharged from custody.

We concur: LENNON, P. J.; KERRIGAN, J.

24 Cal. App. 692

DAVIDSON v. GRAHAM, County Clerk.

(Civ. 1262.)

(District Court of Appeal, Third District, California. June 3, 1914.)

1. MANDAMUS (§ 154*) — PETITION — SUFFICIENCY.

Under Code Civ. Proc. § 585, providing that, in an action arising upon contract for the recovery of money or damages only, if no answer has been filed within the time specified in the summons or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the defendant's default and immediately thereafter enter judgment for the amount demanded, and section 1085, providing that a writ of mandate may be issued to compel the performance of an act which the law specially enjoins, to justify the issuance of a writ of mandate to compel the county clerk to enter defendant's default, plaintiff was required to show by his petition that no answer was filed within the statutory time or such further time as may have been granted, and that plaintiff made application for the default.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

2. JUDGMENT (§ 107*)—BY DEFAULT—DEMURRER REMAINING UNDISPOSED OF.

Conceding that a demurrer may be fully disposed of, without an order of the court, by a stipulation of the parties, the clerk was not required to enter defendant's default where a demurrer was on file undisposed of and unaffected except by a stipulation that no default should be taken against the defendant, he waiving his demurrer, and that he should have to a specified date in which to file and serve his answer, signed in the name of the defendant's attorney by his clerk, where it was not shown that the clerk had authority to sign the attorney's name, especially as the stipulation did not expressly limit the time during which it was provided that no default should be taken.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198–200; Dec. Dig. § 107.*]

3. MANDAMUS (§ 154*) — PETITION — SUFFICIENCY.

Where plaintiff, applying for a writ of mandate to compel the clerk to enter defendant's default, relied upon a stipulation as waiving a demurrer filed by the defendant, he should have directly alleged that defendant entered into or executed such stipulation, instead of alleging that there was entered into and filed such a stipulation.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

Application by Mattie E. Davidson for a writ of mandate against Eugene D. Graham, as County Clerk. Demurrer to the petition sustained.

For decision in Supreme Court transferring cause to Court of Appeal, see 141 Pac. 216.

Webster, Webster & Blewett, of Stockton, for petitioner. A. H. Carpenter and Walter F. Lynch, both of Stockton, for respondent.

BURNETT, J. This is an application for a writ of mandate to compel the clerk of San Joaquin county to enter the default of one A. T. Karry for his failure to answer in a certain action brought against him by said Mattie E. Davidson in the superior court of said county.

The petition herein sets out the complaint in said action and alleges: That it was filed, that summons was issued and served upon said Karry, that he appeared and filed a demurrer, which is exhibited.

"That thereafter on the 18th day of August, 1913, there was entered into and filed in said action a stipulation in the words and figures as follows, to wit: '(Title of court and cause.) It is hereby stipulated and agreed that no default shall be taken against the defendant, A. T. Karry, he waiving his demurrer, and that the said defendant, A. T. Karry, shall have to and inclusive of September 15th, 1913, in the which to file and serve his answer on the merits. Dated this 18th day of August, 1913. Webster, Webster & Blewett, Attorneys for Plaintiff. A. H. Carpenter, Attorney for Defendant, A. T. Karry. By Walter F. Lynch, Clerk.'"

That, on December 1, 1913, the plaintiff filed with the clerk her demand for the entry of Karry's default and tendered the legal fee for the same, that the demand was refused, that thereafter, upon notice given, a motion was made in the said superior court for judgment against said Karry on the ground that he had suffered default but that the motion was denied without prejudice, and that, on December 16th, defendant Karry filed a demurrer in said action, which is set out.

[1] The claim is that it was the clear, ministerial duty of the clerk to enter the default at the time the said demand was made, and therefore that section 1085 of the Code of Civil Procedure as to mandate applies.

It is further contended that the law which "specially enjoins" that duty is found in section 585 of the said Code, which it is sufficient to quote as follows:

"Judgment may be had, if the defendant fails to answer the complaint, as follows: (1) In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the complaint."

We are dealing here simply with the question of default; therefore the nature of the said action is immaterial, although it may be said that it appears it was one to recover damages only for the wrongful levy of a writ of attachment.

It is clear, from the foregoing, that, to justify the issuance of the writ of mandate to compel the county clerk to enter said default, it must be shown by the petition herein: (1) That no answer was filed within the statutory time, "or such further time as may have been granted"; and (2) that plaintiff in the cause made application for the default. It is conceded that the demurrer was an "answer" within the contemplation of said provision, and it expressly appears that a proper application was made for the entry of the default.

[2] The only question remaining, then, is whether the demurrer filed by said Karry

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was undisposed of and of force and effect at the time the demand for default was made.

It is the claim of petitioner that this demurrer was no longer operative as it had been waived by means of said stipulation. The demurrer presented an issue of law (section 589, Code Civ. Proc.), and "an issue of law must be tried by the court, unless it is referred upon consent" (section 591, Id). There is no statutory provision for waiving a demurrer that has been filed in a cause. To effectually dispose of it it is probable that an order of court is required sustaining or overruling it or allowing it to be withdrawn.

But, conceding that by stipulation it may be removed as a pleading in the case, is there a sufficient allegation to show such waiver?

[3] In the first place, there is no allegation that said stipulation was executed by said defendant Karry. In that respect the averment is "there was entered into and filed in said action," etc. There should, of course, be a direct allegation that Karry "entered into" or executed said stipulation. The waiver is the only reliance of petitioner, and that, as seen, depends upon the execution of said stipulation by Karry, and, manifestly, we cannot say that the clerk refused to perform a plain duty unless it appears from the petition herein that Karry was a party to said stipulation.

Again, the purported stipulation does not appear to have been signed by A. H. Carpenter, the attorney for defendant Karry. Assuming that the attorney for a party has authority to enter into such stipulation, it will not be claimed that it extends to the attorney's clerk. If, as a matter of fact, the clerk was authorized by Mr. Carpenter to sign the latter's name to the stipulation, there should be an allegation to that effect. In other words, it should be shown that it was the act of the attorney and not of his clerk.

We must assume that the facts disclosed to the clerk were only those exhibited here by this petition. It is too much, therefore, to demand of him that he should enter the default of a party where the latter's demurrer is on file undisposed of and unaffected except possibly by a purported stipulation simply purporting to be signed by a clerk of the attorney for said party. But, if effect be given to said stipulation, it would at least appear doubtful whether, according to its terms, the clerk should enter the default of defendant Karry. Therein it is provided that "no default shall be taken against the defendant A. T. Karry." As to this covenant, there is certainly no express limit as to time. Probably the parties signing the paper intended to provide that no default would be taken prior to September 16, 1913, but if so it should have been more clearly expressed, and it is not an unreasonable construction that, in view of the waiver of the demurrer, no default was to be taken, although there was no express agreement to extend the time to answer beyond September 15, 1913.

We cannot say therefore that the entry of a default by the clerk was a duty enjoined upon him by law, and the demurrer to the petition is sustained, and the peremptory writ denied.

We concur: CHIPMAN, P. J.; HART, J.

On Application for Rehearing.

PER CURIAM. On application for a rehearing, it is claimed that the faults of the petition may be avoided by an amendment, permission to file which is requested. The portion of the judgment therefore rendered that "the peremptory writ is denied" is set aside, and there is substituted therefor, "Petitioner will be allowed ten days in which to file an amended petition."

24 Cal. App. 426

LYNIP v. ALTURAS SCHOOL DIST. OF MODOC COUNTY. (Civ. 1220.)

(District Court of Appeal, Third District, California. May 12, 1914.)

1. TRIAL (§ 404*)—FINDINGS OF FACT—CONSTRUCTION.

A finding that "all of the allegations of said complaint are true" was a finding, not only that an assignment, set out in hæc verba in the complaint, was executed, but that its terms were true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957–962; Dec. Dig. § 404.*]

2. ASSIGNMENTS (§ 73*)—BUILDING CONTRACT —FUTURE EARNINGS.

An assignment by a contractor to plaintiff recited the fact that the contractor had theretofore contracted with a school district to construct a school building, whereby the trustees were to pay certain amounts monthly as the work progressed until its completion, and the balance upon completion and acceptance of the building, and, in consideration of an advancement, assigned to plaintiff $430, "out of the payment that is to be paid to me, * * * upon the completion and acceptance" of the building, and the school trustees indorsed thereon that they recognized the assignment and agreed to pay such sum to the assignee out of the payment to be made to the contractor at the time of completion and acceptance of the building. *Held*, that the fund upon which the assignment operated was that which would become payable to the contractor upon completion of the building in accordance with the terms of the building contract, it being a mere equitable assignment of moneys subsequently to become due, and in no way purporting to convey a present interest, and hence upon abandonment and failure of the contractor to complete the building defendant's liability ceased to exist.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139–142; Dec. Dig. § 73.*]

3. TRIAL (§ 404*)—FINDING BY COURT—CONSTRUCTION.

A finding that there is now due, owing, and unpaid to plaintiff from defendant, on account of moneys advanced to a contractor, *held*, in view of the averments of the complaint and the other facts admitted and found, a mere conclusion of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957–962; Dec. Dig. § 404.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. **Work and Labor** (§ 14*)—**Building Contract—Part Performance—Abandonment.**

A building contractor, voluntarily abandoning a contract, cannot recover for the value of the work and material already performed and furnished.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

5. **Contracts** (§ 354*)—**Actions for Breach—Findings—Construction.**

A finding that a building contractor "abandoned his contract" was a finding that the abandonment was the result of the contractor's own act and volition.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 354.*]

6. **Appeal and Error** (§ 907*) — **Review — Presumptions.**

When there is no bill of exceptions or statement of the case, of other legally authenticated record of the evidence, all presumptions are in favor of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by B. F. Lynip against the Alturas School District of Modoc county. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

C. S. Baldwin, of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

HART, J. On the 6th day of June, 1911, the defendant and one A. E. Pearson entered into a contract whereby the last named agreed to construct a school building for the former for the sum of $20,350. By the terms of said contract, said Pearson was to furnish the labor and material for the construction of the building and was to complete the construction thereof, in accordance with plans and specifications adopted for that purpose, on or before the 15th day of November, 1911. It was further stipulated in said contract that payments on the contract price should be made by the school district to Pearson as follows:

"Seventy-five per cent of the value of the material and the work upon said building * * * on the first day of each month during the term of this contract, said value to be based upon the superintendent of construction's estimate. And the remainder of the said twenty thousand three hundred and fifty dollars after the full completion of said school building and upon its acceptance by the said board of trustees of the Alturas School District."

It is then provided that no installment as above specified shall be paid until the superintendent of the school building or superintendent of construction shall have first certified to the board of school trustees that the work required to be performed as a condition precedent to the right to claim and receive the payment of such installment has been fully and satisfactorily performed. It is further provided in said contract that:

"Should the said contractor, at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the said first party shall have the right to provide material and workmen, to finish the said works, and the expense incurred thereby by said first party shall be deducted from the amount of said contract price."

The complaint alleges that on the 6th day of November, 1911, while engaged in the construction of said school building under the contract whose terms are, in part, above set forth, said Pearson—

"being short of funds and by reason thereof being unable to proceed with the erection of said building, which was then in a partial state of completion, applied to this plaintiff for the loan of $430 in cash, to enable him to procure the necessary labor and material for use in and upon said school building in the construction thereof; and upon said last-named date the said * * * Pearson duly made, executed, and delivered to plaintiff an assignment of $430 of the money payable to him, the said * * * Pearson, from said Alturas School District for the construction of said building. That said assignment so made * * * as aforesaid was in writing and was in words and figures as follows: 'Know all men by these presents, that I, A. E. Pearson, have heretofore entered into a contract with the board of trustees of the Alturas Public School District to construct a school building for said district, by the terms of which contract the said trustees of said school district have agreed to pay certain sums of money to me as the work progresses on said building, on the first day of each month until said building is completed, *and the balance of the contract price to be paid to me upon completion and acceptance of said building;* and, whereas in order to enable me to pay for labor and material furnished and used in said building and performed thereon, it is necessary for me to have certain sums of money from time to time and week to week during each of said months; and, whereas, B. F. Lynip has this day advanced me the sum of $430 for use by me in the payment of said labor and material: Therefore I do hereby assign and set over unto the said B. F. Lynip the said sum of $430 out *of the payment that is to be made to me by the said board of trustees upon the completion and acceptance of said building as aforesaid*, and to receipt for same in all respects as fully and completely as I might or could do. Dated this 6 day of November, 1911. A. E. Pearson.' And upon which said assignments appeared the following indorsements and agreements, to wit:

" 'We hereby recognize the above assignment and hereby agree to pay the sum therein named to the said B. F. Lynip instead of to the said A. E. Pearson, out of the payment to be made by us to the said A. E. Pearson on the construction of said school building at the time of completion and acceptance of said building. Dated this 6 day of November 1911. F. F. Auble, S. T. Ballard, L. S. Smith, Trustees of Alturas School District.'

" 'This is to certify that the above A. E. Pearson has accomplished work and furnished material and is entitled to more than the amount drawn, including the above amount, as per the 25 per cent basis of his contract upon the completion and acceptance of said school building. H. M. Sweeney, Superintendent.'

"That relying upon the said assignment of said A. E. Pearson and its approval thereof by said defendant, and the certificate of said superintendent, this plaintiff advanced to the said A. E. Pearson the said sum of $430 in lawful money of the United States, and the said $430 so advanced by plaintiff to the said A. E. Pearson, as aforesaid, was used by the said A. E. Pearson in paying for labor performed in the construction of said school building and in paying for material furnished in the construction thereof."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The complaint further avers that, at the time of the execution and delivery to the plaintiff of said assignment, the said school district was indebted to the said Pearson in a sum in excess of the said sum of $430, "in this, that by the terms of the contract entered into between the said A. E. Pearson and the said school district, the said school [district] was to withhold from the monthly payments therein specified twenty-five per cent. of the value of the labor performed on said school building and material furnished therefor, until the completion of the building." It is then alleged that said "building has been completed and is now being occupied by said defendant for school purposes, but that no part of said sum of $430, or any interest thereon, has ever been paid to this plaintiff by said defendant, or by any one else," and that the same is "now due and owing to plaintiff and unpaid to him." Upon information and belief the plaintiff alleges that the defendant "has used and expended for other purposes than paying this plaintiff the sums of money withheld by it out of the money owing by it to the said A. E. Pearson as aforesaid, and that none of said money so withheld by it as aforesaid is now available or will be available at any time hereafter, for the payment of the said $430 and interest, or any part thereof to this plaintiff."

A demurrer on general and special grounds was interposed to the complaint and overruled.

The gist of the defendant's defense is set forth in paragraph 6 of its answer, wherein it is admitted that the contract above described was entered into on the 6th day of June, 1911, between said Pearson and the defendant; that Pearson thereupon commenced the performance of said contract, and at various times, as the work progressed, the defendant paid to Pearson all sums of money due and owing to him by virtue of the terms of said contract; that on the 1st day of January, 1912, and before the completion of the school building according to the terms of said contract, Pearson "neglected and refused to furnish labor and material necessary to complete said school building" according to the requirements of said contract, "and abandoned his said contract and said uncompleted school building." Thereupon, so the answer proceeds, the defendant, in pursuance of the authority so vested in it by said contract, entered into and took possession of the uncompleted school building, and proceeded to complete the same in accordance with the terms of said contract and the plans and specifications adopted therewith, and to that end furnished the required labor and materials, "expending therein for such necessary labor and materials to complete said school building the entire balance of said contract price remaining in its hands over and above the sum theretofore paid to said Pearson under the terms of said contract; that all sums of money which became due said A. E. Pearson under or on account of said contract were fully paid by defendant to him, or to his order, prior to the time of his abandonment of said contract as aforesaid, and by reason of the failure of said Pearson to complete his said contract, and his abandonment thereof, no sum of money was, or ever at any time became, due thereunder out of which defendant could lawfully pay to plaintiff the sum sued for on account of said assignment."

The court found that the contract as above described was entered into between Pearson and the defendant on the 6th day of June, 1911; that Pearson entered upon the execution of the terms of said contract; that on the 6th day of November, 1911, Pearson borrowed the sum of $430 from the plaintiff upon the assignment and indorsements thereon, as set out in the complaint and above quoted; that, at the time of the execution of said assignment, the defendant was indebted to Pearson in an amount greatly exceeding the sum so loaned by the plaintiff to Pearson for work already performed by the latter on said building; that after said assignment was delivered to the plaintiff Pearson performed work and labor upon the building amounting to the sum of $1,497.66, and that after said assignment was made and delivered to plaintiff the defendant paid over to Pearson, for work performed on said building and materials furnished for the same, the sum of $5,200; that the defendant paid said Pearson, on account of said contract, the aggregate sum of $14,895, of which amount the sum of $5,200 was made in three different payments subsequently to the date of the execution and delivery of said assignment and the acceptance thereof by the defendant, to wit, November 9, 1911, $4,100, December 4, 1911, $600, December 18, 1911, $500; that said payments were based upon the written estimates furnished by the superintendent of construction, except the payments of December 4 and December 18, 1911, and amounting to 75 per cent. of the superintendent's estimate of the value of labor and material furnished for the building by the contractor during the month preceding the payment. The court found that Pearson commenced the construction of said school building and continued work on the same up to about January 1, 1912, "at which time he abandoned his contract," after which the defendant took possession of and completed the building in accordance with the "Pearson contract, and necessarily expended therein the sum of $5,848.38 for labor and materials. At the time of the abandonment of said contract by said Pearson on January 1, 1912, there was in the building fund of said school district the sum of $5,455, the balance of the contract price of said school building, all of which moneys were subsequently expended by defendant in completing said building according to the Pearson contract." The court further found that:

"All of the allegations of the said complaint are true, and that the said school building was fully completed on or about September the 1, 1912, and ever since then has been used and occupied by defendant as its public school building."

From its findings, the court concluded, as a matter of law, that "the defendant is justly and legally indebted to plaintiff in the sum of $430, with interest thereon at the rate of 7 per cent. per annum, from December 1, 1911, to this date, and that said last-named sum, with said interest, is now due, owing, and unpaid to plaintiff from the said defendant," and accordingly awarded judgment to the plaintiff for said amount.

This appeal is by the defendant from the judgment on the judgment roll alone.

The defendant insists that on the facts found by the court the judgment ought to have been for it. Its position is, as is manifest from the defense set up in the answer, as above indicated, that the assignment by Pearson to the plaintiff was of the money to accrue in favor of the former on the 25 per cent. of the contract price of the building and to become due and payable to Pearson only on the completion by him of the construction of the building according to his contract with the defendant. In other words, the contention of the defendant is that the assignment was not intended to operate upon any moneys becoming due and payable to Pearson as the work progressed, on the 75 per cent. basis prescribed by the building contract, but solely and exclusively upon the fund to become due and payable upon the completion of the terms of said contract by Pearson, and that, when Pearson abandoned his contract, and so failed to complete the construction of the building according to his agreement, the liability of the defendant under the assignment thereupon ceased further to exist. We can see no way of escaping a conclusion in harmony with the defendant's position, as above explained.

[1] The court found, as we have seen, that "all of the allegations of the said complaint are true," and this constituted a finding that the assignment, as set out in hæc verba in the complaint, was not only executed, but that its terms as so set out are true, and that the defendant accepted and assumed the liability thereby created against it and none other.

[2] The assignment so found to have been executed and delivered to the plaintiff by Pearson, and acknowledged and accepted by the defendant, needs no construction to ascertain its meaning and scope. It clearly, unambiguously, and with unerring certainty speaks for itself, and, as plainly as language can express any proposition, provides that the fund upon which it was intended exclusively to operate was that which the building contract provided should accrue and mature in the hands of the defendant, and to become payable to Pearson only upon the completion by him of the building in accordance with the terms of the building contract. As counsel for the defendant suggests, it constituted a mere equitable assignment of moneys subsequently to become due and payable, and in no way purports to convey a present interest. In other words, the vitality of the assignment, so far as it was capable of accomplishing any substantial purpose, was made to depend and did depend wholly upon the fulfillment by Pearson of a condition precedent, viz., the completion by him of the construction of the building and the consequent maturing of an obligation on the part of the defendant to pay to him, or to any one regularly and duly subrogated to his rights therein, the 25 per cent. of the contract price of the building.

That the effect and scope of the assignment was understood by all the parties to the transaction of which it was the crystallization to be limited in its operation to the fund to mature on the 25 per cent. and not on the 75 per cent. basis prescribed by the building contract, and payable on the completion of the building by Pearson, is clearly and unmistakably emphasized by the language of the written indorsement on the assignment of the acceptance or acknowledgment of said instrument and agreement by the defendant's board of trustees to pay to the plaintiff, instead of to Pearson, the sum of money named therein. Said indorsement, as seen, reads as follows:

> "We hereby recognize the above agreement and hereby agree to pay the sum named to the said B. F. Lynip instead of to the said A. E. Pearson, *out of the payment* to be made by us to the said A. E. Pearson on the construction of said school building *at the time of completion and acceptance of said building*."

Nothing could be clearer than that, by the foregoing language, the board of trustees of the defendant intended and understood that the assignment was to be restricted in its operation to the fund which, under the terms of the building contract, could only mature when the building had been completed by Pearson and accepted by the defendant, and that, since the liability thus named and assumed by the defendant was precisely the same as that created by the assignment itself, the plaintiff must thus have had emphasized upon his mind the proposition that solely upon the fund to mature only on the final completion of the building was the efficacy of his assignment made to depend.

It necessarily follows that when, as the court distinctly finds was true, the building contractor abandoned his contract before completing the construction of the building and thus failed to comply with the condition, the execution of which was prerequisitely essential to the maturing of the fund from which only the assignment, by virtue of its own terms, could be satisfied, any liability which the defendant might have incurred by reason of said assignment was thereupon extinguished, since the assignment vested in the plaintiff only such rights as the assignor had in the fund upon which the assignment was intended to operate, or, as is said in First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. 45, the assignment could vest in the assignee no rights different from or superior to those of the original contractor.

[3] The only finding which furnishes even plausible ground for the contention that the judgment is sufficiently supported is the following:

> "* * * That there is now due, owing and unpaid to plaintiff from defendant on account of the money loaned and advanced by him to A. E. Pearson as aforesaid the sum of $430, with interest," etc.

But, considered by the light of the averments of the complaint and the other findings, said so-called finding must be treated as a conclusion of law rather than as a finding of fact. We may say that the so-called finding involves one of those peculiar statements which may constitute either a finding of fact or a conclusion of law, according to the connection in which or the circumstances under which it is employed. As has been well said as to matters designated "findings of fact" and "conclusions of law":

> "In one connection a word or a phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law." Hill v. Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279.

For illustration, in Gay v. Moss, 34 Cal. 125, it was held that a finding that "the assignment and delivery of the contract was a mortgage and not a pledge," although stated as a finding of fact, was, in view of the other facts admitted and found, a mere conclusion of law. See 2 Hayne on New Trial and Appeal (Rev. Ed.) p. 1388. Hence we say that the so-called finding of fact above referred to cannot, in view of the allegations of the complaint and of the other facts found by the court, be held to be anything more than a mere conclusion of law, as we will now proceed to show.

The foundation of the plaintiff's right to a recovery is obviously the assignment. Upon that instrument his right to a recovery must stand or fall. As seen, the plaintiff, in his complaint, pleaded and set out in hæc verba said assignment. The complaint nowhere alleges that, at the time of the completion of the building, there was any money due from the defendant to Pearson on account of the building contract. It is true, as seen, that the complaint avers that, "*at the time the assignment was made to this plaintiff*," the defendant was indebted to Pearson "for more than the said sum of $430, in that by the terms of the contract entered into between the said Pearson and the said school district, the said school district was to withhold from the monthly payments therein specified 25 per cent. of the value of the labor performed on said school building and material furnished therefor, until the completion of said building, and that *at the time said assignment was made to plaintiff* by said Pearson as aforesaid, the amount so *at that time* withheld by said defendant for work and labor and material furnished * * * in the construction of said building amounted to more than said sum of $430," etc. But that averment, conceding that it states the truth, is manifestly immaterial and can, of course, afford no aid to the plaintiff. The assignment, as is clear from its terms, solely affected a fund different and distinct from any which might have matured in favor of Pearson prior to the completion of the building, and the averment just quoted could have no more pertinency to the right of the plaintiff to recover, if any he had, than an averment that the school district was indebted to some other person than Pearson.

It is also true, as before shown, that on the assignment as set out in the complaint is the indorsement of the superintendent of construction of the building to the effect that Pearson "has accomplished work and furnished material, and is entitled to more than the amount drawn, including the above amount, *as per the 25 per cent. basis of his contract upon the completion of and acceptance of said school building*." While the language of said indorsement, taken by itself, is rather obscure, the succeeding averment of the complaint renders it perfectly clear that the superintendent of construction entered said indorsement upon the assignment prior to the delivery thereof to the plaintiff and before the transaction to which it related was fully completed—that is, before the plaintiff had actually advanced the money to Pearson—and that said indorsement, therefore, solely referred to the 25 per cent. remaining unpaid to Pearson on the work and materials performed and furnished up to the time of the execution of the transaction of which the assignment was the culmination. The averment referred to reads, in part:

> "That relying upon the said assignment of said A. E. Pearson and its approval thereof by said defendant, *and the certificate of said superintendent*, this plaintiff advanced to the said A. E. Pearson the said sum of $430," etc.

But if any doubt could by any possibility arise from the complaint as to whether the indorsement by the superintendent of construction referred to the 25 per cent. remaining due Pearson at the time the assignment was executed and delivered to the plaintiff, it must readily be removed by the finding of the court upon that proposition, as follows:

> "* * * And thereupon the said A. E. Pearson made and executed the assignment to plaintiff and secured the indorsements thereon by the said trustees, and by H. M. Sweeney, the superintendent of construction of said building, as set forth in paragraph 2 of plaintiff's said complaint, and delivered same to plaintiff as security for the said loan. And thereupon the said plaintiff accepted the said assignment, *with said indorsements*, from the said A. E. Pearson and loaned him the said sum of $430 in cash."

Thus it appears, as above stated, that the complaint does not anywhere allege that there was any money due Pearson on account of his contract with the defendant at the time of the completion of the building.

Now, as to the findings other than the one under present consideration: As has been shown, the court found that the assignment as pleaded by the plaintiff (the foundation of his right to a recovery) was executed, and that the terms thereof were as they plainly purport to be by the pleaded instrument itself. The court further found, as seen, that the defendant paid to Pearson, out of the contract price, the total sum of $14,895, the last payment being on the 18th day of December, 1911, or 13 days before the time at which the latter abandoned his contract to construct the building, and that the sum then remaining of the contract price, together with the additional sum of $393.38, was required and actually used by the defendant to complete the building according to the terms of the building contract after Pearson had abandoned the same. From this finding, it is clear, and, indeed, it irresistibly follows, that the fund the existence of which at the time of the completion of the building was contemplated by the building contract, and upon which alone the assignment was to operate, did not and, in the very nature of the case, could not mature in favor of Pearson or his assignee.

Thus readily will it be observed that, if the so-called finding above adverted to, viz., "that there is now due, owing, and unpaid to plaintiff from defendant on account of the money loaned and advanced by him to A. E. Pearson * * * the sum of $430," etc., is to be regarded as a finding of fact, it would not only not be responsive to or within any issue tendered by the complaint or made by the pleadings, but it would be contradictory to the other findings which, obviously, were educed from the only evidence proper to be received into the case under the issues as framed—that is to say, it would be irreconcilably inconsistent with the finding that Pearson abandoned his contract before completing the building and with the assignment itself, which, as pleaded by the plaintiff as the sole foundation of his right to a recovery the court found was executed and delivered to the plaintiff by Pearson in consideration of the loan by the former to the latter of the sum of money therein specified, which finding, in view of the plain and unobscure meaning of the instrument, necessarily implies the further finding (or perhaps it may be more accurate to say compels the legal conclusion) that the assignment was to operate solely upon a fund only to mature, under the terms of the building contract, at the time of the completion of the building by Pearson in conformity with the requirements of said contract and the acceptance of said building, as so completed, by the defendant. Hence, as stated, the so-called finding, although included by the court in its findings of fact, cannot be invested with a higher function than that of a mere conclusion of law, and, as has been shown, one which is obviously erroneous.

[4, 5] But it appears to be the view of counsel for the plaintiff that this case comes within the principle of certain cases where it is held that a contractor may abandon a building after the partial completion thereof and at the same time recover for the value of the work and material already performed and furnished. Among the cases cited by counsel as supporting that proposition is that of Adams v. Burbank, 103 Cal. 646, 37 Pac. 640. There is, however, a clearly marked distinction between that case and the case at bar in respect of the facts. In the Adams-Burbank Case it appeared that, "without cause, and in violation of the contract, defendant took possession of the building, ousted the plaintiff [contractor] therefrom, and refused to permit him to complete the same in consonance with the contract, and appropriated to his own use the material on hand and provided to be used therein or in the construction thereof." In the case at bar, neither the pleadings nor the findings show that Pearson was caused to abandon the contract or prevented from completing the building through any act or fault of the defendant. Indeed, while the complaint contains no reference to the abandonment of the contract by Pearson, the answer alleges, as seen, "that before the completion of said contract, to wit, on or about the 1st day of January, 1912, said Pearson *neglected and refused to furnish labor and material necessary to complete said school building according to the terms of said contract, and abandoned his said contract and said uncompleted school building*," and that thereupon the defendant entered into and took possession of said uncompleted building and furnished the labor and material and completed said building according to the terms of the Pearson contract. Presumptively, upon evidence responding to those allegations of the answer, the court based its finding that on or about January 1, 1912, Pearson "*abandoned his contract* and the uncompleted building was completed by defendant school district." But this finding is itself clear, definite, and certain in meaning. It can imply nothing less than that Pearson, without fault of any person other than himself, relinquished and refused to proceed with the execution of his contract according to its terms. "To abandon," says the Supreme Court of Massachusetts, in Pidge v. Pidge, 3 Metc. 257, 265, quoting Crabb on Synonyms, "is totally to withdraw ourselves from an object; to lay aside all care for it; to leave it altogether to itself," and in Sikes v. State (Tex. Cr. App.) 28 S. W. 688, 689, the word "abandon" is defined to mean "a giving up; a total desertion; an absolute relinquishment." Hence, when the court said that Pearson "abandoned his contract" it meant to find, and does find, if the ordinary,

usual, and natural signification is to be attributed to words, that the abandonment of the contract was solely the result of Pearson's own act and volition—that he voluntarily relinquished or withdrew from the same without the consent of the defendant.

[6] In the foregoing discussion, we have not lost sight of the familiar rule that all presumptions are to be indulged favorably to the support of the judgment, where the appeal is not supported by a bill of exceptions or a statement of the case or other legally authenticated record of the evidence.

Our conclusion is that judgment ought to be entered upon the findings in favor of the defendant. Indeed, it is manifest that the complaint does not state a cause of action against the defendant, and that the demurrer should have been sustained on the general ground.

The judgment is reversed, with directions to the court below to enter judgment upon the findings for the defendant.

We concur: CHIPMAN, P. J.; BURNETT, J.

168 Cal. 91

PACIFIC RYS. ADVERTISING CO. v. CONRAD, Chief of Police. (S. F. 6247.)

(Supreme Court of California. June 26, 1914.)

1. LICENSES (§ 5½*)—POWERS OF MUNICIPALITY.

It is within the power of a municipality to impose license taxes upon persons displaying advertising cards in railway cars operated through the municipality.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5½.*]

2. LICENSES (§ 5½*)—LICENSE TAXES—VALIDITY.

A municipality cannot, under the guise of license taxes operating as revenue measures, subject legitimate business such as display advertising in railway cars to oppressive or unjustly discriminatory burdens, but the power of the courts cannot be invoked unless the ordinance is clearly oppressive and discriminatory; the matter otherwise being one of legislative cognizance.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5½.*]

3. COMMERCE (§ 16*)—INTERSTATE COMMERCE—WHAT CONSTITUTES.

Mere contracts, though executed in several states, are not of themselves interstate commerce, and hence a license tax upon display advertising in railway cars operating wholly within a municipality in the state is not invalid as a burden on interstate commerce because the corporation displaying the advertising made the contracts therefor in a foreign state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. § 16.*]

Department 2. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Pacific Railways Advertising Company, a corporation, against John Conrad, Chief of Police of the City of Alameda. From a judgment for defendant, plaintiff appeals. Affirmed.

Heller, Powers & Ehrman, of San Francisco, for appellant. A. F. St. Sure, of Alameda, for respondent.

HENSHAW, J. Plaintiff sought an injunction restraining the respondent from interfering with advertising cards which it was displaying in the railway cars operated by the Southern Pacific Company in Alameda. The interference of the chief of police was based upon the refusal of the plaintiff to pay the sum exacted by the license ordinance of the city of Alameda. The vital question upon the trial and upon this appeal is whether that ordinance is so unjust, oppressive, and discriminatory as to be illegal and void. Judgment passed for defendant upon general demurrer sustained to plaintiff's complaint, and plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The complaint alleges that its business, conducted throughout various states of the United States and the cities therein, is that of displaying upon printed cards announcements of various business enterprises in street cars and steam cars carrying passengers in such cities. The general office of the corporation is in New York City, and it maintains subsidiary offices in other large cities. Under contract with the Southern Pacific Railway Company it placed its advertisements in the 57 cars operated by that company in and through the city of Alameda and other nearby cities. Plaintiff's ability to secure contracts and maintain its business depends upon its ability to place these advertising cards throughout the United States generally. The Alameda branch of its industry is in its infancy, and is maintained at a loss; the gross annual income for advertisements so displayed in the city of Alameda being about $8,000 a year, and the actual operating expenses for this branch of the business exceeding $12,000 a year. It was so maintained at a loss because it was a part of the general business, in the hope and expectation that in time plaintiff might increase its advertising rates so as to make that branch of the business profitable. The methods of public announcement or advertisements prevailing in the city of Alameda are the newspapers, outdoor displays on billboards, and displays in cars. The license provided by the ordinance of Alameda for printing and publishing newspapers, including the display of such advertisements as those presented to the public by plaintiff, is $25 per annum. No license whatsoever is required of those conducting the business of billboard displays, while the tax or license upon plaintiff's business is fixed at $100 per annum. It is further urged, as showing the discriminatory character of this ordinance, that other businesses requiring more protection and more use of public service or regulation are charged much smaller license fees. Thus banks pay $60 a year; building and loan associations $25. Finally, plaintiff pleads that the ordinance is void as being an unauthorized interference with the interstate commerce which it is carrying on. Upon these allegations plaintiff sought a judgment that the ordinance was injust, discriminatory, oppressive, and void.

[1, 2] The ordinance is clearly a revenue measure within the power of the municipality to pass. The limitations upon the exercise of this power are familiar ones, that a legitimate business such as this shall not be subjected to oppressive or unjustly discriminatory burdens. Within that limit there is full play for municipal discretion. In re Guerrero, 69 Cal. 88, 10 Pac. 261; Wolf v. Lansing, 53 Mich. 367, 19 N. W. 38; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Cooley, Taxation (2d Ed.) p. 599. It is only when such an ordinance is clearly unjustly oppressive and discriminatory that the power of a court may be invoked to right the wrong. Manifestly there is, and must be, a broad zone dividing and delimiting, upon the one hand, those ordinances which are clearly reasonable and just from those which are as clearly unreasonable and unjust. In all that broad zone legislative discretion operates. It is doubtful territory. Ordinances falling within it cannot be set aside by the courts, for then there is a clear substitution of the judgment of the courts for the judgment of the Legislature and thus plain judicial legislation. It would add nothing to this consideration to analyze and discuss the many cases presented for consideration by opposing counsel. The result of the consideration, however, may be declared in this: That the ordinance in question falls within the indicated zone where the view of a court may not be substituted for the determination of the Legislature.

[3] Whatever may be the general nature of plaintiff's business, the particular business for the conduct of which a license fee was here exacted was a business conducted wholly within the state of California, and in no way involved the transportation of goods. Mere contracts, though executed in several states, are not in and of themselves any part of interstate commerce within the meaning of the federal Constitution. Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; New York v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

168 Cal. 81

UNITED IRON WORKS v. OUTER HARBOR DOCK & WHARF CO. (L. A. 3001.)

(Supreme Court of California. June 26, 1914.)

1. EVIDENCE (§ 397*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.

Civ. Code, § 1647, and Code Civ. Proc. § 1860, providing that a contract may be explained by reference to the circumstances under which it was made, are but declaratory of the common-law rule, and a contract reduced to writing and executed cannot be varied by parol evidence of surrounding circumstances.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756–1765; Dec. Dig. § 397.*]

2. EVIDENCE (§ 448*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.

Parol evidence of the surrounding circumstances is admissible only where on the face of the contract there is doubt, and the evidence is used to dispel the doubt by showing what the parties meant by what they said, but not by showing that they meant something other than what they said.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. § 448.*]

3. EVIDENCE (§ 442*)—PAROL EVIDENCE—EFFECT ON PRIOR CONTEMPORANEOUS OR SUBSEQUENT AGREEMENTS.

Where parties to a contract have reduced it to writing and the written instrument appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed to contain the whole of the agreement, and parol evidence of prior, contemporaneous, or subsequent conversations or representations is inadmissible to vary the instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897; Dec. Dig. § 442.*]

4. SALES (§ 267*)—WARRANTIES—CONTRACTS IN WRITING—EFFECT ON PRIOR CONTEMPORANEOUS OR SUBSEQUENT AGREEMENTS.

A written contract for the construction of a dredge, which stipulates that the manufacturer warrants that the dredge will move a specified quantity of material a given distance, provided it is operating in dredgable matter specifically defined, is not within Civ. Code, § 1770, providing that one manufacturing an article for a particular purpose warrants by the sale thereof that it is reasonably fit for that purpose, though it was understood that the dredge was to be used in a particular harbor, and parol evidence of an additional warranty is inadmissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

5. CONTRACTS (§ 166*)—CONTRACTS REDUCED TO WRITING — INSTRUMENTS ATTACHED TO CONTRACT.

Where a written contract refers to an instrument specifically identified as a part of the contract, the instrument is admissible in evidence whether it tends to make the whole contract ambiguous or not, and to exclude the instrument is in ordinary cases prejudicial error.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 749; Dec. Dig. § 166.*]

6. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

Where a contract for the construction of a dredge according to a proposal, made a part of the contract, was complete without the proposal save in one particular, the error in excluding the proposal was not prejudicial, where the language in the proposal and not in the contract did not affect the rights or liabilities of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

7. SALES (§ 261*)—CONTRACTS—REPRESENTATIONS—WARRANTY.

A statement by a contractor of a dredge that he had looked at the grounds of the owner and had designed a dredger which would meet the requirements is not a warranty that the dredge will do the work desired, but is merely an expression of an opinion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727–735; Dec. Dig. § 261.*]

8. EVIDENCE (§ 441*)—PAROL EVIDENCE—VARYING WRITTEN CONTRACTS.

Where a written contract to construct a dredge according to plans contained a limited warranty, parol evidence enlarging the warranty is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

9. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

10. SALES (§ 284*)—PERFORMANCE—EVIDENCE.

Where a manufacturer of a dredge, under a contract stipulating for a trial, was at all times willing and able to make the test, but the buyer failed to designate dredgable ground for the operation, and the ground in which the dredge actually operated was wholly unsuitable, the buyer could not defeat a recovery of the price on the ground that the dredge did not conform to the contract stipulating for a seven days' continuous run of the dredge, during which it should remove a specified quantity of earth per hour.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803–805; Dec. Dig. § 284.*]

11. SALES (§ 284*)—CONTRACTS—PERFORMANCE BY BUYER.

Where a manufacturer of a dredge according to specifications showed that the winding gear and cutter on the dredge delivered were suitable for the work to be done of the character specified in the contract and that changes therein were made in an effort to operate the dredge in ground not contemplated by the contract, the changes did not show a failure to complete the dredge and did not defeat a recovery of the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803–805; Dec. Dig. § 284.*]

12. SALES (§ 284*)—CONTRACTS—PERFORMANCE BY SELLER.

Where a manufacturer of a dredge able to handle a specified quantity of material per hour showed that the dredge manufactured and delivered would handle that amount of material working in the ground specified in the contract, the buyer could not defeat a recovery on the ground that the dredge was not up to contract capacity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 803–805; Dec. Dig. § 284.*]

13. SALES (§ 282*)—CONTRACTS—PERFORMANCE BY SELLER.

Where a dredge was constructed according to plans and specifications therefor, the buyer could not defeat a recovery of the price on the theory that it was improperly constructed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 797, 798; Dec. Dig. § 282.*]

14. EVIDENCE (§ 441*) — CONTRACTS — EVIDENCE.

Where a contract for the construction of a dredge according to plans and specifications was reduced to writing, evidence of prior negotiations and of surrounding circumstances to vary in essential particulars without reformation the terms of the contract was properly excluded, in the absence of any fraud inducing the execution of the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

15. MECHANICS' LIENS (§ 10*)—STATUTORY PROVISIONS—"STRUCTURE"—DREDGE.

A dredge is not a structure within the mechanics' lien law, Code Civ. Proc. § 1183 et seq., in view of the fact that section 813 et seq., provides for a special lien on vessels and floating structures, and hence it was unnecessary to record the contract as required by the mechanics' lien law.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 12; Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 7, pp. 6700–6702; vol. 8, p. 7806.]

16. SALES (§ 77*)—CONTRACTS—MEASURE OF DAMAGES.

Where a contract for the construction of a dredge stipulated that the manufacturer would furnish a captain and crew to operate the dredge for the buyer for 35 days after completion, and that during that time a test run would be made to determine whether the capacity of the dredge was up to contract, and the parties agreed that the 35 days' run should commence on a designated date, the buyer, paying all of the expenses incident to that run, was not chargeable for expenses previously incurred by the manufacturer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 208–212; Dec. Dig. § 77.*]

17. APPEAL AND ERROR (§ 1151*)—POWER OF COURT ON APPEAL.

Though the Supreme Court on appeal cannot make a new finding, it may either order a new trial or modify the judgment, and where the evidence is conflicting it will not peremptorily modify a judgment rendered on a verdict pursuant to erroneous instructions on the measure of recovery, but will conditionally reduce the recovery by the amount resulting from the error, in case the successful party consents thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. § 1151.*]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the United Iron Works against the Outer Harbor Dock & Wharf Company. From a judgment for plaintiff, defendant appeals. Conditionally modified and affirmed.

Lewis W. Andrews, Thos. O. Toland, and Cedric E. Johnson, all of Los Angeles, for appellant. Davis, Kemp & Post, of Los Angeles, for respondent.

HENSHAW, J. This action was brought to recover the unpaid part of the purchase price of a dredge constructed by plaintiff for defendant. Defendant needed a dredge to deepen a portion of the harbor of San Pedro in aid of its dock and wharf business. The purpose for which the dredge was to be used and the place where it was to be used were well understood by the parties. Plaintiff had in a letter designated "D" made an offer to construct dredges of different capacity and design for different prices. This letter concluded with the following statement:

"We have looked at your grounds and have designed you a dredge which we believe will fully meet your requirements and trust you may favor us with your order for same."

In the end, these negotiations resulted in an elaborate contract for the construction of the dredge. This contract began with the following:

"It is hereby understood and agreed that the party of the first part will build and furnish to the party of the second part one 12" suction dredge in accordance with the accompanying plans and specifications and the proposal dated 8th of January, 1909, of the party of the first part, marked 'D.' The hydraulic and operating conditions of dredge to be as follows:"

The contract is too long to be set forth in full, but it goes into minute details concerning the construction of the hull, the nature and character of the dredging machinery, and the time for the completion. It further provided that the plaintiff would furnish a captain and crew to operate the dredge for the defendant for a period of 35 days after completion. In this connection it was agreed:

"The party of the first part agrees that during the 35 days in which they are to operate the dredge that they will make a test run of seven consecutive days during which time they agree to handle an average of 110 cubic yards of material per hour when working in dredgable material, at such point in the channel to be dredged as may be designated by said party of the second part, at a depth of from 10 to 20′ and transporting the spoil (material dredged) to a distance of 1,000′ or more through a 14" pipe line, providing electric current furnished is 2,000 volts, 50 cycle, three phase alternating current; so that the electric motors will operate at the proper speed. It being understood that the said dredgable material shall consist of sand, gravel and clays, excluding gravel or boulder deposits wherein the stone is larger than 8" or the percentage of large stones interfere with obtaining the quantity due to the interference of said large stones; also excluding sand rock formations."

The trial was had before a jury, verdict and judgment were for plaintiff, and defendant appeals.

The dredge was constructed and turned over to the defendant. It did not prove satisfactory, did not operate successfully in removing material from the bed of the harbor, and hence this controversy arose. The fundamental difference between the parties litigant may be briefly stated. Appellant contends that plaintiff agreed under a warranty to build and deliver to the defendant a dredge capable of doing this specific work in which case clearly the proved failure of the dredger so to do would relieve appellant from liability of payment. Respondent, on the other hand, contends that the full measure of its duty is defined by the written contract between the parties and that no such warranty is therein contained.

[1] Appellant undertook by parol evidence of the "surrounding circumstances" to show that there was such a warranty given even if it were not expressly embodied in the written contract. The objections to the admission of this evidence were sustained, and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this is the first one of the asserted errors; the contention being that under section 1647 of the Civil Code and section 1860 of the Code of Civil Procedure such evidence was clearly admissible. In this, however, appellant errs. These sections but enact the common-law rule. It is never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of "surrounding circumstances."

[2] This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said. Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109; Balfour v. Fresno Canal Co., 109 Cal. 221, 41 Pac. 876; 3 Jones, Commentaries on Evidence, § 454. Appellant relies upon the case of Snyder v. Holt Manufacturing Co., 134 Cal. 324, 66 Pac. 311, as expressing a contrary doctrine. We need not be at pains to discuss this case to the end of determining whether or not appellant's position in this regard is well founded. Suffice it to say that, if such a construction is permissible, the principle is so contrary to all adjudications, our own as well as those elsewhere, that it cannot be recognized as authority.

[3] The principle is thus succinctly stated in 2 Mechem on Sales, § 1254:

> "The rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous, or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument. If therefore such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies."

Such is the precise declaration of this court in Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319.

[4] Nor is this consideration influenced in the slightest by the provisions of section 1770 of the Civil Code to the effect that:

> One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose."

True, it is that the parties here understood the general purpose for which the dredge was to be used, namely, the deepening of appellant's tide lands in San Pedro harbor and the filling in of other of its lands with the dredged material. If appellant had represented to respondent that such was the dredge which they desired and respondent had made answer that they would build for and furnish to appellant such a dredge, the section of the Code would have immediate applicability. But respondent did no such thing. It did not pretend to say that the dredger would dredge the harbor bottom. All that it warranted in this particular was that the dredge would move a specified quantity of material a given distance providing it was operating in dredgable material which was very specifically defined.

[5] The second error advanced by appellant is in connection with the same matter and grows out of the following facts: As above set forth, the contract actually entered into between the parties expressly declared that the plaintiff would build the dredge "in accordance with the accompanying plans and specifications and the proposal dated 8th of January 1908, of the party of the first part marked 'D.'" At the trial defendant offered proposal "D" in evidence as being referred to and made a part of the contract between the parties. Respondent's objection to the introduction was on the ground that the contract without proposal "D" was complete in itself and that to admit proposal "D" would make the contract ambiguous and uncertain. Of course, where, as here, the contract between the parties makes reference to another detached but specifically identified instrument as forming a part of the contract, such a collateral writing, whether it tends to make the whole contract ambiguous or uncertain or not, is always admissible in evidence, and to refuse it admission will in the ordinary case be grave and injurious error. It has been said (17 Cyc. 365) upon the authority of one of our cases that the rule demanding the introduction of collateral writings which have been expressly made a part of a contract by reference is inapplicable to an instrument which, although referring to them, is complete in itself. True it is that cases may arise where the collateral instrument has no material bearing upon any terms or conditions of the main instrument so that its rejection from consideration, while error, will be error which does not result in injury. Such, indeed, when we come to consider it, will be found to be the case here; but the fact nevertheless remains that it is always proper to receive such collateral instrument in evidence. If it does affect the terms of the contract, the party insisting on its introduction has the right to establish this fact; if it does not affect the terms of the instrument, his right is none the less. The only consequence is that the result of its introduction is valueless. The one citation supporting the language of Cyc. above quoted is from the case of Tustin Fruit Ass'n v. Earl Fruit Co., 6 Cal. Unrep. Cas. 37, 53 Pac. 693. Therein a contract was offered which began with the recital:

"Being desirous of having my oranges handled in the manner set forth in the by-laws of the Tustin Fruit Association."

This contract was offered in evidence unaccompanied by the by-laws to which it referred. An objection was made upon that ground. This court made answer as follows:

"We agree that no part of a document should be wrenched from its context, and received as a disjointed member of what is properly an indivisible unit of evidence. But here the paper offered by plaintiff was no such fragment. It seemed to be complete in itself, so far as regards authority to sell the subscribers' fruit, and contained no intimation that the by-laws varied or might vary, its import, for, in terms, it purported to conform to the by-laws. * * * Code Civ. Proc. § 1854; Toohey v. Harding (C. C.) 1 Fed. 174, 177; note to Rouse v. Whited, 82 Am. Dec. 345, and cases cited."

This is, in effect, but a declaration that this court would not reverse the case for this technical error unless it was shown, as it was not, that injury resulted from it.

[6, 7] So, in the case at bar, we conclude that it was unquestionably the duty of the court to have admitted in evidence the proposal "D" so plainly by reference made a part of the contract between the parties. It remains to be considered whether appellant suffered injury by the court's refusal to do so.

It is conceded by appellant that the contract without proposal "D" is complete and controlling in all particulars save one. As to that one it is argued that there should be read into the contract the language above quoted from proposal "D" to the following effect:

"We have looked at your grounds and have designed you a dredger which we believe will fully meet your requirements and trust you may favor us with your order for same."

This may be done. But appellant's effort to erect out of this language a warranty that the dredge would do the work desired of it is futile. The language itself imports nothing more than the expression of an opinion. It falls far short of an express warranty, a warranty which, if appellant had desired, it should have caused to be inserted in the contract.

[8] To the contrary, however, the contract does contain express warranties of very much more limited character than that contended for by appellant, and Mechem's rule, as above laid down and approved by this court, comes into immediate applicability—if the contract "contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies." On this proposition the case of Bancroft, etc., v. S. F. Tool Co., 120 Cal. 228, 52 Pac. 496, will be found to be an exact parallel.

[9-14] Appellant advances a number of propositions of fact. They present questions controverted in the case. The evidence upon them is conflicting. The verdict of the jury is conclusive on these propositions against appellant. Thus, it contends that the dredge was never completed. There is the positive testimony of a witness that the dredge was completed upon August 15th and that the operation of it began on August 26th. Again, it is said that plaintiff is not entitled to recover because admittedly the dredge did not make the seven days' continuous run during which it was to remove 110 cubic yards per hour of dredgable material. But the evidence of respondent shows that it was at all times willing and able to make the test, but that appellant was unable, or at least failed, to designate dredgable ground for the operation, and that the ground in which the dredger actually operated was wholly unsuitable. As an argument of the incompleteness of the dredge appellant urges that the winding gear and cutter were changed after the time fixed for the commencement of the seven days' test. But respondent's evidence upon this was that the winding gear and cutter were suitable for the work to be done of the character specified in the contract, and that the changes were made in the effort to operate it in unsuitable ground not contemplated by the contract. Again, it is said that the dredge was never brought up to contract capacity; that is to say, it never proved its ability to handle an average of 110 cubic yards of material per hour. But there is positive testimony on behalf of respondent that the dredge would handle this amount of material, working in the ground specified in the contract. Again, it is contended that the dredge was improperly constructed. But this really means that it was inefficient, not for the work which it contracted to do, but for the work which it was called upon to do, for it is indisputably shown that the dredge—hull and machinery—was built under agreed plans and specifications, and that as built it conformed strictly to those plans and specifications. Again, appellant insists that the court erred in refusing to allow evidence of what it designates the fraudulent representations of respondent, which fraudulent representations are alleged to be representations to the effect that respondent had built other dredges which had proved their capacity and that the dredge which it would build would be equal to the work required of it and that respondent knew the character of the ground in which the dredge was to work. But, as has been said, appellant was abundantly able to protect itself in all these matters which were antecedent to the contract, by the simple method of requiring a warranty in the contract itself. There is not the slightest intimation that any fraud attached to the execution of the contract, and the court was right in excluding the offered evidence. What has here been said is equally applicable to the numerous objections made to the court's other rulings in refusing admission to appellant's proffered evidence. All of this evidence that was so rejected was evidence of previous negotiations and of surrounding circumstances by means of which the effort was made to vary in essential particulars without

reformation the terms of the contract in writing between the parties.

[15] Appellant further alleges that plaintiff should not be allowed a recovery because the dredge is a structure within the meaning of the mechanics' lien law, and that respondent failed to file the contract as required by that law. In section 1183 et seq., Code Civ. Proc., are found the provisions of the Code relating to mechanics' liens. Section 813 et seq. of the same Code provides for a special lien upon vessels and floating structures. It was never the intention of the Legislature to include a vessel under the provisions of the general mechanics' lien law. 26 Cyc. p. 755e; Bartlett v. Steam Dredge, 107 Mich. 74, 64 N. W. 951, 61 Am. St. Rep. 314; Stewart v. Gorgoza, Fed. Cas. No. 13,428, 3 Hughes, 459.

[16] To substantially every one of the instructions which the court gave appellant raises objection. Respondent contending, as has been pointed out above, that the dredge was completed in August, asked for a judgment for the expenses incurred and outlay made in the payment of the captain and crew, amounting to $1,051.50 for the 35 days immediately after this asserted completion of the dredge. Appellant disputed this, contending that during all the intermediate time from August until the 1st of October the dredge was not in fact completed, and insisted that the money was spent by respondent in putting the dredge into working order so that it might comply with its contract. It contended further that under no circumstances did the 35 days begin to run until the 1st of October, that it was not liable for the expenses incurred prior to that time, and that it had paid all that was due after the 1st of October. Upon this phase of the controversy it proposed an instruction which the court gave in the following language; the words in parentheses being words in the proposed instruction stricken out by the court, and the words in italics being words inserted by the court:

> "You are further instructed that it was not incumbent on the defendant to pay the expense *incurred by plaintiff for* (of) operating said dredge at any time, excepting *the* (only the period of) 35 days named in the contract, and if you find from the evidence that it was the understanding and arrangement of the parties that said period of 35 days began to run on or about the 1st day of October, 1909, then I instruct you that the plaintiff can (not) recover from the defendant for the items (of labor and board aggregating $1,051.50) *of labor and material* charged to the defendant, if for said period of 35 days, you find that, commencing on or about October 1, 1909, the defendant began the payment, and thereafter for 35 days, continued the payment of the salary of the captain and crew, and the other expenses incident to the operation of said dredge for the ensuing 35 days."

It is manifest that the instruction proposed was sound as addressed to the contention of respondent; that is to say, it advised the jury that appellant was responsible for the operating expense of the dredge only for the period of the 35 days named in the contract. The court so instructed the jury. Then, so proceeded the proposed instruction, if by consent of the parties this 35 days was to run from October 1st, the appellant was not responsible for the $1,051.50, expenses antecedently incurred by respondent. Such is the substance of the proposed instruction. The instruction which the court actually gave told the jury that, while defendant was responsible only for the expenses incurred in the 35 days' run, nevertheless if by agreement the 35 days' run was to commence on October 1st, and defendant had paid all of the expenses incident to that run, it was nevertheless responsible for the $1,051.50 of the expenses antecedently incurred by plaintiff. There can be no need to expatiate upon the manifest error and injury of this instruction. So plain is it that we are convinced that it was the result of an oversight of the court in its effort to remodel the proposed instruction. But the explanation of the cause does not remove the result, and the result is that upon a disputed question of fact the court positively instructed the jury to find for plaintiff.

[17] This court is not able to make a new finding. Its power is limited either to the ordering of a new trial or to a modification of the judgment, and under the conflicting evidence in the case it is not disposed peremptorily to order such modification. Therefore it is ordered that in the event that within 30 days from this date respondent files with the clerk of this court its consent to a modification of the judgment in its favor by the deduction therefrom of $1,051.50, with legal interest from the date of the judgment, the judgment shall stand modified accordingly.

But in the event that said consent be not so filed within said time, the judgment appealed from shall be reversed. Salstrom v. Orleans Bar, etc., Co., 153 Cal. 551, 96 Pac. 292.

We concur: LORIGAN, J.; MELVIN, J.

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GOLDEN GATE UNDERTAKING CO. v. TAYLOR. (S. F. 6272.)

(Supreme Court of California. June 26, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 97*)—LIABILITY OF ESTATES OF DECEASED PERSONS.

Estates of deceased persons are not directly liable to those employed by the executor or administrator to assist him in his duties of administration; this having been the rule with attorneys of executors and administrators prior to the statutory changes of 1905 in Code Civ. Proc. §§ 1616, 1619.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 411, 411½; Dec. Dig. § 97.*]

2. EXECUTORS AND ADMINISTRATORS (§ 214*)—FUNERAL EXPENSES—LIABILITY.

In view of Code Civ. Proc. § 1643, providing that funeral expenses shall be first paid, and the fact that such expenses must ordinarily be incurred before the appointment of an executor or administrator, such claims do not stand on the same footing as other claims for expenses of administration, but are enforceable against the estate, though not authorized by the executor or administrator; an undertaker being justified in furnishing the necessary services upon the request of any one so related to the deceased as to exclude the idea of officious interference.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 755; Dec. Dig. § 214.*]

3. Executors and Administrators (§ 430*)—Suits Against.

Whenever a recovery would be a direct charge upon the estate of a deceased, the executor or administrator may be sued in his representative capacity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1683–1688; Dec. Dig. § 430.*]

4. Executors and Administrators (§ 431*)—Suits Against Executor.

In view of Code Civ. Proc. § 1643, providing that funeral expenses shall be first paid, and the fact that the charge is one for which the estate is liable, though the arrangement for funeral expenses is not made by the executor or administrator, an action for funeral expenses may be brought against the administrator in his representative capacity and need not be presented as a claim for expenses of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819, 1664, 1679–1682; Dec. Dig. § 431.*]

5. Executors and Administrators (§§ 214, 443*)—Burial Expenses—Actions for.

As an estate can be charged with the expenses of the burial of the deceased only on the ground that the funeral is the work of necessity, as well as charity and piety, the amount charged cannot exceed such sum as is reasonable under the circumstances; hence a complaint seeking recovery of funeral expenses is defective, unless it allege that the amount sought to be recovered is a reasonable amount in view of all the circumstances.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 755, 1798–1811, 1823–1830, 1842–1845, 1848; Cent. Dig. §§ 214, 443.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by the Golden Gate Undertaking Company against Bee Taylor, as executrix of James D. Taylor, deceased. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bee Taylor, of San Francisco, in pro. per. Ralph L. Hathorn and Brooks Palmer, both of San Francisco, for respondent.

PER CURIAM. This is an action brought to recover the value of materials furnished and services rendered in the matter of the burial of James D. Taylor.

It was alleged that at the time of the death of James Taylor, and for about 14 days thereafter, there were no relatives or heirs at law surviving deceased in the state of California; that shortly before his death James D. Taylor requested Almer F. Veale, his attending physician, to take charge of his body and upon his death to make all funeral arrangements; that said deceased left a will wherein he appointed Almer F. Veale and Bee Taylor as executor and executrix, respectively; that after the death of said James D. Taylor, the plaintiff, at the special instance and request of said Almer F. Veale, and at the special instance and request of said Bee Taylor, rendered services and supplied merchandise for and on account of the preparation, care, disposition, funeral, and burial of the body of said deceased; and that the reasonable value of said services and merchandise was and is the sum of $1,110.

The complaint further states that subsequently, in May, 1903, the said will was admitted to probate, and letters testamentary thereon were issued in accordance with the directions of said will, and that said Bee Taylor ever since has been, and now is, such executrix; that Almer F. Veale was discharged as such executor on or about June 8, 1903, prior to the commencement of this action. To this complaint defendant interposed a special and general demurrer, which was overruled; whereupon the defendant filed an answer denying all the allegations of the complaint, and also filed a cross-complaint, in which she sought damages from the plaintiff in the sum of $5,000. A demurrer to the cross-complaint was sustained.

Nothing further appears to have been done in the case until January 29, 1909, when, after due notice, the cause was set for trial. By various postponements the trial was continued until May 19, 1909, when, in the absence of the defendant, the court heard the evidence and rendered judgment in favor of the plaintiff in the sum of $850, together with interest and costs, and directed that the same be paid in due course of administration of said estate. Within six months thereafter the defendant applied to the court to set aside the judgment on the ground of surprise, inadvertence, and excusable neglect. The motion was denied. The defendant appeals from that order and from the judgment.

The only point that need be considered here is the claim that the general demurrer to the complaint should have been sustained.

The principal contention of the defendant is that a claim for funeral expenses is not recoverable by action against the executrix in her representative capacity, but will sustain only an action against the individual who ordered the services. If payment out of the assets of the estate is sought, the sole jurisdiction of the demand rests, it is argued, in the court in which the proceedings for administration of the estate are pending.

[1, 2] It is, of course, the well-settled rule that estates of deceased persons are not directly liable to those who have been employed by the executor or administrator to assist him in the performance of his duties of adminis-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tration. The claim is "against the executor or administrator in his individual capacity, who in turn may, if the expenditure was made in good faith and was proper, be credited therewith in the settlement of his accounts with the estate." Hickman-Coleman Co. v. Leggett, 10 Cal. App. 29, 100 Pac. 1072; 2 Woerner Am. Law Adm. § 356. The rule has been applied in this state to claims of real estate brokers for services rendered the personal representative (Maxon v. Jones, 128 Cal. 77, 60 Pac. 516; Estate of Willard, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554; Hickman-Coleman Co. v. Leggett, supra), as well as to claims of attorneys for services rendered the executor or administrator (Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352; Briggs v. Breen, 123 Cal. 657, 56 Pac. 633, 886; Estate of Kasson, 119 Cal. 489, 51 Pac. 706). The same principle is applicable to demands of attorneys for services rendered guardians of minors or incompetents. Hunt v. Maldonado, 89 Cal. 636, 27 Pac. 56; Morse v. Hinckley, 124 Cal. 154, 56 Pac. 896; McKee v. Hunt, 142 Cal. 526, 77 Pac. 1103. Prior to the statutory changes of 1905 (Code Civ. Proc. §§ 1616, 1619) giving to attorneys for executors or administrators the right to have their compensation fixed and paid out of the assets of the estate, such attorneys, in common with all others rendering service to the personal representative, could not assert a demand against the estate in the probate proceedings (Briggs v. Breen, supra), or otherwise, and were limited to their personal action against the executor or administrator who had employed them.

The appellant argues that claims for funeral expenses stand upon the same ground as claims for attorney's fees, brokers' commissions, or other demands arising under contracts made by the executor or administrator, and that, accordingly, a demand for such funeral expenses cannot form the basis of any action except one against the executor or administrator personally. We think this position cannot be upheld. Claims for funeral expenses are not necessarily founded upon contracts made by the personal representative. It is seemly and proper, indeed necessary, that decent burial should be given to the body of a deceased person within a very short period after death. Ordinarily, arrangements for such burial must be made, and the expense incurred, before the appointment of an executor or administrator. An undertaker is justified in furnishing the necessary service upon the request of any one so related to the decedent as to exclude the idea of officious interference. The one ordering the burial may or may not be the same person who subsequently becomes executor or administrator. If, as in this case, the person alleged to have ordered the funeral does become executor or administrator, the liability, if any, of the estate is not affected one way or the other by such circumstance. The person contracting for the service may be individually liable therefor, but this liability depends upon his individual agreement, and not upon his subsequent representative character.

The claim for funeral services is not, to be sure, a claim on a contract or debt of the decedent, existing before his death. Neither, as we have pointed out, is it a claim on a contract made after death by the personal representative as such. It is a demand of a peculiar nature, arising immediately upon death, but prior to the commencement of administration. It is properly chargeable, in some form of procedure, against the assets of the estate.

The Code of Civil Procedure ranks such charges among debts of the estate. Section 1643 provides that:

> "The debts of the estate * * * must be paid in the following order:
>
> "1. Funeral expenses;
>
> "2. The expenses of the last sickness;
>
> "3. Debts having preference by the laws of the United States;
>
> "4. Judgments, * * * and mortgages and other liens * * *;
>
> "5. All other demands against the estate. * * *"

Section 1646 declares that:

> The "executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and expenses of the last sickness, and the allowance made to the family of the decedent. * * *"

[3, 4] Not only, then, is the charge for funeral expenses a debt of the estate, but it is a preferred debt of the first class, and is payable as soon as the executor or administrator has sufficient funds in his hands. It is not a debt arising upon a contract made by the decedent in his lifetime, and a creditor's claim, as defined in section 1493, Code of Civil Procedure, is not, therefore, required to be presented as a basis for action. Potter v. Lewin, 123 Cal. 146, 55 Pac. 783. It is, however, a claim upon a debt of the estate, and thus differs essentially from claims based upon services rendered the executor or administrator, which, as we have seen, do not constitute debts of the estate. If the claim is one against the estate, and for which the estate as such is liable, it is difficult to see why an action cannot be brought against the executor in his representative capacity, to obtain a judgment payable in due course of administration. The general rule is that, whenever a recovery would be a direct charge upon the estate of a deceased, the executor or administrator may be sued in his representative capacity. 8 Ency. Pl. & Pr. 678.

> "The only way in which an action can be brought against an estate is to sue the administrator or executor in his representative capacity." Sterrett v. Barker, 119 Cal. 492, 51 Pac. 695.

If the executor voluntarily pays the demand, he may undoubtedly claim credit for the payment of such amount as the court thinks proper, in the settlement of his accounts. See In re Galland, 92 Cal. 293, 28 Pac. 287. But, if the executor should refuse to pay, the claimant must have some remedy for the enforcement of a demand which is, by the express provision of the statute, made a preferred debt of the estate. To await the settlement of accounts would be destructive of the preference granted by the Code. There is no provision expressly authorizing the claimant to go into the probate court by petition for an order compelling the payment of his claim, if it be disputed. The funeral charges are not, strictly speaking, expenses of administration, but are, as we have shown, classed with debts of the estate. By sections 1643 and 1646, the demand is put in the same category as a claim for expenses of the last sickness. Such a claim may, beyond question, be established by an action against the executor or administrator. The judgment is that the amount found due be paid in due course of administration. The question of priority is thus left to be determined in the probate court. McLean v. Crow, 88 Cal. 644, 26 Pac. 596. So, too, with the claim for funeral expenses, which is equally a debt of the estate, and which differs only in so far as the necessity for presenting a claim is concerned. While we do not hold that the validity and amount of the demand may not properly be determined by the probate court upon petition of the claimant, we find no sufficient ground for holding that the demand may not be established in the manner applicable to all other debts of the estate; that is, by an action against the personal representative.

This conclusion is, we believe, in accord with the practice commonly accepted by the profession. Potter v. Lewin, 123 Cal. 146, 55 Pac. 783, may be cited as an example of the cases in which the procedure of action against the executor or administrator was taken. In that case the procedure was upheld without question of its propriety. And this view seems to be in accord with the weight of authority in other jurisdictions. 8 Am. & Eng. Enc. L., (2d Ed.) pp. 1024–5–6; Schoul. Ex'rs (3d Ed.) § 398; 2 Woern. Adm. (2d Ed.) § 357, and cases cited. Of course, the services may be furnished upon the personal credit of the executor or of some one else, in which event the person contracting will be individually liable. This is, however, not such a case.

[5] But the only ground upon which the estate may be charged with the expenses of burial is, as has already been suggested, that the "funeral is a work of necessity, as well as of charity and piety." Woern. Adm. (2d Ed.) § 357. The amount to be charged to the estate cannot exceed such sum as may, upon a consideration of all the circumstances, including the station of the decedent and the value of his estate, be found to be proper and reasonable. Woern. Adm. (2d Ed.) §§ 359, 360. These considerations would govern the probate court in passing upon a charge made by the executor or administrator for funeral expenses incurred by him. The court would not be controlled by the amount actually expended, even though such amount would afford only a proper compensation to the undertaker for the services rendered, but would inquire into the circumstances and conditions in order to ascertain whether such amount was reasonable and proper to be charged against the particular estate. The same considerations must apply where the person furnishing the services is suing the executor in an action like the present one. It follows that, in order to state a cause of action in such a case, the complaint must contain proper allegations designed to show that the amount sought to be recovered is a reasonable and proper charge against the estate in view of all the circumstances, so far as they could with reasonable diligence be ascertained at the time of the burial. Woern. Adm. (2d Ed.) § 359. The complaint before us contains no such allegations. All that is alleged is that the plaintiff rendered services and supplied materials for the funeral and burial of the body, and "that the reasonable value of such services and merchandise was and is the sum of $1,110." This means no more than it says; namely, that the services and merchandise furnished were worth the amount named. It may well be that they were fairly worth $1,110, but that at the same time a charge of $1,110 would be greatly excessive for the estate upon which the burden of this payment is sought to be imposed. The plaintiff is not seeking to recover upon a contract made by the decedent, but is endeavoring to charge against the estate the amount of an expenditure incurred on behalf of the estate. The complaint shows that some expenditure was necessary and proper. It does not show what amount was necessary or proper and for that reason justly chargeable against the estate.

For these reasons, we think the demurrer should have been sustained, with leave to plaintiff to amend its complaint. This conclusion makes it unnecessary to consider any other points made.

The judgment and the order appealed from are reversed.

BEATTY, C. J., does not participate in the foregoing.

ANGELLOTTI, J. (concurring). I concur in the judgment, but not for the reasons stated in the foregoing opinion. I adhere to the views expressed in my dissenting opinion filed on the former decision of this case when the judgment and order appealed from were affirmed. That opinion was as follows:

> "I am unable to concur in the conclusion that a claim for funeral expenses of a deceased person is recoverable by action against his executor or administrator in his representative capacity. In so far as payment of such a claim is sought from the estate, including the determination of the amount to be paid by the estate, it is my opinion that the probate court having jurisdiction of the estate has sole and exclusive jurisdiction, and that the matter is to be de-

termined in the estate proceedings, where all persons interested in the estate may be heard and the amount that the estate shall pay fixed with a view to the circumstances and condition of the estate. This question does not appear to have been suggested in Potter v. Lewin, 123 Cal. 146 [55 Pac. 783]. I see no difficulty in holding that under our law one having a claim for funeral expenses may present his claim to the court in probate for determination. Although not a creditor of decedent who is obliged to present his claim for allowance to the executor or administrator and the judge, he is, by virtue of our statutory provisions in that behalf, a creditor of the estate, entitled to appear in the probate proceeding and there obtain an adjudication as to his claim and an order for the payment of so much thereof as may be found to be a proper charge against the estate. I think that under our statutory provisions this is his sole remedy where he seeks to be paid from the funds of the estate and there is any controversy as to his claim."

I therefore agree with the other members of the court in the conclusion that the demurrer to the complaint should have been sustained.

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168 Cal. 73

PHELPS v. GRADY (DAUGHADAY et al., Interveners.) (S. F. 6677.)

(Supreme Court of California. June 20, 1914. Rehearing Denied July 20, 1914.)

1. Descent and Distribution (§§ 75, 84*)—Wills (§§ 722, 742*)—Descent of Real Property—Rights of Heirs and Devisees.

Title to real property of a deceased intestate vests immediately in his heirs, and of a testator in his devisees, which title they may convey, whether residents or nonresidents, without administration, subject only to the payment of claims of local creditors.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 243–251, 260–262, 309, 322–325; Dec. Dig. §§ 75, 84;* Wills, Cent. Dig. §§ 1728, 1729, 1900–1906; Dec. Dig. §§ 722, 742.*]

2. Executors and Administrators (§ 333*)—Assets—Interest in Estate in Another State.

An order of a probate court in Kansas, administering the estate of a devisee, authorizing the administrator and beneficiaries to transfer certain assets, consisting of an interest in an unadministered estate under administration in California, was valid, and was not objectionable as an attempt by the Kansas court to administer on lands in California which belonged to the California estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1372–1375; Dec. Dig. § 333.*]

3. Descent and Distribution (§ 86*)—Interest in Estate—Assignment—Defect—Estoppel.

Where the heirs of a devisee assigned their interest in the testator's estate to testator's widow, such heirs were estopped thereafter to claim that the title which the widow secured by the assignment was imperfect for lack of local administration.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 326–329; Dec. Dig. § 86.*]

4. Fraud (§ 11*)—Deceit—Expressions of Opinion.

While mere expressions of opinion honestly made are not actionable, yet a false statement of an opinion or a false opinion expressed to one entitled to rely thereon may form the basis for an action of deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

5. Cancellation of Instruments (§ 34*)—Fraud—Laches.

Where an assignment of the interest of the heirs of a devisee, alleged to have been induced by the assignee's fraudulent misrepresentation as to the value of real property belonging to the estate, was executed in 1904, and the value of the property could have been promptly ascertained by reasonable diligence, and without great difficulty, the failure of the assignor to ascertain the facts and sue to set aside the conveyance for such fraud until 1912 constituted fatal laches.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49–54; Dec. Dig. § 34.*]

Department 2. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Josephine A. Phelps against John H. Grady, as special administrator of the estate of Phœbe W. Daughaday, deceased, in which Frederick Daughaday and others intervened. From a judgment in favor of plaintiff, defendant and interveners appeal. Affirmed.

See, also, 141 Pac. 929.

Thomas E. Curran and Francis Dunn, both of San Francisco, for appellants. Ross & Ross, of Redwood City, and Walter H. Linforth and W. C. Sharpstein, both of San Francisco, for respondent.

HENSHAW, J. John H. Grady was appointed special administrator of the estate of Phœbe W. Daughaday, deceased. Josephine A. Phelps, plaintiff herein, brought this action against him to quiet her title to certain real estate in the county of San Mateo. The heirs of Phœbe W. Daughaday, who were also beneficiaries under her will, sought to intervene, asserting an interest in the land in their ancestor, Phœbe W. Daughaday, which interest was devised to them by her will, and with which interest they allege they were fraudulently induced to part, selling and conveying it to plaintiff in reliance upon certain fraudulent representations made by her. The facts in detail are set forth in San Francisco No. 6668, 141 Pac. 929, this day decided. A decree of partial distribution given in the matter of the estate of Timothy Guy Phelps, under which decree the land in controversy was distributed to plaintiff, was introduced in evidence, as well as the final decree of distribution. Many grounds of attack are advanced against the validity of the decree of partial distribution. They need not be noticed, for, if the result of them is all that appellant contends for, so that the decree should be considered as absolutely void and thus conveying no title, the fact then would be that all of the property remained in the estate until the decree of final distribution, which is not assailed, and which distributed all of the property to Mrs. Phelps.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] Again, it is argued that by force of the will of Timothy Guy Phelps, deceased, title to real estate vested in Phœbe W. Daughaday, and that the probate court of Kansas had no power to administer on and dispose of real estate situate in California. Wherefore, so runs appellant's argument, the conveyance by the heirs and beneficiaries under the will of Phœbe W. Daughaday to Mrs. Phelps of their interest through the estate of Phœbe W. Daughaday in the estate of Timothy Guy Phelps was abortive and void. But such, however, is not the law. Title to the real estate of a deceased intestate vests immediately in his heirs of a testate in his devisees. That title they may convey without administration, and this they may do whether they be domestic or foreign heirs or devisees. The heirs of a nonresident intestate leaving real estate in California may convey complete title so far as they are concerned to such real estate without ancillary administration in the state of California. True, the title thus conveyed is not a perfect title, in that the title will always be subject to the right of possession in a local administrator for the payment of the claims of local creditors. But with this defect, the heirs who have deliberately parted with their title are not concerned, and can find no fault. The probate court of Kansas in no sense undertook to administer upon lands in California. It had all of the heirs and beneficiaries under the will of Phœbe W. Daughaday before it, and it authorized them, on their request, to make conveyance to Mrs. Phelps of all of their interest in the estate of her husband. If the title thus derived by Mrs. Phelps was in any way incomplete or imperfect for lack of local administration, she, and not her grantors, was the one that suffered thereby. No case cited by appellant denies the power of the heirs or devisees so to convey their title. Indeed, such a denial would be in the face of our express statutory law. All that such cases as In re Pina, 112 Cal. 14, 44 Pac. 332, Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189, Estate of Strong, 119 Cal. 663, 51 Pac. 1078, and Blair v. Hazzard, 158 Cal. 721, 112 Pac. 298, declare upon this matter is that the title thus conveyed is still subject to administration, and is therefore and in this sense only not perfect.

[4, 5] A general demurrer to the answer of appellant, setting up the above-mentioned fraud, and a general demurrer to the interveners' complaint, asserting the same fraud were sustained. This ruling presents the one serious question in this case. We waive consideration of certain minor objections of respondent, as that the special administrator, authorized to maintain or defend only such suits as might have been maintained by or against his testatrix, cannot present such a defense in this action, since his testatrix was not defrauded. We pass over also the consideration as to whether or not the heirs and beneficiaries under the will of Phœbe W. Daughaday could rightfully intervene at all in this action, and, conceding this right, come immediately to the question of the sufficiency of their complaint in intervention. In this they allege that in January, 1904, Josephine A. Phelps, plaintiff herein, opened negotiations with them by correspondence for the purchase of their interest in her husband's estate. She represented to them that the value of the estate was about $90,000, and that the value of the entire portion of the estate devised and bequeathed to Phœbe W. Daughaday was only about $3,333.33. They aver that these representations were false and untrue, and were known to Mrs. Phelps to be false and untrue, and were made by her for the purpose of deceiving them. Certain other false representations are declared. It is said that Mrs. Phelps represented that on account of the condition of the estate distribution could not be had for many years, and that the family allowance of $400 a month decreed by the court would, during the progress of the administration, consume a large portion of the estate. The interveners further allege that Mrs. Phelps was the widow of their mother's brother, and that because of this relationship they believed that she would deal with them in all respects fairly and justly, and that so believing they relied upon these representations and parted with their interest to her. Respondent argues that the only one of these allegations with any semblance of strength to support an action for deceit is that which charges the misrepresentation as to the value of the estate, and of Phœbe W. Daughaday's interest therein. And this, it is urged, considering the nature of the estate and its problematical value, must be construed as the expression merely of Mrs. Phelps' opinion, and not as the statement of a fact. True of course it is that expressions of opinion honestly made are not actionable. Equity has no concern with them. But equally true it is that a false statement of an opinion or a false opinion expressed to one entitled to rely upon it may form the basis of an action for deceit, like any other misrepresentation of fact. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351; Henry v. Continental Bldg., etc., Ass'n, 156 Cal. 680, 105 Pac. 960; Brandt v. Krogh, 14 Cal. App. 39, 111 Pac. 275. The complaint in intervention charges deceit upon this kind of a false opinion and in this respect it sufficiently states a cause of action. But in this case the conveyance was executed in 1904. The decree of final distribution in the estate of Timothy Guy Phelps was given in 1907. This action was commenced in 1912, and here for the first time interveners are found asserting the right to avoid their conveyance because of its fraudulent procurement. Excepting upon a proper showing touching their discovery of the fraud their cause of action was barred. One seeking relief under such circumstances is held to stringent rules of pleading. Says

the Supreme Court of the United States, in Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807:

> "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' * * * A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * A party seeking to avoid the bar of a statute on account of fraud must aver and show that he used due diligence to detect it. * * * Concealment * * * which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery. * * * Concealment * * * must be the result of positive acts. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. * * * The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

And this is the rule consistently adopted and adhered to in this state. Robertson v. Burrell, 110 Cal. 578, 42 Pac. 1086; Lady Washington v. Wood, 113 Cal. 486, 45 Pac. 809; Simpson v. Dalziel, 135 Cal. 603, 67 Pac. 1080; People v. San Joaquin, etc., Ass'n, 151 Cal. 797, 91 Pac. 740. The allegations of the complaint touching discovery are as follows:

> "That interveners herein did not discover that the representations made to them by said Josephine A. Phelps, as alleged in paragraphs VII and VIII of this complaint in intervention, were untrue, nor did they nor any of them have any truthful information concerning the matters and subjects covered by said representations until about the month of October, 1911. That on or about the 1st day of October, 1911, said interveners were informed for the first time that some time in the year 1907 said Josephine A. Phelps had entered into a contract to sell a certain portion of the real estate of Timothy Guy Phelps, and a part of the real property described in the complaint herein at a price which seemed to indicate that the value of the entire estate of Timothy Guy Phelps, deceased, was in and during the year 1904 very much greater than had been represented to interveners as above related by said Josephine A. Phelps. That thereupon said interveners made inquiry and investigation, and were informed that in and during the year 1904 the estate of Timothy Guy Phelps, deceased, was of a value many times greater than $90,000."

Frauds are infinite in their variety, and while the rules of equity apply equally to all, when the doctrine of laches or stale demand is invoked, and the question involved is why was not the discovery earlier made, each case must be interpreted and construed under its own facts. To illustrate, if A should employ B as a mining expert to express his opinion upon the probable value of a mine which he contemplated purchasing, and B should report as his opinion that the mine was of great value, and if, relying upon this opinion, A should purchase the mine, expend large sums of money thereon, and meet with failure as the result, he would have no cause of action against B for the latter's mistaken opinion. Years might elapse, and A might never suspect, nor have occasion to suspect, that the opinion so given to him by B was fraudulent. If years thereafter he should come into possession of knowledge that B had conspired with the former owner of the mine to fraudulently represent its value, B's own opinion being that the property was valueless, here would be a clear case, under a proper pleading of these facts, of an active suppression of the fraud by the guilty parties, and a discovery of the facts made possible only under the indicated circumstances. In such a case A's right of action would unquestionably exist no matter how many years had elapsed before discovery was made possible. But no such case is here presented. The false representation, it is asserted, was as to the value of the lands of the estate, which lands were situated in a populous county adjacent to the city and county of San Francisco. The fact that the estate owned these lands is not only not questioned but is declared. While it is conceivable that a person under such circumstances might misrepresent to another at a distance the value of those lands, it is impossible that that person could have concealed knowledge of the true value had the slightest inquiry been made. It cannot be said, therefore, and of course it is not alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these interveners knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is, of course, no excuse. They were under no other disability. Says the Supreme Court of the United States:

> "Parties cannot thus, by seclusion from the means of information, claim exemption from the laws that control human affairs and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject." Case of Broderick's Will, 88 U. S. (21 Wall.) 503, 22 L. Ed. 599.

Herein the words of the circuit court in Naddo v. Bardon (C. C.) 47 Fed. 782, are peculiarly apposite:

> "The conclusion is almost irresistible that the complainant might, and he perhaps would, have continued to sleep quietly and peacefully upon his supposed rights, had it not been for the quickening influences that have, within a comparatively recent period, materially appreciated the value of this property and brought it into prominence."

Independently of any statute of limitation courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for laches in asserting them. Speidel v. Henrici, 120 U. S. 386, 7 Sup. Ct. 610, 30 L. Ed. 718. The interveners are clearly in this position, and for this reason the superior court was justified in finding that their complaint in intervention was without equity, and in sustaining the general demurrer thereto.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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168 Cal. 63

In re DAUGHADAY'S ESTATE. (S. F. 6668.)

(Supreme Court of California. June 20, 1914. Rehearing Denied July 20, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 11*)—ADMINISTRATION—GRANT—NATURE OF PROPERTY.

Where a nonresident died, leaving an equitable claim to real property in the county where an application for issuance of letters of administration is made, the probate court may treat such claim as property justifying the issuance of letters in advance of the establishment of the claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. § 11.*]

2. EXECUTORS AND ADMINISTRATORS (§ 29*)—ISSUANCE OF LETTERS—EFFECT—PROPERTY OF ESTATE.

Where the sole property of a nonresident decedent within the jurisdiction of a probate court, to which an application for grant of letters was made, consisted of an equitable claim to real property within the court's jurisdiction, the grant of such letters would not be considered an adjudication either on the value or validity of the claim, but only that the estate had made a prima facie showing of an equitable claim which justified the issuance of letters.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177–182, 1411; Dec. Dig. § 29.*]

3. EXECUTORS AND ADMINISTRATORS (§ 20*)—APPLICATION FOR LETTERS — NATURE OF PROPERTY.

Where an application for letters of administration on the estate of a foreign decedent showed that the only property of the decedent within the jurisdiction was an equitable claim to an interest in certain real property therein, the court, on trial of such application, though not required to try the validity and enforceability of the asserted equity, may nevertheless consider its nature, at least to the extent of determining whether it may be made the subject of a decree substantiating and giving it legal validity, and will deny letters if the claim presented has no such reasonable and colorable value.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83–105; Dec. Dig. § 20.*]

4. EXECUTORS AND ADMINISTRATORS (§ 20*)—GRANT OF LETTERS—PROBATE COURT—DISCRETION.

A probate court has an actual discretion in acting on an application for letters testamentary or of administration, and, while letters will always be granted where administration is necessary, advisable, or desirable, it will not grant them in its discretion if the purpose to be accomplished can as well or better be attained in another forum.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83–105; Dec. Dig. § 20.*]

5. EXECUTORS AND ADMINISTRATORS (§ 518*)—ANCILLARY ADMINISTRATION—ENFORCEMENT OF RIGHTS.

Testator died in California, leaving a share in his estate, which consisted partly of real property located in California, to his sister, who died testate in Kansas during the administration of testator's estate. After the appointment of an executor in Kansas for the sister's estate, he and the benficiaries under the sister's will, with the consent of the Kansas court, on representations of testator's widow as to the value of his estate, transferred all of their interest under testator's will to the widow for $3,333.33. The sister's estate was thereupon closed, the money so received distributed, and partial and final distribution made of testator's estate in California, where final decrees were entered without opposition. Thereafter certain of the sister's beneficiaries, claiming that they had been defrauded in making such assignment, applied in California for administration on the sister's estate that the administrator when appointed might proceed to set aside the assignment and recover the lawful share of testator's estate that would have been distributed to the sister's executor but for the assignment. *Held* that, if any one was defrauded in such transaction, it was the sister's beneficiaries, whose rights could be established and enforced with greater expedition in a direct suit in equity, and that their equitable claim was insufficient to justify ancillary administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2299–2309; Dec. Dig. § 518.*]

6. EXECUTORS AND ADMINISTRATORS (§ 12*)—APPOINTMENT—JURISDICTION—SITUS OF ASSETS.

Code Civ. Proc. § 1322, providing for probate of foreign wills and the grant of letters of administration in any county in which the testator shall have left any estate or means, is limited to a county in which there shall be an estate of the testator at the time administration is sought, and was not fulfilled by a situation where the applicant for letters asserted a mere claim to an interest in the proceeds of another estate which he alleged had been assigned through fraud.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 24; Dec. Dig. § 12.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Application by John H. Grady for letters of administration on the estate of Phoebe W. Daughaday, deceased, to which Josephine A. Phelps filed objections. From an order denying the petition, petitioner appeals. Affirmed.

See, also, 141 Pac. 926.

Thomas E. Curran and Francis Dunn, both of San Francisco, for appellant. Ross & Ross, of Redwood City, and Walter H. Linforth and W. C. Sharpstein, both of San Francisco, for respondent.

HENSHAW, J. Timothy Guy Phelps died testate. At the time of his death he was a resident of the county of San Mateo, and his estate was probated therein. By his will he left a legacy of $50,000 to his widow, Josephine A. Phelps, and, in addition thereto, one half of the remainder of his estate. The other half he apportioned amongst certain named relatives, leaving to them interests he designated as "shares." One of these relatives was a sister, Phœbe W. Daughaday, who was a resident of Kansas City, state of Kansas. She there resided until she in turn died testate in 1901. By her will she bequeathed her estate to her son Frederick, and to the heirs of her deceased son Mortimer. Her whole estate consisted of her "share" or interest in the estate of her brother, Timothy Guy Phelps. Her will was duly admitted to probate in the probate court of Wyandotte county, Kan. Her son Frederick was appointed administrator of her estate. Notice to creditors to present their claims was published; but no claim was ever presented for allowance. Thereafter the administrator petitioned the probate court of Wyandotte county for leave "to sell and assign to Josephine A. Phelps all the right, title, and interest of Phœbe W. Daughaday, deceased, in and to the estate of Timothy Guy Phelps." In his petition the administrator alleged:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "That the estate of Phœbe W. Daughaday consisted of an undivided interest in the estate of Timothy Guy Phelps, deceased, of San Mateo county, Cal.; that said estate consists largely of real estate and mining properties which it is impossible at this time to sell to advantage, and that the income from said estate is not sufficient to pay the expenses thereof; that the heirs of Phœbe W. Daughaday have received through your petitioner an offer of $3,333.33 for their interest in the estate of Timothy Guy Phelps; and that said heirs desire to accept the same, and are willing to join in an assignment with your petitioner of their interest in said estate."

A hearing was had upon this petition, and the court in probate authorized the sale to Josephine A. Phelps of all of the interest of the estate of Phœbe W. Daughaday, her heirs and beneficiaries, in the estate of Timothy Guy Phelps, and ordered Frederick Daughaday, administrator, to join with the other heirs of Phœbe W. Daughaday in executing a deed and assignment of this interest. Pursuant to this order this instrument was executed by all the parties in interest under the will of Phœbe Daughaday. Thereafter the administrator filed his final account, showing his receipt of $3,333.33 from Josephine A. Phelps, and showing, further, that after paying all debts and expenses of administration he had, pursuant to the order of the court, ratably distributed the remainder amongst the heirs and beneficiaries of Phœbe Daughaday's will. This final account was heard and settled, and the probate court of Wyandotte county declared the administration to be at an end, and discharged Frederick Daughaday from his trust as administrator. The estate of Phœbe W. Daughaday was thus finally closed on December 19, 1904. About eight months thereafter the superior court of San Mateo county, sitting in probate, in the matter of Timothy Guy Phelps, made its decree by which a portion of that estate was distributed to the widow, Josephine A. Phelps, the respondent herein. In 1907 the same court, sitting in the matter of the same estate, made its decree settling the final account of the executrix, and distributing the residue of the estate to respondent. This final decree declared:

> "That prior to the 9th day of May, 1905, Josephine A. Phelps, the surviving widow of Timothy Guy Phelps, deceased, purchased of and from all of the heirs of said deceased, and of and from each and all of the devisees and legatees named and mentioned or referred to in and by the last will and testament of said deceased, and of and from all persons and each and every person interested in the estate of said deceased, all of the right, title, interest, estate, and claim of each and every one of said heirs, devisees, and legatees and persons in and to the estate of said deceased, and in and to all of the property real and personal belonging to said deceased at the time of his death, or comprising any portion of his estate; and each and all and every one of said heirs, devisees, legatees, and persons prior to said 9th day of May, 1905, granted, sold, assigned, transferred, and conveyed to and vested in her said Josephine A. Phelps by good and proper and sufficient instruments in writing properly executed to her by them and each of them all of their and each of their rights, interests, titles, estates, and claims in all of the real and personal property of the estate of said deceased, or owned by or belonging to said estate, or in which the estate of said deceased has any right, title, interest, or claim, without exception or reservation, and that said Josephine A. Phelps, as surviving widow of said deceased and devisee and legatee under the last will and testament of said deceased, and as grantee and assignee of all of the heirs of said deceased, and of all of the devisees and legatees under the will of said deceased, and of all persons interested in the estate of said deceased, is now entitled to have distributed to her all of the estate of said deceased, and all the property, real and personal, owned by or belonging to said estate, or in which the estate of said deceased now has any right, title, interest, or claim, without reservation, and as fully as if an exact and particular description of all of the property, real and personal, of said estate and each and every interest therein was here fully and particularly described, mentioned, and set forth."

This final decree was never appealed from, and has long since become final. On the 9th day of January, 1912, John H. Grady, appellant herein, filed his petition in the superior court of the city and county of San Francisco, setting up the death of Phœbe W. Daughaday, the probate of her will in Wyandotte county, Kan., and alleging that she "left estate in the city and county of San Francisco" consisting of "a certain interest in real estate vested in said deceased under the last will and testament of Timothy Guy Phelps, deceased." The petition further alleged:

> "That your petitioner is a person interested in the estate and in the will of said deceased, being the assignee and transferee of a certain interest from Frederick Daughaday, one of the devisees under the last will and testament of said deceased, and is entitled to have distribut-

ed to him said certain interest as assignee and transferee of said Frederick Daughaday."

Respondent met this petition by a contest, setting out the matters of fact above recited, and alleging that Phœbe W. Daughaday had not left any estate in the city and county of San Francisco subject to administration. Code Civ. Proc. § 1322. The petitioner, after his demurrer to this contest had been overruled, filed an answer which admitted all of the facts above set forth, but pleaded that the deed and assignment made by the administrator and other heirs and beneficiaries under the will of Phœbe W. Daughaday had been procured of them by respondent by means of fraudulent representations concerning the value of the interest of Phœbe W. Daughaday's estate in the estate of Timothy Guy Phelps, deceased, and by false representations concerning the condition of the estate and its administration, "and by threats wrongfully made by said Josephine A. Phelps that steps would be taken whereby the interest of said parties and of said Phœbe W. Daughaday in said estate would be rendered valueless, unless they assigned their interests to said Josephine A. Phelps."

Upon the hearing contestant fully and satisfactorily established all of the facts set forth in her contest, and in addition thereto showed, without conflict that the only real estate owned by Timothy Guy Phelps in the city and county of San Francisco at the time of his death consisted of three lots, title to which had been quieted in respondent in an action brought by her under the McEnerney Act; the decree having been given on August 7, 1911. It was further disclosed at the hearing that no creditors of Phœbe W. Daughaday were involved in the controversy, and that the interest of John H. Grady, petitioner, consisted of an assignment from Frederick Daughaday, former administrator of his mother's estate, of "a one-thousandth part of all my right, title and interest in and to my share bequeathed to me by Phœbe W. Daughaday," which, upon the basis of the sale of that interest made by Frederick Daughaday to respondent, amounted to about $1.50. Petitioner, though not denied the opportunity so to do, offered no evidence concerning the asserted fraudulent nature of the transfer of the interest of the Phœbe W. Daughaday estate to respondent, but contented himself with introducing in evidence an answer which he as special administrator of the estate of Phœbe W. Daughaday had offered in an action to quiet title to certain lands in San Mateo county brought by Josephine A. Phelps, respondent herein, against him as such special administrator, which answer set up the same matters touching the fraudulent procurement of the deed and assignment to respondent as have above been stated. He also offered a proposed complaint in intervention in that action, which complaint in intervention was by the beneficiaries of Phœbe W. Daughaday's will and set up the same matters of fraud. He made no offer of evidence in support of any of these allegations contained in his answer, or in the complaint in intervention.

The facts have here been stated with even more elaboration than is perhaps necessary for the discussion of this case; but it will save a repetition of them in the consideration of the appeal in San Francisco No. 6677, in which action the superior court of San Mateo county quieted the title of the plaintiff, Josephine A. Phelps, against the claims of appellant herein, and of the beneficiaries under the will of Phœbe W. Daughaday, who sought in vain to intervene in that action.

With whatever may be its legal ramifications, the question in this case is whether or not Phœbe W. Daughaday left any estate in the city and county of San Francisco calling for administration. The assertion in the petition that she did leave such estate is controverted by the decree of final distribution in the estate of Timothy Guy Phelps as above quoted, which declares that Mrs. Phelps had acquired in the lifetime of Phœbe W. Daughaday all the latter's interest in the estate of Timothy Guy Phelps. However mistaken this decree may have been in fact, it stood and stands as a conclusive adjudication upon the question—an adjudication in rem (Code Civ. Proc. 1908, subd. 1)—binding upon the whole world. If the finality of this decree were not attacked, or attempted to be attacked as it is here, upon the ground of fraud, it would require no discussion to support the declaration that the decree of final distribution was conclusive under these circumstances on the proposition that Phœbe W. Daughaday did not leave estate in the city and county of San Francisco, and that therefore there could be no reason for the issuance of letters of administration upon her nonexistent estate. But the answer of petitioner to the contest asserts that this decree was procured by fraud.

[1-3] We will not here stop to consider the sufficiency of these allegations as measured by the rules of pleading in a court of equity. Rather will we go to the essence of the proposition, which may be thus stated: Where, under an application for letters of administration, it is made to appear that the sole property of the estate is an equitable claim or demand, should the court in probate (1) treat such a claim as property justifying the issuance of letters in advance of its establishment, or (2) should it await the action of a court of equity in establishing the validity of the asserted equity, or, finally, (3) should it, sitting as a court of equity, itself try the controversy, and, as it determines it in favor of or against the asserted equity, so grant or withhold letters of administration? If the third view is the correct one, then the court's determination was perfectly proper, for, as has been said, no scintilla of evidence was offered to substantiate the assertions of fraud. If the

second proposition is the sound one, then equally was the court correct, for its refusal to issue letters was in effect to send the petitioner into a court of equity to establish his asserted fraud. If the first proposition is the correct one, then it is to be considered whether the facts disclosed at the hearing presented a case demanding of the court the issuance of letters. Upon these three propositions we hold that the action of the court in probate should not be and is not governed by either the second or the third consideration. We need not discuss this matter with elaboration. It is sufficient to point out that in many cases it would work a hardship if an equitable claim were not recognized as property or estate sufficient to warrant the issuance of letters. Creditors might find it difficult, if sent into a court of equity to establish such a claim, successfully to do so. Heirs may be numerous, scattered, and of divergent views, which might make it difficult for them successfully to enforce the equity. As to the third suggestion, the court in probate should not be called upon to try a contested matter in equity, which arises in the probate court in a sense collaterally as the mere outgrowth of the primary question whether or not the decedent left estate, even if the court in probate, with its circumscribed jurisdiction, is not absolutely without power to try such questions. Yet, on the other hand, for that court to send the petitioner into a court of equity, there first to establish his claim, may result in very real and unnecessary hardship to those interested in the estate. These considerations compel the conclusion that, in proper cases, and upon a proper showing that the property of the estate is an equitable claim, the court in probate should grant letters of administration. In so doing, however, the decree of the court granting letters of administration will in no sense be considered an adjudication either upon the value or validity of the equitable demand, but will be an adjudication solely that the estate makes a prima facie showing of an equitable claim which justifies the issuance of letters of administration. This declaration, however, is not to be stretched to mean that any and every assertion of an equitable right demands of the court in probate the issuance of letters. While the court is not called upon to try, and will not therefore try, the question of the validity and enforceability of such an asserted equity, it is both its right and its duty to consider the nature of the asserted equity, at least to the extent of determining whether, if it be all that it is asserted, it may be made the subject of an equitable decree substantiating it and giving it legal validity; and it will deny letters of administration where the claim presented to it has not such reasonable and colorable value.

Herein the principle is the same (though its application is different) as that which governs the conduct and rulings of courts where one, declaring himself to be a public officer, seeks injunction against unwarranted intrusion and violent ouster at the instance of another claimant to the same office. The courts in such cases do not and cannot try the title to the office; but they inquire into the status of the complainant to the extent of determining whether he has such a colorable right to the office as to justify the law's protection of his possession until his adversary has by legal judgment established his own superior title and consequent right of possession. Scott v. Sheehan, 145 Cal. 692, 79 Pac. 353.

[4] This discussion and this conclusion are manifestly predicated upon the concept that the court in probate has a real discretion in the matter of granting or refusing to grant letters testamentary or of administration. That discretion actually exists. True it is that in the vast majority of cases where such application is made no occasion for its exercise arises, for in the vast majority of cases there are substantial interests to be subserved by administration. Creditors are to be paid, heirship determined, distributive shares fixed, construction of wills had, all resulting in the final decree of distribution, which affords a most valuable and conclusive muniment of title. So it may be said that the probate court will always grant such letters where administration is either necessary or advisable or desirable. But it will not grant them, in its discretion, where the purpose to be accomplished can be as well or better attained in another forum.

[5] Did the petition, then, in this case show such a reasonable and colorable equitable claim as to force the conclusion that it was an abuse of discretion for the court in probate to have refused letters of administration? As presented to that court the facts were that Phœbe W. Daughaday died in Kansas, and was a resident of that state. Her estate was there probated, the rights of all the beneficiaries under her will decreed and determined. All of the interest which her estate had in the estate of Timothy Guy Phelps had been conveyed to Mrs. Phelps under order of the Kansas court. The sale had been effectuated, the price paid, the money distributed to the beneficiaries under the will of Phœbe W. Daughaday, and her estate was finally closed. This, in turn, was followed by decrees of partial and final distribution in the probate court of San Mateo county in this state, which decrees were made without opposition, and have long since become final. If anybody was defrauded by these decrees, it was not Phœbe W. Daughaday, who was dead; it was not this petitioner, who took a thousandth part of the one-half interest of one of the beneficiaries who joined in the conveyance to Mrs. Phelps. If fraud was practiced at all, it was upon those beneficiaries. If those beneficiaries believe themselves to have been defrauded, they can one or all establish their rights by direct action

in a court of equity in this state much more expeditiously than through the roundabout medium of ancillary administration upon the estate of Phœbe W. Daughaday.

[6] Still further it should be pointed out that section 1322, Code of Civil Procedure, touching the probate of foreign wills, and providing that administration may be had in any county in which the testator shall have left any estate, means any county in which there shall be estate of the testator at the time administration is sought. But what is the situation here presented? It was shown in this case, as above pointed out, that contestant established title to herself in this very land by a decree in an action which she brought under the McEnerney Act (St. 1906 [Ex. Sess.] p. 78). That decree has become final, and is as binding upon the Daughaday beneficiaries as upon all the rest of the world. It does not appear, and it matters not, whether that decree was based wholly or not at all upon the evidence of the decree of distribution in the estate of Timothy Guy Phelps. If it were obtained wholly upon the evidence afforded by that decree of distribution, and, if that distribution itself had been secured by fraud, nevertheless it would amount to nothing more than the introduction of fraudulent evidence in the trial of a cause, which fact would not militate in the slightest against the validity of the decree, nor be a ground for setting it aside. Bell v. Thompson, 147 Cal. 689, 82 Pac. 327.

From every point of view, therefore, the court rightly exercised its discretion in refusing letters of administration. Indeed we would be inclined to hold that it would have abused its discretion had it acted otherwise. For it is not within the contemplation of the law that the mere assertion of any claim, however visionary and unsubstantial, shall call for the issuance of letters of administration, and to that extent give a form of judicial sanction to unfounded pretensions.

Wherefore the decree of the court is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

24 Cal. App. 495

PEOPLE v. CUCCHIETTE. (Cr. 501.)

(District Court of Appeal, First District, California. May 18, 1914.)

1. Rape (§ 7*)—Elements of Offense.

The gist of the crime of rape denounced by Pen. Code, § 263, is the outrage to the person and feelings of the female; any sexual penetration, however slight, being sufficient to complete the crime.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 7; Dec. Dig. § 7.*]

2. Criminal Law (§ 720*)—Trial—Prosecuting Attorney—Argument.

Where, in a prosecution of defendant for rape on his 13 year old daughter, there was proof that defendant had attempted the crime on other members of his family, comment of the district attorney in argument with reference to such other acts was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Peter Cucchiette was convicted of rape, and he appeals. Affirmed.

W. D. Crichton and C. K. Bonestell, both of Fresno, for appellant. U. S. Webb, Atty. Gen., and J. H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant of the crime of rape, perpetrated by him upon the person of his 13 year old daughter. It is not necessary and would not be edifying to review the evidence in this case.

The appellant concedes that the proofs presented by the prosecution would have warranted a conviction of an attempt to commit rape.

[1] We think the evidence goes further, and was sufficient to have justified the jury with the parties before it in finding the defendant guilty of the higher crime, in view of the provisions of the Penal Code relating to this offense:

> "The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime." Penal Code, § 263.

[2] The only other point relied upon by the appellant is that of misconduct on the part of the district attorney in commenting in his argument to the jury upon other illicit acts of the defendant, done or attempted upon other members of his family. We think there is sufficient in the record to have warranted the insinuation of the district attorney that this was not the first time that the defendant had attempted the commission of this bestial and revolting crime.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

24 Cal. App. 486

HOME PAYMENT JEWELRY CO. v. SMITH et al. (Civ. 1443.)

(District Court of Appeal, Second District, California. May 15, 1914. Rehearing Denied June 13, 1914.)

1. Replevin (§ 11*)—Demand—Necessity.

If one rightfully obtains possession of personalty, a demand must be made on him for delivery of the property before an action of claim and delivery can be brought against him.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 85–97; Dec. Dig. § 11.*]

2. Replevin (§ 61*)—Complaint—Demand.

A complaint, in an action of claim and delivery by one who had delivered personalty under a lease contract against a third party, which merely alleged that prior to the commencement of the action demand was made without showing when respondent obtained possession was insufficient as alleging a demand, and hence a demurrer thereto was properly sustained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 223; Dec. Dig. § 61.*]

3. REPLEVIN (§ 22*) — NECESSARY PARTIES — LESSEE.

In an action of claim and delivery by one who had delivered personalty under a lease contract against third parties to recover such property delivered by the lessee to them, the lessee was not a necessary party, since such action will only lie against persons in possession at the time of its commencement.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 122; Dec. Dig. § 22.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the Home Payment Jewelry Company against J. B. Smith and another. Judgment on demurrer for defendants, and plaintiff appeals. Affirmed.

Ben F. Gray and H. G. Bittleston, both of Los Angeles, for appellant. L. E. Dadmun, of San Diego, for respondents.

JAMES, J. Appellant sued to recover possession of personal property consisting of certain articles of jewelry and for damages. A demurrer was interposed to the amended complaint, which was sustained by the trial court. Appellant declined to take advantage of the leave given to further amend, and from a judgment of dismissal this appeal was taken.

In the complaint it was set out that the appellant had delivered to one Mary C. Ames under a lease contract, which was set out in full as an exhibit attached to the amended complaint, certain articles of jewelry of the alleged value of $1,080. The contract as set out provided that the articles of jewelry were leased to the said Mary C. Ames for a term of ten months for the total rental of $1,080, which rental was to be paid, $100 in cash and the balance in monthly payments of $100. The contract also contained these conditions:

> "Second. And I further agree not to let the above goods go out of my possession without first notifying said Home Payment Company and having first obtained their written consent; and I assume all responsibility of loss or damage of said goods for any cause whatsoever.
>
> "Third. It is also agreed that in the event that I shall fail to pay any monthly installment when due, the said Home Payment Company may at their option take possession of said goods and cancel this lease, and that said Home Payment Company shall be entitled to retain all sums paid by me as a reasonable compensation for the use of said goods and for their trouble and expense in connection with this transaction with me."

[1-3] In the complaint it was alleged that the lessee had failed and refused to comply with the terms and provisions of the contract; that she had paid the sum of $700 on account of rental of the property, but had defaulted in the payment of the balance due; that plaintiff had made demand on her for the payment of the balance, but she had refused to pay the same. This allegation then followed:

> "That after obtaining possession of said property from plaintiff as aforesaid, the said Mary C. Ames, without plaintiff's consent and against the will of plaintiff, concealed said property from plaintiff and transferred and delivered the same to other parties. That prior to the commencement of this action the defendants herein obtained possession of the said aforesaid personal property, either directly or indirectly, from the said Mary C. Ames; and the said defendants are still in possession of said property, and, without plaintiff's consent and against the will of plaintiff, are detaining said property from the possession of plaintiff. That prior to the commencement of this action, plaintiff demanded the possession of said property from the defendants, but the defendants then and there refused, and still refuse, to deliver the possession thereof to the plaintiff. That when defendants obtained possession of said property as aforesaid, plaintiff was, and ever since has been and still is, the owner of said property and entitled to the immediate possession thereof."

General and special grounds of demurrer were assigned. It does not appear by the allegations of the complaint that respondents did not obtain possession of the jewelry from the lessee with the consent of the plaintiff, which it is provided might be given under the terms of the lease contract. If they obtained the possession rightfully, then it was necessary, before an action of claim and delivery could be brought, that demand be made upon them requiring that the property be delivered to the lessor. Bacon v. Robson, 53 Cal. 399; McNally v. Connolly, 2 Cal. Unrep. Cas. 621, 9 Pac. 169. A demand being necessary, it was essential that appellant should have alleged the making of such a demand during the time that respondents held possession of the property. This it did not do. To be sure it was alleged that prior to the commencement of this action demand was made, but it is not shown by any allegation of the complaint at what date the respondents obtained possession of the property. The general ground of demurrer went to this point, and upon the question just suggested the demurrer was properly sustained. The plaintiff was not required to join as a party defendant the lessee named in the contract and to whom the jewelry was first delivered, for an action of claim and delivery will only lie against persons who have possession of property in dispute at the time of its commencement. Richards v. Morey, 133 Cal. 437, 65 Pac. 886.

It will be unnecessary to notice particularly the argument made as to other and special grounds of demurrer. As the complaint did not state facts sufficient to constitute a cause of action, the judgment of the court was right.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

24 Cal. App. 493

RADKE & CO. v. HESTHAL. (Civ. 1355.)

(District Court of Appeal, First District, California. May 16, 1914.)

1. Pledges (§ 23*)—Pledgees as Bona Fide Purchasers—Priorities.

Under Civ. Code, § 2991, providing that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge thereof to one who has received the property in good faith in the ordinary course of business and for value, the seller of a diamond ring, under an oral agreement by which the buyer was to pay up an old account, make monthly payments on the ring, and return it if such payments were not made, could not recover the ring from a pledgee in good faith, where to the seller's knowledge the buyer purchased the ring for the purpose of giving it to his wife, and the seller agreed that this might be done, since the buyer was the absolute owner of the ring, at least to the extent of being able to give it away to his wife, and he therefore had more than an apparent ownership.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 47, 68; Dec. Dig. § 23.*]

2. Pledges (§ 23*)—Priorities—Estoppel.

Under Civ. Code, § 3543, providing that when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer, where the seller of a ring, under an agreement by which the buyer was to return it if he failed to make specified payments, upon learning that the buyer had pledged the ring, relied on his promise to make good and pay for it and made no attempt to recover it from the pledgee until several months later, after the buyer had left the state, apparently placing himself beyond the reach of either the seller or the pledgee, it could not recover the ring from the pledgee.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 47, 68; Dec. Dig. § 23.*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Radke & Co. against W. J. Hesthal. Judgment for defendant, and plaintiff appeals. Affirmed.

Dan Hadsell, of San Francisco, for appellant. R. F. Mogan and Leon Samuels, both of San Francisco, for respondent.

RICHARDS, J. This is an action in the nature of replevin brought to recover possession of a diamond ring, or the sum of $1,100, the alleged value thereof, from the defendant as the pledgee of said personal property.

The facts of the case, which are practically undisputed, are briefly these: On March 16, 1909, one J. McKinery, who had been a customer of the plaintiff in previous dealings, came to the plaintiff's store, desiring to purchase a diamond ring, which he said he wished to give to his wife. He already owed the plaintiff several hundred dollars, and plaintiff therefore declined to sell him the ring outright and entirely on credit, but finally delivered it to him upon an oral agreement that he was to pay up the old account and begin paying $50 a month on account of the purchase of the ring; and, in case of his failure so to do, he was to return the ring, and the transaction was not to be regarded as a sale. McKinery received possession of the ring, but neither paid anything upon his old account nor upon the purchase price of the ring. Shortly thereafter he pledged the ring to the defendant for a loan of $500, and not long after making the pledge, and within a month of the time of his receiving the ring from the plaintiff, he informed the plaintiff of the fact of the pledge, and promised it "to make good and pay for the ring." The plaintiff relied upon McKinery's assurance that he would make good and pay for it, and hence took no action against him, and made no attempt to demand or recover the ring from the defendant until several months later, when, McKinery having left the state, plaintiff for the first time claimed the ownership and demanded the return of the ring from the defendant. This action for its recovery was begun in January, 1910.

[1] We think that these undisputed facts bring the case clearly within the terms of section 2991 of the Civil Code, which reads as follows:

> "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other to a pledgee who has received the property in good faith, in the ordinary course of business, and for value."

It is conceded by the plaintiff that the transaction was something more than a mere conditional sale of this article of personal property, for the avowed purpose of its purchase was that he should be invested with much more than the apparent ownership of the property. He was to become the absolute owner thereof to the extent of being able to give it away to his wife; and to this the plaintiff agreed. We think this brings the case squarely within the terms of the section above quoted, and hence must be held to bar the right of the plaintiff to recover the property in the hands of the pledgee who, it is conceded, received it in good faith and in the ordinary course of business and for value.

[2] We think, also, that for another reason the plaintiff is not entitled to recover in this case. Within a few days after it had delivered possession of the ring to McKinery upon the arrangement above stated, it learned from his own lips that he had pledged the ring to the defendant for a loan of several hundred dollars. The plaintiff was thus put upon notice that its purchaser was asserting an ownership and right of possession contrary to the alleged agreement for its conditional sale. It was also advised as to the possession and asserted rights of the pledgee. Under such conditions the plaintiff was not only content to accept the assurance of McKinery that he would make good and pay for the ring, but it was also content to allow the pledge transaction to stand without objection or attack for several months, and until Mc-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Kinery had apparently been permitted to place himself beyond the reach of either the plaintiff or the pledgee. We are of the opinion that section 3543 of the Civil Code should be given application to such a state of facts:

> "When one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer."

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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24 Cal. App. 497

PEOPLE v. CRUSE. (Cr. 312.)

(District Court of Appeal, Second District, California. May 18, 1914.)

1. INFANTS (§ 20*)—OFFENSES—"DEPENDENT PERSON."

Under an information charging that accused caused and contributed to the dependency of a girl 18 years old, and that she was in danger of growing up to lead an immoral life, and was then and there a dependent person, the state must not only prove accused's wrongful acts, but that the girl, by reason of such acts, was in danger of becoming a dependent person within the general juvenile act of 1909 (St. 1909, p. 213), as amended by St. 1911, p. 659, § 1, subd. 16, defining a dependent person as one under the age of 21 years who is in danger of growing up to lead an idle, dissolute, or immoral life.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*]

2. INFANTS (§ 20*) — OFFENSES — EVIDENCE — ADMISSIBILITY.

In a prosecution for causing and contributing to the dependent state of a girl 18 years of age, evidence *held* sufficient to support a conviction.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*]

3. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

In a prosecution for causing or contributing to the dependent state of a girl 18 years of age, where the court fairly charged on all the elements of the offense, the refusal of more detailed charges, which were not essential to a proper consideration of the case, was not error, though in such prosecutions the accused should be given the full measure of every legal right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS.

The failure of the court to give offered instructions as to the good character of accused is not error, where no evidence thereof had been introduced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

5. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In a prosecution for causing or contributing to the dependent state of a girl 18 years of age, the refusal of an instruction that the moral delinquency of the girl complainant could not be considered as affecting her credibility was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. § 785.*]

6. INFANTS (§ 20*) — PROTECTION — LAWS — PROSECUTIONS UNDER.

In a prosecution for the commission of certain acts claimed to have rendered a girl 18 years of age a dependent person, the state is not bound to show that the acts were committed at or about the time laid in the information, but a conviction may be had on evidence showing the commission of the acts within one year before the filing of the information.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*]

7. CRIMINAL LAW (§ 1104*)—TRIAL—APPEAL—TRANSCRIPT.

Upon appeal from a judgment of conviction, the appellate court cannot, on mere supplemental transcript of the reporter, review the action of the trial court in attempting to set aside the judgment and resentence accused, where the appeal was perfected before the acts complained of occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2776, 2885, 2886; Dec. Dig. § 1104.*]

8. CRIMINAL LAW (§ 1083*)—APPEAL—EFFECT.

The taking of an appeal from a judgment of conviction precludes the trial judge, during its pendency, from making any order affecting the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2732; Dec. Dig. § 1083.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Samuel Cruse was convicted of causing and contributing to the dependent state of a girl 18 years of age, and he appeals. Affirmed.

R. G. Swaffield and P. M. Swaffield, both of Long Beach, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Appeal from a judgment following conviction on the charge that appellant did cause and contribute to the dependent state of a girl 18 years of age. The judgment provided as follows:

> "No cause having been shown why judgment should not be entered, you, Samuel Cruse, should be and are now fined by this court in the amount of five hundred dollars, and, in case said fine is not paid, you shall be confined in the county jail of Los Angeles county for the term of six months."

No complaint is made as to the sufficiency to this judgment in form.

[1, 2] The information charged that on the 15th day of March, 1913, in the county of Los Angeles, appellant caused and contributed to the dependency of the girl named; and it is alleged that the latter was then and there a dependent person within the meaning of the acts of the Legislature, in that she was in danger of growing up to lead an immoral life "by reason of the acts of the defendant." An allegation followed setting forth that the particular offense was that appellant had had upon one occasion sexual intercourse with the girl named. Under this information it was necessary for the people to establish, not only the fact that the act of intercourse described had been committed,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

but also that the girl mentioned in the information was, prior to the filing of the charge against appellant, a dependent person within the meaning of the statute, and that the offending conduct of appellant caused or contributed to that condition. People v. Pierro, 17 Cal. App. 741, 121 Pac. 689. The amendment to the general juvenile act of 1909 (Stats. 1909, p. 213), as found in the Statutes of 1911, at page 658, defines the term "dependent person." Such person is first declared to be one under the age of 21 years. Then follows 16 subdivisions describing various conditions and habits which give to the person the character of a "dependent." Section 1, subd. 16, declares that any person under the age of 21 years "who from any cause is in danger of growing up to lead an idle, dissolute or immoral life" is a dependent. Section 26 of the same act declares that any person who shall "encourage, cause, or contribute to the dependency or delinquency of such person" shall be guilty of a misdemeanor. The punishment prescribed is a fine not exceeding $1,000, or imprisonment in the county jail not more than one year, or both the fine and imprisonment. Appellant presents for consideration a number of questions involving the matter of the sufficiency of the evidence to sustain the judgment; of alleged errors of the court in giving and refusing to give certain instructions. It must be admitted at the outset that, had the case been submitted to the jury upon the evidence introduced by the prosecution alone, there would have been serious doubt as to the sufficiency of such evidence to sustain the conviction. The appellant was a motor car conductor; one of the terminal points of his runs being at the city of Long Beach. The girl complainant lived a few miles outside of that city and traveled frequently to town, where she performed errands and also attended business college. She testified that she became acquainted with appellant while traveling upon cars where he was employed. She testified that on a particular day in March, 1913, she met the appellant at Long Beach by chance about 1 o'clock as she was on her way to attend her classes; that appellant persuaded her to take a walk with him in the direction of the beach, and that the two went down some steps past an old bathhouse; that appellant, while they were at the rear or side of the bathhouse in an obscure place, endeavored to persuade her to submit to his desires, which she refused; that thereupon he pulled her down, and that she tried to get away, but that he caught her skirts and so held her, and finally by force and against her will pushed her over upon the ground, where he held her securely and there committed the act complained of, all of which time, she testified, she was using her strength to release herself from his grasp, but which she was unable to do. All of this testimony coming from the girl went to show that a forcible rape had been committed. Further than this, the girl testified that she, neither before nor after that time, had ever had such intercourse with any man. Her mother was called as a witness, and from her testimony it appeared that she had always exercised such reasonable control of the girl as might be expected of a mother, and that the daughter had always conducted herself in an orderly and proper manner, and that she had not been allowed to "keep company" with any man. The testimony of the father and the younger sister of the girl complainant all tended to corroborate the statements of the mother as to the fair character possessed by the girl. The mother testified that she knew nothing of the alleged commission of the act complained of until a number of months afterward, when it was discovered that the girl was pregnant. Upon the case thus made, viewed in the light of this evidence introduced by the prosecution, it would seem that the girl was not a dependent or delinquent child, for it could not be properly said that, with the disposition thus ascribed to her, and the fact that the act of intercourse committed with her was accomplished by force and against her will, there was danger of her "growing up to lead an idle, dissolute or immoral life." It might as well be said where, for instance, a married woman is assaulted and outraged, and she chances to be under the age of 21 years, that she thereupon becomes a delinquent person, and that the perpetrator of the outrage could be prosecuted as one having caused the woman to become of that character. Appellant denied that he had committed the act complained of, and introduced on his part evidence which tended to show that the girl was in the habit of loitering about the railway yards; that she conversed with men generally there; and that he had heard her use language which indicated that prior to his acquaintance with her she had had illicit relations with other men. The jury, of course, was entitled to take the whole evidence into consideration in determining what its verdict should be. If the jury believed the testimony introduced by and for the appellant which tended to show that the disposition of the girl complainant was prior to the date of the commission of the alleged offense such as to indicate a lewd and immoral character, and if the testimony was believed that the act of intercourse had been committed by the appellant with the complainant as charged, then the verdict of guilty cannot be said to lack support in the evidence. The testimony introduced by the defendant tended to show the proneness of the girl to yield to immoral persuasions, and to show as a matter of reasonable probability that, if appellant did commit the act charged with her, the result would be to give to her the character of a delinquent within the meaning of the definition contained in the statute.

[3-6] A great many instructions offered by the defendant were refused, many of which might well have been given by the trial judge, in order that the defendant might have had a more detailed statement of the propositions material to be submitted given to the jury. It is said by the Supreme Court in the case of People v. Baldwin, 117 Cal. 249, 49 Pac. 187, in discussing a case similarly conditioned as to the evidence:

> "In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right."

An appellate court, however, in considering the matter of the instructions given and refused, will not reverse a case where it appears that the court has stated in a generally clear, though brief, form the propositions of law applicable to the issues tried. The charge to the jury as given by the court in this case must be said to have been fair and in general substance sufficient. It will serve no useful purpose to discuss the other points made in detail. Where it is contended that the court in isolated paragraphs of the instructions omitted to state important matters necessary to be taken into account, the answer is that the instructions as a whole, and when considered together, as they must be considered, presented all of the matters necessary to a proper consideration of the case. The omission of the court to give the offered instruction as to the good character of appellant, where no evidence was offered in support thereof, was not error. People v. Griffith, 146 Cal. 339, 80 Pac. 68. The instruction given to the effect that the moral delinquency of the girl complainant was not to be considered as affecting her credibility, which was the substance of the instruction, is sustained by the authorities. People v. Wilmot, 139 Cal. 103, 72 Pac. 838. The trial judge instructed the jury that it was immaterial on what day or night the offense charged in the information was committed, provided the jury believed from the evidence that it was committed, and that it was committed within one year prior to the filing of the information in the case. Appellant argues that the jury in their consideration of the case should have been limited to a time at or about the precise date fixed in the information. This court held adversely to a similar contention as made in the case of People v. Carmean, 138 Pac. 117.

[7, 8] It seems that the trial judge, at the instance of appellant, and some time after the judgment appealed from was pronounced, attempted to vacate that judgment and resentence appellant, for the reason that it was claimed that the arraignment at the time of the first sentence was not sufficiently made. The question as to whether the trial judge could under such circumstances resentence appellant is not properly here presented, as it is shown only by a supplemental transcript of the official reporter, and, further, because the appeal from the judgment here considered was taken prior to the time when the proceedings on the resentencing of appellant were had. After the appeal had been so taken and was pending, the trial judge had no authority to make any order which would affect that judgment. Upon the face of the record it appears that the judgment appealed from was regularly entered.

A careful examination of the entire record does not disclose any errors which may be said to have injuriously affected appellant in his right to a fair trial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

24 Cal. App. 503

FIRST NAT. BANK OF LONG BEACH v. ZIEGLER. (Civ. 1485.)

(District Court of Appeal, Second District, California. May 18, 1914.)

TIME (§ 9*) — ACTIONS — LIMITATION — COMPUTATION OF TIME.

Under Code Civ. Proc. § 312, providing that civil actions can only be commenced within the period prescribed after the cause of action shall have accrued, and section 337, subd. 1, providing that an action upon any contract, founded upon an instrument in writing executed within the state, must be commenced "within four years," suit on a note dated April 12, 1908, payable on demand after date, not commenced until April 12, 1912, was not barred by the four-year statute of limitations, as the date, taken as the day of maturity, was to be excluded in computing the limitation period.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the First National Bank of Long Beach against H. B. Ziegler. Judgment for defendant, and plaintiff appeals. Reversed, with direction to enter judgment for plaintiff on the facts admitted by the pleadings and determined in the findings.

John E. Daly and James H. Daly, both of Long Beach, for appellant. Myron W. Tilden and W. A. Sumner, both of Los Angeles, for respondent.

JAMES, J. Action brought on a promissory note dated April 12, 1908, and made payable "on demand after date." The suit was commenced on the 12th day of April, 1912. Defendant had judgment upon the finding of the court that the cause of action was barred by the provisions of section 337, subdivision 1, of the Code of Civil Procedure. Plaintiff has appealed from the judgment and presents the judgment roll. The only matter in controversy on this appeal is whether the trial court correctly determined that the four-year period of limitation had fully run against plaintiff's cause of action. If the day upon which the note was dated is to be included in the computation of the time, then the trial judge was correct in his conclusion; if that day is to be excluded, then plaintiff's action was in time, and it should have had judgment. Section 312 of the Code of Civil Procedure provides as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "Civil actions, without exception, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued*, unless where, in special cases, a different limitation is prescribed by statute."

Section 337 of the same Code, which was pleaded by the defendant, provides that an action upon any contract founded upon an instrument in writing executed within this state must be commenced "within four years." Reading this section, as it must be read, in connection with the provision contained in section 312 which we have italicized, results in the limitation here invoked being read in this form:

> "An action upon any contract obligation or liability founded upon an instrument in writing executed within this state, must be commenced within four years after the cause of action shall have accrued."

It has been held that a note containing the condition that this note did as to payment, to wit, "on demand after date," should be considered as a note payable immediately after the making thereof. O'Neil v. Magner, 81 Cal. 631, 22 Pac. 876, 15 Am. St. Rep. 88. Without assenting finally to the law as it is so declared in the case just cited, it may be assumed that the note in suit did mature on the day of its making, for by so assuming respondent's contentions are presented in their strongest light. The note in suit, then, matured on the 12th day of April, 1908. In computing the time constituting the period embraced within a statute of limitation, courts in the earlier decisions have differed as to whether the day of maturity should be included. The later cases, however, are quite uniformly harmonious in their holding that that day should be excluded, especially where the provisions of the statute are, as in our statute, that the time shall be computed after the cause of action shall have accrued; and, as fractions of a day are not considered, it has been sometimes declared in the decisions that no moment of time can be said to be after a given day until that day has expired. In an early Massachusetts case (Presbrey v. Williams, 15 Mass. 193) the Supreme Court of that state held that "the action was not brought within six years next after the cause of action accrued" on a demand note, where, by including the day of the date of the note, the full period prescribed had expired on the day preceding that when action was commenced. For a number of years this case was considered by appellate courts of neighboring states, by some criticized and seldom followed. In a later case in the same Massachusetts court (Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 846, 15 Am. St. Rep. 183), the contrary rule was declared, and the court there said:

> "We think the decisions in these and in some other cases in this court are so inconsistent with that in Presbrey v. Williams as virtually to have overruled it, and it can therefore no longer be considered an authority in this commonwealth."

Under statutes of limitation in substance the same as ours, the Connecticut Supreme Court determined that the day of the date of the note was to be excluded in computing the period of limitation, and a like holding was made under similar statute and in a similar case by the Supreme Court of New York. See Blackman v. Nearing, 43 Conn. 56, 21 Am. Rep. 634; Cornell v. Moulton, 3 Denio (N. Y.) 12. While a different statute was being considered in the case about to be mentioned, the argument by our Supreme Court is favorable to the view announced in the decisions last cited. Dingley v. McDonald, 124 Cal. 90, 56 Pac. 790.

The judgment is reversed, with direction to the trial court to enter judgment in favor of plaintiff on the facts as admitted by the pleadings and determined in the findings.

We concur: CONREY, P. J.; SHAW, J.

24 Cal. App. 475

ABBOTT v. ABBOTT. (Civ. 1266.)

(District Court of Appeal, First District, California. May 15, 1914.)

1. Contempt (§ 66*) — Appeal — Decisions Reviewable.

At common law, and under Code Civ. Proc. § 1222, which provides that the judgment and orders of the court or judge made in cases of contempt are final and conclusive, an order in a contempt proceeding is not reviewable by appeal.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

2. Contempt (§ 67*)—Review by Certiorari—Want of Jurisdiction.

Certiorari will lie to review an order in a contempt proceeding when the proceedings are absolutely void for want of jurisdiction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222; Dec. Dig. § 67.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Margaret J. Abbott against Thomas E. Abbott. From an order dismissing a citation to show cause in a contempt proceeding, the plaintiff appeals. Appeal dismissed.

W. P. Netherton, of Santa Cruz, for appellant. James A. Hall, of Watsonville, for respondent.

KERRIGAN, J. The plaintiff in this action sued for a divorce from the defendant upon the ground of cruelty. Incidentally the

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plaintiff prayed for the sum of $50 per month as temporary alimony. The defendant defaulted. The lower court made its findings of fact in favor of the plaintiff, and among other things specifically found that:

> "The sum of $50 per month permanent alimony is a reasonable sum to be allowed plaintiff for her support and maintenance."

Thereupon the plaintiff was granted an interlocutory decree of divorce, and in addition to declaring that the plaintiff was entitled to be divorced from the defendant, it was ordered, adjudged, and decreed that the defendant pay to the plaintiff "the sum of $50 per month permanent alimony" until the further order of the court. The interlocutory decree was duly entered as of the date of its making. No appeal was taken therefrom, and upon the expiration of one year a final decree of divorce was made and entered, which failed to award to plaintiff an allowance for her maintenance, and made no reference to the "permanent alimony" previously allowed her in the interlocutory decree. The defendant paid $50 per month to the plaintiff as directed by the interlocutory decree from the date of its making to the date of the entry of the final decree, but failed and refused thereafter to make any further payments to the plaintiff. Upon the affidavit of plaintiff the defendant was cited to show cause in the court below why he should not be punished for contempt in refusing to comply with the mandate of the interlocutory decree. Upon the hearing of the order to show cause the defendant contended, and the lower court held, that the interlocutory decree, in so far as it related to the payment of permanent alimony, was not enforceable after the entry of the final decree, and that, inasmuch as the latter decree made no provision for alimony, the defendant was not in contempt. Upon that ground alone the lower court ordered the citation in contempt dismissed and respondent discharged. From this order the plaintiff has appealed.

[1, 2] We cannot consider the merits of the question presented by the briefs for the reason that the order appealed from, being one in a contempt proceeding, is not a reviewable order. Such was the common law. 9 Cyc. 61. It is the law generally (see note to Mullin v. People, 22 Am. St. Rep. 417), and it is expressly so provided in section 1222 of the Code of Civil Procedure. People v. Latimer, 160 Cal. 716, 720, 117 Pac. 1051; Tyler v. Connolly, 65 Cal. 28, 33, 2 Pac. 414; People v. Kuhlman, 118 Cal. 141, 50 Pac. 382; In re Vance, 88 Cal. 262, 26 Pac. 101. Certiorari will lie when the proceedings are absolutely void for want of jurisdiction. People v. Latimer, supra; Muir v. Sup. Ct., 58 Cal. 361; Maxwell v. Rives, 11 Nev. 213; Phillips v. Welch, 12 Nev. 158; Young v. Cannon, 2 Utah, 560. In this case, if plaintiff's position be correct, the trial court in effect refused to enforce a plain provision of a judgment in which case mandamus would seem to be the proper remedy. Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006; People v. Latimer, supra. In 9 Cyc., at page 65, it is stated that the extraordinary writ of mandamus will issue in contempt proceedings when the applicant has a clear right, and no other specific and adequate remedy.

The appeal is therefore dismissed.

We concur: LENNON, P. J.; RICHARDS, J.

24 Cal. App. 471

PEOPLE v. QUAN CHUCK. (Cr. 484.)

(District Court of Appeal, First District, California. May 14, 1914. Rehearing Denied June 12, 1914; by Supreme Court July 13, 1914.)

1. Homicide (§ 309*)—Degrees—Evidence—Manslaughter.

Where the words passing between accused and decedent just before the killing of decedent did not disclose a quarrel, nor show incitement by decedent to any such heat of passion by accused as to reduce the crime to manslaughter, refusal to charge on manslaughter was not reversible error, especially where the jury found a verdict of first degree murder, though the court also submitted second degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652–655; Dec. Dig. § 309.*]

2. Criminal Law (§ 413*)—Evidence—Self-Serving Declaration.

Statements made to police officers by accused, prior to a homicide by him, that he was afraid of the main witnesses for the people was properly excluded as self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928–935; Dec. Dig. § 413.*]

3. Homicide (§ 253*) — Evidence — Sufficiency.

Where, on the trial of a Chinese for murder, four Chinese witnesses testified that they saw accused kill decedent, and accused produced evidence in support of his alibi and in support of the theory that the state's witnesses were seeking the lives of both decedent and accused, a conviction of murder in the first degree will not be disturbed on appeal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Henry Quan Chuck was convicted of murder in the first degree, and he appeals. Affirmed.

H. H. Davis, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the State.

RICHARDS, J. This is an appeal from a judgment upon a verdict of conviction of the defendant of murder in the first degree, with his punishment fixed at life imprisonment, and from an order denying his motion for a new trial.

The facts as presented by the chief witnesses for the prosecution were briefly these: Four Chinese persons were in the basement of a Chinese store on Jackson street in San Francisco upon the 20th day of June, 1913, about 10 o'clock in the evening, when the defendant entered and asked for Fong Hung, the deceased. He was told that he was not in, but one of those present offered to telephone for him, which he did, and Fong Hung presently appeared, and defendant asked him for a loan of $25 to which the deceased replied that "he had no money." The defendant then asked "What are you going to do about it?" to which the deceased answered, "What are you going to do about it?" and started to walk away. The defendant drew a pistol and fired several shots at the deceased, killing him almost instantly. He then threw away the weapon and fled up the street to another building. The officers who appeared presently on the scene, attracted by police whistles blown by the Chinese witnesses to the murder, went into this building, and at first arrested another Chinese who was acting suspiciously, and brought him to the spot of the crime, where the witnesses declined to identify him, but informed the officer that the defendant was the person who had done the shooting. They went back immediately and found the defendant in the building which the murderer had been seen to enter, and apprehended him. When brought to the scene of the homicide the four witnesses identified him as the murderer; and, when called as witnesses in the case, all testified positively that they had seen him do the deed. The defense relied chiefly upon an alibi, which was not, however, established to the satisfaction of the jury, who returned a verdict of murder in the first degree.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The first point made by the defendant upon this appeal is that the court erred in its refusal to give an instruction upon the subject of manslaughter. This contention of the defendant must be based, under the authorities, upon the claim that there is sufficient evidence in the case upon which the jury might predicate a verdict of manslaughter. The only bit of evidence which the defendant can find to base this claim upon is that contained in the brief interchange of words between the defendant and the deceased just before the homicide. The bare words of that conversation do not suffice to disclose or suggest a quarrel, nor to show any incitement by the deceased to any such heat of passion on the part of the defendant as would serve to justify a jury in reducing the defendant's crime from murder to manslaughter; and that the jury who heard the evidence of this conversation did not so regard it is plain, for they refused by their verdict to reduce the defendant's crime even to murder in the second degree, although they were instructed that they might do so. We must conclude, therefore, that this episode immediately preceding the homicide was not of sufficient importance to have entitled the defendant to have an instruction upon the subject of manslaughter given, or to have the judgment reversed because the court, having also heard all the evidence, refused to so instruct the jury. The case of People v. Wright (Sup.) 138 Pac. 349, cited by the appellant, is in entire harmony with these views.

[2] The appellant further contends that the court erred in sustaining the objection of the prosecution to a number of questions put to witnesses for the evident purpose of showing that a relation of enmity existed on the part of the four main witnesses for the people toward the defendant, and that he stood in respect to them in an attitude of fear, for example, Officer Sutton, called for the people, was asked on cross-examination this question: "Did Quan Chuck ever complain to you of being afraid of his life?" to which an objection was sustained, and very properly so; for a statement of this kind, made by the defendant some time before the homicide, would be evidently a self-serving declaration, and as such inadmissible upon any possible theory of the case. In short, all of the testimony sought to be elicited from the police officers regarding the defendant's fear of his accusers, and his various acts indicative of such fear, were either hearsay or conclusions not properly admissible in evidence.

The same observation applies to the testimony of the defendant himself. His conclusions as to the reasons for the enmity of his accusers were properly stricken out; but his direct testimony as to their acts of hostility was in each case admitted and allowed to remain in evidence.

[3] The defendant predicates his effort to procure the admission of much of this sort of proof upon his theory of the case, which is that he was not the perpetrator of, and was not present at the time and place of the crime; but that the four witnesses against him were enemies both of the deceased and of himself; that it was they who killed the deceased, and, being the only witnesses to their own crime, conceived and attempted to execute the double crime of swearing it off upon him. Counsel for the defendant argues plausibly that since all of the parties and eyewitnesses to this homicide are Chinese, and most of them of the highbinder type, this court ought to go behind the direct evidence fastening the crime upon the defendant, to discover and declare the existence of the dark conspiracy above set forth. However plausible this argument may be, the only available place for its presentation was to the jury in the trial court. Before this Court of Appeal all parties, all nationalities, and all proofs must be placed upon the same footing, and be estimated by the same inflexible rules of law. In the case at bar four Chinese witnesses testified that they saw this defendant commit this crime. The defendant on his part produced his proof in support of his alibi, and also in support of his theory that the witnesses against him were seeking the life of both the deceased and himself, because of

the fact that he had been an informer against them in relation to other offenses against the law. The jury believed the eyewitnesses to the crime and disbelieved the defendant's alibi. Upon such a state of the record it is plain that had the parties and witnesses been of European extraction the verdict of the jury would not be disturbed; and the same rule must be applied to a case where all of the parties and witnesses are of Asiatic extraction; for otherwise our judicial system would cease to be the administrator of uniform and impartial law.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J

24 Cal. App. 505

WOLBRECHT v. FRENCH et al. (Civ. 1527.)

(District Court of Appeal, Second District, California. May 18, 1914.)

1. FRAUDULENT CONVEYANCES (§ 121*)—PREFERENCES TO CREDITORS.

A creditor receiving preference from a debtor must take only enough property to satisfy his debt, and, where he pays a cash difference to be used by the debtor for his own purposes, the entire transaction is rendered invalid and null and void as to a protesting creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 385-391; Dec. Dig. § 121.*]

2. FRAUDULENT CONVEYANCES (§ 121*)—PREFERENCES TO CREDITORS.

To sustain a conveyance from a debtor preferring a creditor of more property than needed to satisfy the demand of the creditor, the property must be of such a nature as to make its severance or division impracticable, or that the debtor intends in good faith to use the proceeds in paying other creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 385-391; Dec. Dig. § 121.*]

3. FRAUDULENT CONVEYANCES (§ 184*) — RIGHTS OF GRANTEE.

Where a wife, at the time of a conveyance to her by her husband, knew that his intent was to hinder and delay plaintiff, a creditor, and participated with him in carrying out the fraud, etc., the court, in setting aside the conveyance, erred in giving her a lien for any amount of money in preference to plaintiff's claim.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 583-588; Dec. Dig. § 184.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Allis Wolbrecht against S. Anne French and husband. From a judgment declaring a lien on property in favor of defendant, plaintiff appeals. Reversed, with directions.

Haines & Haines, of San Diego, for appellant. L. E. Dadmun, of San Diego, for respondents.

JAMES, J. Appellant is a judgment creditor of respondent W. D. French. S. Anne French is the wife of the latter. On October 5, 1908, W. D. French was indebted to appellant in a large sum of money, and on the 7th day of July, 1910, appellant brought an action to secure judgment on account of that indebtedness. Writ of attachment was issued therein and levy made upon the interest of respondent W. D. French in a certain lot of land in the county of San Diego. This action progressed to judgment which was rendered on April 20, 1911, in appellant's favor for the principal sum of $1,482.50. Execution was issued on the judgment and, prior to the commencement of this action, was returned by the sheriff wholly unsatisfied. On August 26, 1909, respondent W. D. French had executed to his wife a grant deed purporting to convey his interest in the land upon which attachment was levied, but this conveyance was withheld from record until September 28, 1910, some months after appellant commenced her action against respondent W. D. French. At the date of the conveyance by French to his wife he was indebted to her in the sum of $300 upon two certain promissory notes theretofore given by him, and the further sum of $50, money advanced by his wife to him at various prior times. At all times prior to the making of the conveyance by French to his wife and all times subsequent thereto, respondent W. D. French was wholly insolvent, and his wife at the time she accepted the conveyance from him knew of that fact and knew of the indebtedness of her husband to appellant. The instrument of conveyance was in form an absolute deed and was made pursuant to the agreement with S. Anne French that it should be in satisfaction of the antecedent indebtedness due by the husband of the sum of $350, and in further consideration that $100 in money should be advanced by her to him, and the further consideration that the property should be mortgaged and the sum of $300 secured by such mortgage should be delivered to respondent W. D. French for his use. The wife at the time of the making of the deed and the agreement had knowledge of the purpose of her husband to hinder, delay, and defraud the plaintiff from the enforcement of her demand against the land so conveyed, and with that knowledge proceeded to carry out the agreement mentioned. One James H. Parker did make a loan of $300 upon the interest of the Frenches in the property, without knowledge, however, of any intent on the part of the mortgagors to hinder, delay, or defraud the plaintiff. After appellant obtained her judgment in the action hereinbefore referred to and had failed to secure satisfaction thereof by execution, she brought this suit to secure a decree declaring null and void the conveyance made by French to his wife as being in fraud of her rights as a creditor. The court in the findings of fact which were filed determined the facts to be in substance as they have been hereinbefore set forth. In the conclusions of law, however, it was determined that appellant's lien against the property was subject to the lien of S. Anne French for the total amount of money which she had advanced to her husband before, at, and after the date of the conveyance mentioned, and subject also to the lien of the mortgage made to James H. Parker. The appeal was taken from that portion of the judgment which adjudges that S. Anne French is entitled to a lien upon the premises described therein. No brief has been filed on the part of respondents and no oral argument was made on their behalf.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] Appellant insists that the conveyance to the wife by the husband, under the condition of the facts as found by the trial judge, was wholly void and conferred no title as against appellant's claim as an existing creditor, citing, among other cases, Burke v. Koch, 75 Cal. 356, 17 Pac. 228, and section 3439, Civil Code, which provides that every transfer of property or charge made thereon, "with intent to defray or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest." It should be remembered that the court determined that S. Anne French took the conveyance from her husband with full knowledge of his insolvency and with full knowledge that he intended thereby to prevent the plaintiff from securing satisfaction of her debt. Conveyances have sometimes been upheld which have the effect of giving preference to one creditor over another. It is established as a rule, however, that such creditor receiving preference must take only enough property to satisfy his debt, and that, where he bargains to pay an added cash difference which is desired to be used by the debtor for his own purposes, such fact invalidates the entire transaction and renders the conveyance null and void as against the protesting creditor. In order to sustain a conveyance of a greater amount of property than might be necessary to satisfy the demands of the creditor receiving preference, it must be made to appear that the property is of such a nature as to make its severance or division impracticable, or that the debtor intends in good faith to use the proceeds derived therefrom in satisfaction of debts owing to other creditors. Appellant has called attention to several decisions which affirm these propositions. Sly v. Bell, 131 Iowa, 184, 108 N. W. 227, 117 Am. St. Rep. 417; Jackson v. Citizens' Bank & Trust Co., 53 Fla. 265, 44 South. 517. The court here found in effect, not only that the wife had knowledge of the fraudulent intent of her husband in making the conveyance to her, but that she participated in the carrying out of that fraud by arranging to take the title out of the reach of appellant and to give back to the husband a sum of money greater than the amount of the indebtedness found to be owing by him to her. Upon the facts as found, the court erred in determining that the right of appellant to have subjected to the payment of her debt the real property described in the complaint was subject to the lien of S. Anne French as security for the payment of any amount of money.

The judgment is reversed, with direction to the court to enter, upon the findings of fact as made, such a judgment as is consistent with the conclusions announced in this opinion.

We concur: CONREY, P. J.; SHAW, J.

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24 Cal. App. 489

PEOPLE v. CRADLEBAUGH. (Cr. 495.)

(District Court of Appeal, First District, California. May 16, 1914.)

1. Officers (§ 39*)—"De Facto Officer."

A de facto officer is one who actually assumes and exercises the duties of a public office under color of a known and authorized appointment, but who has failed to comply with all of the requirements of the law prescribed as a precedent to the performance of the duties of the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 61; Dec. Dig. § 39.*

For other definitions, see Words and Phrases, vol. 2, pp. 1845–1851.]

2. Sheriffs and Constables (§ 20*)—De Facto Deputies.

A person who, after having been commissioned a deputy by the sheriff of a county, openly and notoriously assumed to perform the duties of the office was a de facto public officer, notwithstanding the failure to file his appointment with the county clerk as required by Pol. Code, § 4024.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 36; Dec. Dig. § 20.*]

3. Officers (§ 121*)—Criminal Offenses—Assault—"Public Officer."

The words "public officer," as used in Pen. Code, § 149, providing that every public officer who, under color of authority, without lawful necessity, assails or beats a person, is punishable by a fine of not exceeding $1,000 and imprisonment, etc., include a de factor officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 207, 208; Dec. Dig. § 121.*

For other definitions, see Words and Phrases, vol. 8, pp. 7772, 7773.]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

R. B. Cradlebaugh was convicted for assault committed under color of his authority as a public officer, and he appeals. Affirmed.

Thomas B. Dozier, of San Francisco, and E. B. Taylor, of Martinez, for appellant. U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. The defendant was charged, in an information filed in the superior court of the county of Contra Costa, with the offense defined by section 149 of the Penal Code, which reads as follows:

"Every public officer who, under color of authority, without lawful necessity, assails or beats any person, is punishable by a fine not exceeding $5,000, and imprisonment in the county jail not exceeding five years."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The defendant was convicted, and sentenced to pay a fine of $1,000, and to be imprisoned in the county jail for one year. The appeal is from the judgment, and from an order denying defendant's motion for a new trial.

The information charged:

"That on the 19th day of September, A. D. 1913, the * * * defendant, R. B. Cradlebaugh, alias R. B. Henry, was a public officer, to wit, a duly appointed, qualified, and acting deputy sheriff in and for the county of Yuba, state of California, under George H. Voss, who was then and there the duly elected, qualified, and acting sheriff of said county; that on the said 19th day of September, 1913, and while the said defendant was acting as such deputy county sheriff, at the county of Contra Costa, * * * he, the defendant, did then and there unlawfully and willfully and violently, and under color of authority, assail, strike, and beat, without lawful necessity, and without any just cause or provocation, one Alfred Nelson, while he, the said defendant, had then and there the said Alfred Nelson under arrest and in his custody and control by virtue of a warrant of arrest, and by virtue of his office as such deputy sheriff."

The insufficiency of the evidence to sustain the verdict, and the refusal of the trial court to give certain requested instructions, are the only points urged for a reversal.

It is conceded that the evidence sufficiently shows the commission of the assault; but it is claimed that the evidence is insufficient in the particular that it does not show that the defendant was at the time of the assault a regularly appointed deputy sheriff of the county of Yuba. Upon this phase of the case the evidence in substance is that on the 8th day of September, 1913, George H. Voss, sheriff of the county of Yuba, in writing appointed the defendant a deputy sheriff of said county; that thereupon the defendant, before Edward B. Stanwood, the district attorney of said county, swore and subscribed to the oath of office as such deputy sheriff, which oath, in the usual and ordinary form, was indorsed upon the sheriff's written appointment. It was not shown, or attempted to be shown, that such appointment had ever been filed with the clerk of Yuba county. To the contrary, the testimony of Sheriff Voss, uncontradicted and received without objection, clearly shows that the writing in question had never at any time been filed with said clerk.

Section 4024 of the Political Code provides that the appointment of a deputy to a county officer must be made in writing and filed in the office of the county clerk, and further expressly declares that:

"Until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy."

The gravamen of the offense of which the defendant was convicted consists primarily of an assault by a public officer under color of authority. It is not disputed that the evidence shows that at the time of the assault alleged and proved against him the defendant was acting under color of the assumed authority of a public peace officer; but it is insisted, nevertheless, that the evidence of the defendant's failure to file his appointment as such officer affirmatively established the fact that he was not a public officer within the meaning of section 149 of the Penal Code, and that therefore the evidence upon the whole case was lacking in proof of an essential element of the offense for which the defendant was prosecuted and convicted.

[1] It may be, as counsel for the defendant contends, that the defendant was not a de jure public officer at the time of the assault; but we cannot accede to the proposition that he was not a de facto officer. A de facto officer may be defined to be one who actually assumes and exercises the duties of a public office under color of a known and authorized appointment, but who has failed to comply with all of the requirements and conditions by law prescribed as a precedent to the performance of the duties of the office. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Oakland Paving Co. v. Donovan, 19 Cal. App. 488, 126 Pac. 388; People v. McDowell, 70 Hun, 50, 23 N. Y. Supp. 950.

[2] In the present case the defendant was in writing appointed a deputy sheriff by the duly elected, qualified, and acting sheriff of the county of Yuba. The defendant had taken the oath of office as such deputy, and was openly and notoriously assuming to perform the duties of the office. Having been commissioned a deputy by the sheriff, and having acted at the time of the assault under color of such commission, the defendant was undoubtedly a de facto public officer, notwithstanding the failure to file his appointment with the county clerk. State v. Underwood, 75 Mo. 230; State v. Quint, 65 Kan. 144, 69 Pac. 171; State v. Dierberger, 90 Mo. 369, 2 S. W. 286.

Generally speaking, the obligations and responsibilities of a de facto officer while in the performance of the duties of his office are, so far as the public and third persons are concerned, in legal effect the same as those of an officer de jure. State v. Dierberger, supra; Oakland Pav. Co. v. Donovan, supra; People v. White, 24 Wend. (N. Y.) 539; Adams v. Tator, 42 Hun (N. Y.) 384. And the rule in this behalf applies with equal force to deputy de facto officers. State, etc., v. Muir, 20 Mo. 303.

[3] The words "public officer," as used in section 149 of the Penal Code, are broad enough to cover and include a de facto officer; and, this being so, the evidence upon the whole case sufficiently supports the verdict of the jury finding the defendant "guilty of the crime of a public officer under color of authority, without lawful necessity, assaulting, and beating one Alfred Nelson as charged in the information."

The requested instructions of the defendant which were refused by the trial court in effect called for an acquittal of the defendant if the jury found that he was a de facto, and not a de jure, officer. For the reasons stated in disposing of the point relating to the alleged insufficiency of the evidence, the requested instructions were rightfully refused.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

24 Cal. App. 440

PEOPLE v. SCOTT. (Cr. 237.)

(District Court of Appeal, Third District, California. May 12, 1914.)

1. JURY (§ 136*)—CHALLENGES—NUMBER OF PEREMPTORY CHALLENGES.

One charged with rape of a female under the age of consent is entitled, under the statute, to ten peremptory challenges only.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 607–618; Dec. Dig. § 136.*]

2. CRIMINAL LAW (§ 1169*)—EVIDENCE—DECLARATIONS—BIRTH—HARMLESS ERROR.

Where, on a trial for rape of a female under the age of consent, the evidence showed that the offense was committed in August, 1912, and the father of prosecutrix gave the year of her birth as 1898, and testified that he knew the birth independently of a record, except the exact date, the error in permitting him to testify to the exact date from a date on a slip of paper copied from an entry in a Bible, which in turn was copied from an entry in the family Bible, was not reversible, for the particular month of the birth of prosecutrix was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

3. RAPE (§ 54*)—EVIDENCE—SUFFICIENCY.

A conviction of rape of a female under the age of consent may be had on her uncorroborated testimony.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 123, 125, 126; Dec. Dig. § 54.*]

4. RAPE (§ 59*)—EVIDENCE—SUFFICIENCY.

An instruction, on a trial for rape of a female under the age of consent, that, while the law does not require that the prosecutrix shall be supported by any other witness or by corroborating circumstances, the law requires that the jury examine her testimony with caution sufficiently cautions the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 132; Dec. Dig. § 59.*]

5. RAPE (§ 38*)—EVIDENCE—ADMISSIBILITY.

On a trial for rape of a female under the age of consent, evidence of subsequent acts of intercourse between the same parties is admissible, not as independent substantive offenses on which a conviction can be had, but as corroborative evidence showing a continuous illicit relationship.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 95; Dec. Dig. § 38.*]

6. CRIMINAL LAW (§ 678*)—OFFENSE—ELECTION BY PROSECUTION.

The better practice is to require the district attorney at the beginning of the trial to elect the particular act for which a conviction is sought; but the purpose of the rule will be accomplished if, at any time before the submission of the case, the jury is clearly informed as to the particular offense of which they are asked to find accused guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580–1583; Dec. Dig. § 678.*]

7. CRIMINAL LAW (§ 1166½*)—OFFENSE—ELECTION BY PROSECUTION—PREJUDICIAL ERROR.

Where the information alleged that the offense of rape of a female under the age of consent was committed on or about August 15th, and there was no evidence of any criminal act on more than two occasions, one on August 9th, and the other three weeks later, and the evidence clearly identified the two events, the refusal of the court to require the district attorney to elect, except by stating that he would rely on the evidence establishing the act committed on or about August 9th, was not prejudicial, especially in view of a charge that, where one is charged with rape, evidence of improper familiarity between the parties is admitted to prove their disposition, and to render it more probable that the act charged in the information was committed on August 9th, and for no other purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3123; Dec. Dig. § 1166½.*]

8. RAPE (§ 59*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where the information charged accused with rape of female under the age of consent on or about August 15th, and the evidence showed a rape on August 9th, and another three weeks later, and the district attorney elected to rely on the evidence of rape on or about August 9th, an instruction that the precise time at which the offense was committed need not be stated in the information, but it may be alleged to have been committed at any time before the filing thereof, was not misleading, but was merely given because the information alleged that the offense was committed on or about the designated date.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 132; Dec. Dig. § 59.*]

9. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF PROSECUTING ATTORNEY—ACTS CONSTITUTING—HARMLESS ERROR.

Where the court, for the benefit of a witness, explained the meaning of the term "integrity," the action of the district attorney in stating that he understood the term to include "moral uprightness" was not misconduct, prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

10. WITNESSES (§ 268*)—CROSS-EXAMINATION—EXTENT.

Where a witness testified that he had a conversation with a witness of accused as to the character of accused, a question on cross-examination, the witness of accused denying the conversation, as to whether he had discussed the conduct of defendant in peeping into the window of a young lady, was within the legitimate scope of cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

11. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—IMPROPER QUESTIONS ON CROSS-EXAMINATION.

Where the evidence of the guilt of accused is so strong that it is incredible that the verdict would have been otherwise if the district attorney had not asked a witness on cross-examination an improper question, the misconduct of the district attorney was not ground for reversal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

12. CRIMINAL LAW (§ 1172*)—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

Where, on a trial for rape of a female under the age of consent, a physician testified as to the physical condition of prosecutrix, and accused showed that prosecutrix had been criminally intimate with others prior to the alleged offense, an instruction that any female under the age of 16 years is incapable of consent, and any one having intercourse with her is guilty, though he obtains her consent, and that whether prosecutrix consents or resists, or whether she had previously been guilty of misconduct with another, is immaterial, given while the court was dealing with a hypothetical case, was not prejudicial to accused, for the jury could merely have understood that, if they were satisfied that accused had committed the act charged, it was no defense that prosecutrix had been previously guilty of misconduct with another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

13. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

Where there was no possible room for uncertainty of the guilt of accused or some other person committing the act charged, the refusal to charge that the prosecution must prove to a moral certainty, and beyond a reasonable doubt, that accused, and not some other person, committed the act charged, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849, 1851, 1880, 1904–1922, 1960, 1967; Dec. Dig. § 789.*]

14. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested instruction sufficiently covered by an instruction given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

15. CRIMINAL LAW (§ 769*)—INSTRUCTIONS—NECESSITY.

It must be assumed that the jury are fair and intelligent men, and require no special admonition as to an obvious fact, so that an instruction relating thereto is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803–1806; Dec. Dig. § 769.*]

16. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS—ERROR.

Where the court, on a trial of rape of a female under the age of consent, charged that neither sympathy for or prejudice against accused, a dentist, or any other person, should influence the verdict, but the jury must look alone to the evidence and from it make the decision, refusal to charge that the fact that accused is a dentist could not be considered against him was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

17. RAPE (§ 46*)—EVIDENCE—ADMISSIBILITY.

On a trial for rape of a female under the age of consent, obscene printed articles shown to prosecutrix by accused while she was in accused's dental chair, and prior to the commission of the offense, were admissible in evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 105; Dec. Dig. § 46.*]

18. CRIMINAL LAW (§ 404*)—EVIDENCE—ADMISSIBILITY.

Where, on a trial for rape of a female under the age of consent, prosecutrix went with the sheriff to the office of accused, a dentist, and the sheriff obtained certain suppositories, and prosecutrix testified that one used by accused when the offense was committed was like those secured by the sheriff, and that accused obtained them at the same place, they were properly received in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891–893, 1457; Dec. Dig. § 404.*]

19. CRIMINAL LAW (§ 475*)—EVIDENCE—ADMISSIBILITY—EXPERT TESTIMONY.

Where, on a trial for rape of a female under the age of consent, capsules taken from the office of accused were received in evidence, a chemist was properly permitted to testify as to the result of a chemical analysis of the capsules, and a physician was properly permitted to testify as to their probable effect when used as testified to by the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1063; Dec. Dig. § 475.*]

20. CRIMINAL LAW (§ 1165*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where a conviction was just, and would have been reached if error complained of had not been committed, the error must be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089; Dec. Dig. § 1165.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

E. W. Scott was convicted of crime, and he appeals. Affirmed.

W. F. Cowan and Phil Ware, both of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

BURNETT, J. The defendant was convicted of the crime of rape in having carnal intercourse with a female under the age of consent, and he has appealed from the judgment and the order denying his motion for a new trial.

[1] The claim that he should have been allowed 20 peremptory challenges has been determined several times by the Supreme Court adversely to his contention. It is sufficient to refer to People v. Sullivan, 132 Cal. 94, 64 Pac. 90, wherein, alluding to the earlier construction of the statute allowing only 10 such challenges, it is said:

> "The construction thus given to the section was made nearly 20 years ago, and, as the Legislature has not seen fit to make a change in the statute, we do not feel authorized to recede from the construction then given."

[2] The court was clearly right in denying defendant's motion to strike out all of the testimony of the girl's father as to the daughter's age. In opposition to the ruling, it is claimed that he had no independent recollection on the subject, but testified only from a date on a slip of paper which was copied from an entry in a Bible, which in turn was copied from an entry in the family Bible. Whether the witness should have been

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

permitted to refer to the slip or not is of no consequence, since he testified positively of his independent recollection as to her age. He declared:

> "I think I should know when the birth was; I was right there in the house. I know the birth independently of the record, except the exact date. I might get mixed up on that. I know the age independent of the Bible record."

He gave the year as 1898. The offense was committed in August, 1912. It is manifest, therefore, that the particular month of her birth was unimportant. In fact, the evidence as to her being under the age of consent is so conclusive that any technical error in admitting testimony upon the subject would and should be disregarded.

[3] We cannot agree with appellant that:

> "The court erred in instructing the jury as to the rule in considering the testimony of the prosecutrix."

The part of the instruction of which complaint is made is the following:

> "The court further instructs the jury that it is not essential to a conviction in this case that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular acts constituting the offense. It is sufficient if you believe from her evidence and all the other testimony and circumstances in proof in the case, beyond a reasonable doubt, that the crime charged has been committed."

[4] It has been held many times that in such prosecution the jury may convict on the uncorroborated testimony of the prosecutrix. It is sufficient to cite People v. Keith, 141 Cal. 686, 75 Pac. 304. If this were not the rule, it is quite clear that many offenses of this character would go unpunished. For reasons readily suggested, though, it is entirely proper for the court to caution the jury to weigh the testimony of the prosecutrix with the utmost care, that no wrong be done to the defendant. The trial court in the case before us was careful to sound this warning in the following language:

> "While it is true that the law does not require in this character of cases that the prosecuting witness be necessarily supported by another witness, or by corroborating circumstances, still I charge you that the law does require in this class of cases that you examine her testimony with caution."

That the court did not "more carefully and distinctly warn the jury of the danger of convicting the defendant on the testimony alone" of the prosecutrix is no ground for reversal. People v. Currie, 16 Cal. App. 736, 117 Pac. 941.

[5] It was not error for the court to permit evidence of subsequent illicit intimacy and intercourse between the same parties. In People v. Koller, 142 Cal. 624, 76 Pac. 501, it is said:

> "And while we recognize that there is a conflict in the authorities as to the admissibility of evidence of subsequent acts, we are of the opinion that the better rule, and the one sanctioned by the weight of authority, is that acts of improper familiarity, or illicit intimacy, or relations between the parties, subsequent as well as prior to the act charged in the information relied on by the prosecution for a conviction, are admissible as corroborative evidence, where they tend to show a continuous illicit relationship."

The court proceeds, however, to state that they are not admissible as independent substantive offenses upon which a conviction can be had, and they are only admissible at all after the prosecution has selected some particular act which constitutes the offense upon which reliance is had for a conviction.

[6] And that brings us to one of the two points most strongly urged by appellant, that is, that the district attorney did not make the selection which the law requires. For an exposition of the rule particular attention is directed to People v. Castro, 133 Cal. 13, 65 Pac. 14, and People v. Williams, 133 Cal. 165, 65 Pac. 323. In the former it is said:

> "The state, at the commencement of the trial, should have been required to select the particular act upon which it relied to make good the allegation of the information."

In the latter opinion it is declared:

> "In this case, as well as in any other, the prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the *one* specific offense for the alleged commission of which defendant is on trial."

[7] The better practice is, of course, to designate at the beginning of the trial the particular act for which a conviction is sought; but it is manifest that the purpose of the rule will be accomplished if, at any time before the case is submitted, the jurors are clearly informed as to the particular offense of which they are asked to find the defendant guilty. When the prosecutrix was on the stand, and was being questioned, the record shows the following:

> "Mr. Cowan: * * * And we also ask at this time that the district attorney elect upon which date—as I understand his statement yesterday to the jury there were three different times that the offense was committed— Mr. Lea: Oh, no. Mr. Cowan: We ask that he elect the date. The Court: I understand the offense was alleged to have been committed on the 9th day of August. Mr. Lea: On or about the 9th day of August."

This answer of the district attorney might have left the matter in uncertainty in view of certain considerations hereafter to be noticed. But when the whole record is regarded, we think there could be no doubt in the minds of the jury as to the particular charge upon which they were called to pass. There is no evidence whatever of sexual intercourse on more than two occasions, one on the 9th of August, and the other about three weeks later. The district attorney, however, did not claim that in the latter occurrence the coition was complete. Indeed, it clearly appears from his opening statement that only the first of these was regarded as measuring up to the offense charged in the information, and that for this he expected a conviction. He said:

> "On or about the 9th day of August we expect to show that she again visited his office, and that he tried to have intercourse with her, and did take her on his lap and finally take her

into the back room, where his bedroom was located, and laid her on the bed, and had intercourse with her, she consenting to it; that he gave her a sum of money that day and told her to say nothing about it. On a later period she visited the office a few times after that and had work done at times, and that on a later date he endeavored to have intercourse with her, and took her in and put her on his bed for that purpose, but, finding that she was in her period of monthly sickness, he desisted. That the charge is based on the occasion on which the intercourse occurred."

The evidence clearly identifies these two events, and, in view of the district attorney's statement, we think there could be no ground for misapprehension on the part of the jury as to which they were called upon to find a verdict. It may be said also that, from a colloquy between the court and district attorney in the beginning of the examination of the prosecutrix, the only reasonable inference would be that the prosecution was based on the first of these occurrences. The court also declared, in an instruction to the jury, that:

> "In cases where a person is charged with the crime of rape, evidence of improper familiarity on the part of the defendant towards and with the prosecutrix is received and admitted in evidence to prove the adulterous disposition of the person charged, and as having a tendency to render it more probable that the act of sexual intercourse charged in the indictment was committed on August 9, 1912, and for no other purpose."

[8] It is true that the court further instructed the jury that:

> "The precise time at which the offense was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the filing thereof, except where the time is a material ingredient in the offense."

This, however, was given for the reason that the information alleged the offense was committed "on or about" the 15th day of August; but, in view of what we have set forth this instruction could not have misled the jury as apprehended by appellant.

The other contention most confidently urged by appellant relates to the alleged misconduct of the district attorney.

[9] When the court, for the benefit of a witness, explained the meaning of the term "integrity," the district attorney stated that he understood it to include "moral uprightness." That was in the course of a running argument, and, granting that the district attorney placed a wrong interpretation upon the expression, we cannot assume that he was thereby guilty of willful misconduct. Indeed, "moral soundness" is one of the definitions of the term, and *probity*, *uprightness*, and *rectitude* are given in one of the standard dictionaries as synonymous of integrity. The district attorney was therefore not without plausible reason for his contention; but at any rate we cannot impute to him improper motives, nor believe that the jury was misled in violation of the rights of the defendant. Two other instances of misconduct are specified: The first is involved in a question asked of Dr. C. J. Fredericks, as follows: "Did you discuss about the defendant being seen peeping into the window of a young lady?" the doctor answering, "No; I never did, for I never saw him doing anything like that at all." The other relates to the following question asked on cross-examination of the witness W. C. Moran: "Didn't you ever hear that he was found looking in at windows of young ladies?" the witness having testified on direct examination that the defendant's general reputation for truth, honesty, and integrity "was the very best."

[10] As to the first of these, it may be said that the witness Fredericks had contradicted witness Wood, who testified, in reply to questions asked on cross-examination, that he had a conversation with the former as to the character of defendant. The question, therefore, asked of Fredericks, to which exception is taken, was within the legitimate scope of cross-examination. This was probably the view first taken of it by defendant, as no objection was made to the question.

[11] It may be that the district attorney should have refrained from asking said question of witness Moran; but, if we were to so hold, it would, in our opinion, be a gross miscarriage of justice to set aside the verdict for the mere asking of said question. The evidence of defendant's guilt is so strong and persuasive that it is incredible that the verdict would have been otherwise if the declared misconduct of the district attorney had not occurred. We consider this case easily distinguishable from People v. Derwae, 155 Cal. 592, 102 Pac. 266, and People v. Tufts, 139 Pac. 79.

[12] The prosecution requested the court to give the following instructions:

> "The court instructs you that it is the law of the state of California that any female under the age of 16 years shall be incapable of consenting to an act of sexual intercourse, and that any one committing an act of sexual intercourse with a female under such age, and not his wife, is guilty of the crime of rape, notwithstanding he obtained her consent. Therefore whether such child consents or resists is wholly immaterial."

It is admitted by appellant that the foregoing "is unquestionably good law"; but complaint is made of the action of the court in modifying the proposed instruction by substituting for the last sentence the following:

> "Therefore, whether such female consents or resists, or whether such female had previously had intercourse with another, if such be the fact, is wholly immaterial."

The ground of the criticisms is found in these considerations: A physician had testified as to the girl's physical condition, from which the inference would follow that coition had taken place. The jury might readily accept this as a circumstance against the defendant. Appellant, however, offered evidence tending to show that the prosecutrix had been intimate with two boys prior to the alleged offense of defendant. Such evidence, if given credit, would destroy the effect of her physical condition as evidence of appellant's guilt. It is claimed, though, that said instruction would lead the jury to reject said evidence as immaterial to the case.

This, however, is not a fair interpretation of the language used by the court. There was no intimation in the instruction that the jury should not consider such evidence for the purpose of reaching a conclusion as to whether defendant had committed the offense charged in the information. The court was dealing with a hypothetical case, that is, with one where it was established that intercourse had taken place with a female under the age of consent. In such case, the jury were told, it was immaterial whether there had been previous intercourse. The instruction, in the connection in which it was given, could be interpreted as meaning nothing more nor less than, if the jury were satisfied that defendant had committed the act charged in the information, it would be no defense that the prosecutrix may have had previous sexual intercourse with another. Such is the law. People v. Davenport, 13 Cal. App. 632, 110 Pac. 318; People v. Currie, 16 Cal. App. 731, 117 Pac. 941.

[13, 14] There was no error in the refusal of the proposed instruction that:

> The prosecution "must prove to you to a moral certainty, and beyond a reasonable doubt, that the defendant, and *not some other person*, committed the act of penetration as charged in the indictment."

Under the evidence there was no possible room for uncertainty or discussion as to whether the defendant or some other person committed the act *charged in the information*. In other words, there was no kind of showing or pretense that any other person committed said act. If it was intended that the jury should be instructed that the prosecution must prove to a moral certainty, and beyond a reasonable doubt, that the defendant committed the act, or else he must be acquitted, we find the legal proposition amply covered by the instructions given.

[15] The court refused a hypothetical instruction concluding with the direction:

> "Then I instruct you that you are to entirely disregard the evidence of a ruptured hymen as tending in any manner to establish the guilt of the defendant of the charge embraced in the indictment."

The instruction could mean only that, if the jury believed that a certain physical condition was produced by the act of another, it should not be considered as evidence against the defendant.

If the jurors needed such instruction, they were certainly lacking in an essential qualification for jury duty, that is, the possession "of ordinary intelligence." We must assume, however, that they were fair and intelligent men, and required no special admonition as to such an obvious and rudimentary principle of just conduct.

[16] The same suggestion may be made as to the action of the court in striking from a proposed instruction the words "nor the fact that the defendant is a dentist." The contention was that such circumstance should not operate to the prejudice of defendant. There is no reason to suppose that the jury would be so remiss as to look with disfavor upon that circumstance. Besides, the situation was entirely covered by this admonition given by the court:

> "Neither sympathy for nor prejudice against the defendant or any other person should influence your verdict. You must look alone to the evidence in this case and from it make your decision. The defendant is entitled to the calm, unbiased, and deliberate judgment upon the truthfulness of the charge against him."

[17] Two printed articles of an exceedingly libidinous and obscene character were introduced in evidence. The prosecutrix identified them as articles shown her by defendant while she was in the dental chair and prior to the commission of the offense charged in the information. She testified: "He just handed them to me and said, 'Here is a couple of pieces I could read.' I asked him where he got them, and he said a gent had given them to him." Being asked, "And what, if anything—did you look at the articles?" she answered, "Yes, sir; I glanced at them." That they were likely to constitute a lure to concupiscence and were used for that purpose is quite evident from the record. Any act or declaration of defendant tending to show a desire or purpose on his part to have illicit relations with the prosecutrix or any solicitation or representation made by him to excite a similar desire on the part of his victim, or to overcome her natural aversion to wantonness, would be relevantly and clearly connected with the crime and therefore admissible. A printed statement, shown to the prosecutrix, would, of course, stand upon the same footing as a similar oral or written declaration of defendant under similar circumstances.

[18] There is no more room to doubt the correctness of the ruling in permitting the introduction in evidence of certain suppositories found in defendant's office after the commission of the offense. The prosecutrix went with the sheriff to the office where he obtained them, and she testified that the "capsule" used by defendant when the offense was committed was just like those secured by the sheriff, and that the defendant "got it at the same place." The principle is the same as that involved in the introduction of a bottle containing strychnine found in the home of the defendant that was allowed in the case of People v. Wilkins, 158 Cal. 535, 111 Pac. 612. Therein, referring to the bottle, it is said:

> "Its identity and integrity were both sufficiently established to justify its admission in evidence."

See, also, People v. Lewis, 9 Cal. App. 281, 98 Pac. 1078.

[19] The witness Price, an analytical chemist, was permitted to give the result of a

chemical analysis of certain of the capsules found as aforesaid by the sheriff. This evidence was certainly proper if the capsules themselves were admissible.

The testimony of a physician as to the probable effect of these capsules when used in the manner testified to by the prosecutrix was legally pertinent, and its weight was for the jury. The relation to the charge was not too remote to render the foregoing circumstances proper subjects of consideration.

We have thus noticed, in the order presented by him, the various points made by appellant, and we are satisfied no sufficient reason exists to justify an interference with the verdict of the jury.

[20] If it should be conceded that any error was committed, it should be disregarded, for the reason that we are convinced that:

"The result was just, and it would have been reached if the error had not been committed." People v. O'Bryan, 165 Cal. 66, 130 Pac. 1042.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 451

PEOPLE v. HO KIM YOU.

SAME v. CHEW BOCK HUE.

(Cr. 455, 456.)

(District Court of Appeal, First District, California. May 13, 1914. Rehearing Denied June 12, 1914; Denied by Supreme Court July 11, 1914.)

1. HOMICIDE (§ 162*)—EVIDENCE—ADMISSIBILITY.

Where the theory of the prosecution was that defendants aided and abetted codefendants in committing a murder, it was not error to permit the prosecution to prove that two days prior to the homicide defendants and codefendants were traveling on the same train in the direction of the scene of the homicide, and that codefendants were armed, to connect defendants with the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 303; Dec. Dig. § 162.*]

2. WITNESSES (§ 268*) — EXAMINATION — CROSS-EXAMINATION.

Where, on the trial of defendants, charged with aiding and abetting codefendants in committing a murder, a witness testified that he heard a codefendant say to the other codefendant, "Start shooting," but did not hear the name of any person mentioned, a question whether the witness had at any time before testified that codefendant had said to the other codefendant that he should shoot a person named was legitimate cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

3. WITNESSES (§ 387*)—CROSS-EXAMINATION—IMPEACHMENT.

A question asked on cross-examination, whether at any time witness had testified to a fact in conflict with his testimony, implies that the witness had given such testimony, and, in the absence of a specific objection that it assumes a fact not in evidence, is properly allowed, and is not within Code Civ. Proc. § 2052, declaring that, before a witness may be impeached by prior testimony, the testimony, if in writing, must be shown him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228–1232; Dec. Dig. § 387.*]

4. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error, if any, in sustaining objections to questions on cross-examination seeking to elicit facts subsequently established without objection is not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

5. CRIMINAL LAW (§ 696*)—EVIDENCE—MOTION TO STRIKE OUT.

A motion to strike out certain answers of a witness on the ground that they are not responsive must be specifically directed to the unresponsive part of the answers, and, when directed to the answers in their entirety, parts of which are responsive, it is properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639–1644; Dec. Dig. § 696.*]

6. WITNESSES (§ 268*)—CROSS-EXAMINATION—LIMIT—DISCRETION OF TRIAL COURT.

Where a witness had on cross-examination testified in detail as to the dress and appearance of defendant, a Chinese, on the occasion referred to by the witness, the sustaining of an objection to a further question whether defendant wore American clothes, and how he was dressed, was within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

7. CRIMINAL LAW (§ 696*)—EVIDENCE—MOTION TO STRIKE.

A motion to strike out testimony constituting hearsay or the expression of an opinion of the witness should be granted, where the question was answered before counsel had an opportunity to object.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639–1644; Dec. Dig. § 696.*]

8. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

The error in refusing to strike out improper evidence to prove a fact is not prejudicial, where proper evidence justifies the jury in finding the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

9. CRIMINAL LAW (§ 696*)—EVIDENCE—OBJECTIONS—TIME TO MAKE.

Where a witness answered a question before objection was made, and the party complaining did not claim that he did not have an opportunity to object before the giving of the answer, the objection to the question came too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639–1644; Dec. Dig. § 696.*]

10. CRIMINAL LAW (§ 1170½*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where the testimony of a witness on the trial was not in conflict with his testimony at the preliminary examination, any error on the cross-examination of the witness as to his testimony at the preliminary examination for the purpose of showing a conflict between his testimony on the trial and at the preliminary examination was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

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11. Criminal Law (§ 622*)—Separate Trials—Prejudicial Error.

Where two defendants asked that they be tried separately from a codefendant, and separate and independent juries were impaneled—one for the trial of defendants and the other for the trial of the codefendant—but the trial of both cases proceeded simultaneously before both juries, who heard witnesses for the prosecution, up to a certain point, when the cases were separately tried, defendants could not complain that they were denied a separate trial, where their counsel stated in open court that he had no objection to the impanelment of two juries and the concurrent trial of the two cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380–1383, 1385, 1386, 1388–1390; Dec. Dig. § 622.*]

12. Homicide (§ 234*)—Parties—Principals—Evidence.

The mere presence of defendants at or near the scene of a homicide actually committed by codefendants is not of itself sufficient to support a conviction of defendants as aiders and abettors, but is a circumstance which, when coupled with other circumstances, may show complicity in the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482–493; Dec. Dig. § 234.*]

13. Homicide (§ 234*)—Parties—Evidence—Sufficiency.

Evidence *held* to sustain a conviction of defendants as aiders and abettors of codefendants actually committing a homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482–493; Dec. Dig. § 234.*]

14. Criminal Law (§ 1170½*)—Rulings on Evidence—Harmless Error.

The error in overruling objections to questions on cross-examination of witnesses to show that defendants and codefendants, separately tried, had been several times arrested for carrying concealed weapons, and that one defendant had been previously arrested under an assumed name for assault with intent to murder, was harmless, where in each instance the answer was in the negative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

15. Criminal Law (§ 1170½*)—Rulings on Evidence—Harmless Error.

The mere asking of an improper question on the cross-examination of a witness for defendants cannot be deemed prejudicial, especially where the court charged the jury to be governed solely by the evidence admitted, and not by any matters outside thereof which might have been injected into the case by counsel on either side.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

16. Criminal Law (§ 1170½*)—Harmless Error—Misconduct of Prosecuting Attorney—"Highbinders."

Misconduct of the prosecuting attorney in the cross-examination of witnesses, in seeking to show that defendants, tried as aiders and abettors of codefendants in the commission of a murder, were lawless and desperate men, was not ground for reversal, where competent evidence, received without objection, showed that defendants and codefendants, who were Chinese, were highbinders; the term "highbinder" meaning a rough, one of a Chinese secret society composed of blackmailers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

17. Criminal Law (§ 1171*)—Misconduct of Prosecuting Attorney—Effect.

Misconduct of the prosecuting attorney, intended and likely to result in prejudice to defendants, does not justify a new trial where, on the whole case, the misconduct was removed by a proper admonition of the trial court or was offset by competent evidence concerning the matters involved in the misconduct, and there is no presumption that misconduct prejudices the jury, where it was admonished by the court to disregard the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

18. Criminal Law (§ 1171*)—Misconduct of Prosecuting Attorney—Effect.

Where defendants would have been convicted without the misconduct of the prosecuting attorney in making improper suggestions and asking improper questions on cross-examination, the misconduct will not warrant a reversal of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

19. Criminal Law (§ 1186*)—Misconduct of Prosecuting Attorney—Effect.

Though Const. art. 6, § 4½, requires the court on appeal to affirm a conviction regardless of any error, where, on a consideration of the evidence, the court is of the opinion that the conviction has not resulted in a miscarriage of justice, the court on appeal will order a new trial for misconduct of the prosecuting attorney, where the guilt of defendants is doubtful, and the misconduct contributed materially to the conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. § 1186.*]

20. Criminal Law (§ 1186*)—Misconduct of Prosecuting Attorney—Effect.

The determination by the court on appeal whether an irregularity in pleading or procedure in a criminal case contributed to a miscarriage of justice depends on the opinion which the justices form of the guilt or innocence of defendants after weighing the evidence, and, where the court finds that the evidence is evenly balanced or the guilt of defendants is doubtful, a conviction will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Ho Kim You and Chew Bock Hue were convicted of murder, and they separately appeal. Affirmed.

Carroll Cook, R. Porter Ashe, and Elliot M. Epsteen, all of San Francisco, and Daugherty & Lacey, of Salinas, for appellants. Attorney General Webb, for the People.

LENNON, P. J. The information in this case jointly charged the defendants Ho Kim You and Chew Bock Hue and two other Chinamen, On Git and Yee Yum, with the crime of murder. The defendants Ho Kim You and Chew Bock Hue, were convicted of murder in the first degree. Life imprisonment was fixed by the jury as the penalty. The appeal is from the judgment and from an order denying a new trial.

The facts of the case, upon which the people relied for a conviction, briefly stated are these: On the night of April 27, 1912, at about 8 o'clock, five Chinese were engaged in a poker game at No. 20 Soledad street, Salinas City, Monterey county. These five Chinese were Lee Lung Kai, Chin Taw, Lee Poi, Lee Hing, and Toi Kai. They were gathered about a high table, and while engaged in gambling the codefendants, On Git and Yee Yum, entered the room, drew pistols and began shooting. As the result of the shooting Lee Lung Kai, Chin Taw, and Lee Poi were killed. Immediately after the codefendants On Git and Yee Yum quitted the premises a fourth Chinaman was killed in the street, but by whom it does not appear. The defendants Ho Kim You and Chew Bock Hue did not participate in the shooting, but were standing in or near the door of the building at the time the shooting commenced. The circumstances preceding and immediately attending the shooting were testified to by the survivors of the poker game, Lee Hing and Toi Kai, who positively identified On Git and Yee Yum as the persons who did the shooting. Toi Kai testified that the codefendant Yee Yum on entering the room said to On Git, "Start shooting;" that thereupon On Git shot twice at Lee Lung Kai; that Yee Yum shot at Chin Taw; that On Git also shot at Chin Taw; that Yee Yum and On Git then turned their guns upon and began shooting at Lee Poi. The story as told by Toi Kai was corborated in detail by the testimony of Lee Hing. In addition to the foregoing, evidence a railroad brakeman named Andrews testified upon behalf of the people that on April 25, 1912, two days before the homicide, his train, south bound, left San Francisco at 8 o'clock p. m. and that after passing San Mateo he observed four Chinese passengers, whom he positively identified as the defendants, On Git, Yee Yum, Ho Kim You, and Chew Bock Hue. The witness testified that On Git was in the rear end of the smoking car; that Yee Yum occupied a forward seat in the same car; that Chew Bock Hue and Ho Kim You were respectively in the front and rear seats of another car; that On Git and Chew Bock Hue were respectively armed with an automatic and an ordinary pistol, which they each carried on the left hip. The testimony of the witness Andrews was followed and supplemented by the testimony of the conductor of the train, who said, in substance, that on the same trip testified to by Andrews four Chinamen boarded the train at San Mateo with tickets for Castroville; that two of them were armed; that two of them were in the smoker and the other two in the ladies' car; that they all left the train at Castroville, and proceeded to the south side of the depot to the rear of the train and in the vicinity of the freight sheds; that he could not identify any one of them; that the pistols which two of them carried were black-handled; that one pistol was an automatic and the other an old-style revolver. The prosecution also introduced in evidence four railroad tickets which had been issued at San Mateo on April 25, 1912, and which the conductor witness testified he collected from the four Chinamen whom he observed upon the train on that date.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The other evidence offered in the case by the prosecution was to the effect that on the 2d day of May, 1912, five days after the homicide, these four defendants were arrested as they were about to depart in an automobile which had been brought from Santa Cruz by a Chinaman to Moss' Landing, about 12 miles from Salinas and 3 miles from Castroville. Incidentally the evidence upon the whole case shows that On Git, Yee Yum, Ho Kim You, and Chew Bock Hue were members of the Chinese highbinder society known as the Sing Suey Ying tong; and that during the months of March and April, 1912, this tong was at war with the Hop Sing tong of highbinders.

As against the showing made by the people's case the defendants introduced the defense of an alibi, and in support thereof produced two Chinese witnesses, Tom Git and Chow Soon, the former a merchant doing business at San Mateo, and the latter a merchant doing business in Stockton. Both of these witnesses testified that the defendants Ho Kim You and Chew Bock Hue were in the city of San Mateo on the evening of April 27th, the date of the homicide, at an hour which would have precluded the possibility of their being in Salinas City at the time of the homicide. The evidence of these Chinese witnesses was fortified by the testimony of John J. Reilly, who testified, in substance, that he had been a police officer in San Mateo for about four years; that his detail included San Mateo's Chinatown; that he was on duty in March and April, 1912, and that on the night of April 27, 1912, at about 9 o'clock he saw the defendant Ho Kim You and defendant Chew Bock Hue at the store of Wing Hing Sing at Railroad avenue in the city of San Mateo; that he knew both of these Chinamen well because they had been in San Mateo for several weeks.

The codefendant On Git was separately tried and convicted. The judgment in his case was recently affirmed upon appeal to this court. The defendants Ho Kim You and Chew Bock Hue were tried together. Each of said defendants, however, has taken a separate appeal to this court, and both cases come here upon independent records, but, inasmuch as the record and the points presented in each case are precisely the same, we shall consider the two appeals together as if they had been perfected and presented upon a single record.

[1] The defendants Ho Kim You and Chew Bock Hue were tried and convicted upon the theory that they had aided and abetted the commission of the homicide, and were therefore principals within the meaning of section 31 of the penal Code. Over objection the trial

court permitted the prosecution to prove that two days prior to the homicide the defendants Ho Kim You and Chew Bock Hue, and the codefendants On Git and Yee Yum, were traveling on the same railway train in the direction of Salinas, the scene of the homicide, and that the codefendant On Git and the defendant Chew Bock Hue were then armed with pistols. We see no error in the ruling. The circumstances, although slight in themselves, nevertheless, when considered in conjunction with the evidence adduced upon the entire case, tended in a material measure to connect the defendants with the perpetration of the homicide, and were therefore rightfully admitted in evidence, notwithstanding that such circumstances incidentally included proof of the fact that two of the codefendants may at the same time have been violating the law against carrying concealed weapons. People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

[2] The record shows, as a part of the cross-examination of Lee Hing, the following questions, answers, and rulings of the trial court:

"Q. Was there anything said before any shooting commenced at all? A. Yee Yum told On Git—saying to him, 'Shoot Lee Lung Kai.'

"Q. You heard Lee Lung Kai's name mentioned? A. No; he says, 'Start shooting.'

"Q. Well, what did he say? Did he say, 'Start shooting?' or did he say 'Shoot Lee Lung Kai?' A. He says, 'Start shooting.'

"Q. Did Wong Duck tell you that on this trial you should say 'to shoot Lee Lung Kai'?

"Mr. Hanley: I object; that is not a proper means of cross-examination.

"The court: He may answer.

"A. No; nobody taught me.

"Q. Did you ever at any time before testify that he told him to shoot Lee Lung Kai?

"Mr. Hanley: I object; that is not the proper way to lay a foundation. If any such testimony has ever been offered, it should be shown to him.

"The Court: The objection is sustained.

"Mr. Cook: We are trying to prove a negative.

"The Court: The objection is sustained."

The objection noted in the excerpt above quoted, we think, should have been overruled. The question objected to called for an answer which, if it had been in the negative, the jury, in the absence of a satisfactory explanation, might have deemed inconsistent with the present testimony of the witness, and therefore the question was well within the lines of legitimate cross-examination. People v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

[3] Although the question, strictly construed, was without a proper foundation, in that it was not preceded by express proof of the fact that the witness had previously given testimony concerning the homicide, nevertheless such question implied that the witness had given such testimony, and therefore, in the absence of a specific objection that it assumed a fact not in evidence, should have been allowed. People v. Hart, 153 Cal. 261, 94 Pac. 1042. Obviously the objection and the court's ruling were grounded upon the erroneous assumption that the witness could not, under the provisions of section 2052 of the Code of Civil Procedure, be required to answer the question until the record of his previous testimony had been shown to him. In no sense can the question objected to, standing alone, be considered an impeaching question; and therefore it did not fall within the inhibition of the code section last cited. People v. Jones, 160 Cal. 358, 117 Pac. 176. Such question, dependent on the character of the answer, might have been subsequently employed as the foundation for the attempted impeachment of the witness; but plainly its primary purpose was to test "the memory, the bias, the accuracy or the sincerity of the witness." People v. Manasse, 153 Cal. 10, 94 Pac. 92. A negative answer would have satisfied the primary object of the question; while, on the other hand, an affirmative answer might have been met and overcome by the introduction in evidence of a record of the previous testimony of the witness. A proper objection, however, would have given counsel for the defendant an opportunity to obviate the defect in the question. The objection as made did not afford any such opportunity; and therefore the ruling of the court deprived counsel for the defendant of the right to proceed along a legitimate line of cross-examination. People v. Hart, supra.

[4] The error of the ruling, however, was subsequently cured by counsel for the defendant reading in evidence the record of the testimony given by the witness at the coroner's inquest, which, although in the main conforming to his testimony given at the trial of the case in the court below, contained no statement that he had heard Yee Yum say to On Git, "Shoot Lee Lung Kai." It will thus be seen that the object of the question objected to was ultimately accomplished by another method, which was not only much more effective, but somewhat to the detriment of the prosecution, in that the witness was not given an opportunity to explain why his testimony at the coroner's inquest did not contain all of the details testified to by him upon the trial of the present case.

[5] There was no error in the ruling of the trial court refusing to strike out certain answers of the same witness upon the ground that those answers were not responsive to the questions. The defendants' motion to strike out, in order to prevail, should have been specifically directed to the unresponsive part of the answers. Having been directed to the answers in their entirety, the motion in each instance was properly denied.

[6] Complaint is made that counsel for the defendant was not permitted to ask this same witness upon cross-examination whether, at a time when the defendant was pointed out to him, he (the defendant) wore slippers or American clothes, and how he was dressed. The record shows that the witness in question had previously testified upon cross-examination and with considerable detail concern-

ing the defendant's dress and appearance upon the occasion referred to; and it does not appear to us that the court abused its discretion in refusing to permit further cross-examination upon the same lines.

[7, 8] H. J. Shannon was a witness for the people. He, in company with a Chinaman named S. K. Lee, drove the automobile from Santa Cruz in which the defendants were arrested at Moss' Landing. Among other things this witness testified that when the automobile arrived at Moss' Landing Lee got out and "went to look for four Chinamen." The motion to strike out the quoted statement should have been granted. The question was answered before counsel had an opportunity to object, and the testimony of the witness in the particular stated was either the expression of a mere opinion, or else it was hearsay. But the error of the ruling was inconsequential in view of the fact that the circumstances following the arrival of the automobile at Moss' Landing, as later narrated without objection by the witness (Shannon), tended strongly to show that Lee got out of the automobile to look for four Chinamen. In this behalf the witness testified that he waited quite a while after Lee left the automobile, and finally saw a "bunch of Chinamen; * * * there were four Chinamen, and they all got into the car;" whereupon the witness "asked them where the other fellow [Lee] was, and they said he would not come, * * * and two of them got out and started to look for him [Lee]." It was further shown without objection that the witness asked the four Chinamen who would pay for the use of the car, and they replied that their friend Lee would pay. Clearly this testimony would have justified the jury in arriving at the conclusion that Lee did get out of the automobile at Moss' Landing to look for four Chinamen and that he eventually found them.

[9, 10] The witness Reilly for the defense, during the course of his cross-examination, testified, in effect, that he saw the two defendants Ho Kim You and Chew Bock Hue at about the hour of 9 o'clock on the evening of the homicide at the store of Wing Hing Sing in San Mateo, and that one of the defendants was inside the store, and the other standing on the street outside the store. The witness was then asked, "Didn't you say upon the preliminary examination that you saw them [the defendants] in the store at the telephone?" The witness replied, "No, sir," whereupon counsel for the defendants objected to the question being answered until the transcript of the testimony given by the witness at the preliminary examination was shown to him. The objection was overruled. It will be noted that the question was answered before the objection was made. It is not claimed, nor does it appear, that counsel did not have an opportunity to object before the answer was given. This being so, the objection to the particular question under consideration came too late, and therefore was rightfully overruled. The cross-examination, however, was continued to a slight extent upon the same lines, and evidently subject to the same objection. When pressed further, the witness answered, in effect, that he was not positive as to whether or not he had stated in his previous testimony that he had seen both defendants inside the store at the telephone. The trial court had previously sustained a similar objection of the prosecution; and, assuming (as evidently the trial court did) that this latter testimony was given subject to the previous objection, consistency, if not the law (Code Civ. Proc. § 2052), should have prompted the trial court to sustain the objection of the defense. However, it must be an exceptionally clear case of resulting injury to justify a reversal for such an error; and we are satisfied, after a perusal of the entire testimony of the witness, that, if he did testify at the preliminary examination as claimed by the prosecution, such testimony was not inconsistent with his testimony at the trial to the effect that he had, at a specified hour on the night of the homicide, seen one of the defendants in the store and the other outside on the street. This being so, the ruling did not result in substantial injury to the defendants.

Several other rulings of the trial court are complained of; but upon examination we find that they are of minor importance, and were not erroneous.

[11] The record shows that the codefendant Yee Yum and the defendants in the present case, at one stage of the preliminary proceedings in the trial court, demanded separate trials. It seems, however, that two separate and independent juries were impaneled at the same time, one for the trial of the defendant Yee Yum, and the other for the trial of the defendants in the present case, Chew Bock Hue and Ho Kim You. Thereupon the trial of both cases proceeded simultaneously before both juries up to a certain point in the evidence; that is to say, the principal witnesses for the people, Lee Hing and Tai Kai, gave their testimony but once and in the presence of both juries. Upon the conclusion of their testimony the trial of Ho Kim You and Chew Bock Hue was halted, and the jury sitting upon their case temporarily excused. The trial of the defendant Yee Yum then proceeded separately. We think that the record on appeal in each of the cases now before us as originally presented warrants the inference that the then counsel for the defendants, who conducted both trials, consented to the concurrent trial of both cases; and the record, as amended by a further transcription of the proceedings had in the court below, shows that Mr. Cook, counsel for the defendants, who was in charge of the trial of the case, and who was also one of the counsel for the codefendant Yee Yum, expressly stated in open court that he had no objection to the impanelment of two juries and the concurrent trial of the two cases. This being so, none of the defendants will now be heard to complain that their demand for a separate trial was denied, or that they were prejudiced by the procedure thus adopted.

[12, 13] The claim is made that the evidence is insufficient to support the verdict against these particular defendants in this: That it was not shown that they aided and abetted the codefendants On Git and Yee Yum in the commission of the homicide. Assuming all of the evidence for the people to be true, it is the contention of counsel for the defendants that the fact of their presence at or near the entrance of the room in which the homicide occurred was not, either alone or in conjunction with the other facts of the case, legally sufficient to warrant the finding implied from the verdict that the defendants had aided and abetted the commission of the homicide.

With this contention we do not agree. Of course the mere presence of the defendants Ho Kim You and Chew Bock Hue at or near the scene of the homicide would not in and of itself support the verdict; but such presence was a circumstance which, when coupled and considered with all of the circumstances immediately preceding, attending, and following the homicide, tended strongly to show complicity in the crime. People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176. It must be conceded that the evidence adduced upon behalf of the people shows, if true: (1) That all of the defendants belong to the same highbinder society known as the Suey Sing tong, and that this tong was at war at the time of the homicide with the highbinder society known as the Hop Sing tong; (2) that prior to the homicide all four of the defendants resided in the same house in San Mateo; (3) that two days prior to the homicide the defendants in these cases, Ho Kim You and Chew Bock Hue, and the two codefendants, On Git and Yee Yum, who actually did the shooting, traveled by rail upon the same train in the direction of Salinas City from San Mateo to Castroville, and that On Git and Chew Bock Hue were armed with pistols; (4) that, notwithstanding the fact that each of the defendants occupied separate seats in separate cars of the train and were apparently unacquainted with one another, they all left the train at Castroville, and assembled at the south end of the station in the rear of the train and in the vicinity of the freight sheds; (5) that the defendants in these cases, Ho Kim You and Chew Bock Hue, were seen standing at the door of the building in which the homicide occurred at the time of the homicide; (6) that five days after the homicide all four of the defendants were arrested between 11 and 12 o'clock at night at Moss' Landing about 12 miles from Salinas, just as they were about to enter an automobile that had been brought from Santa Cruz by a fellow tongman.

It will thus be seen that the evidence, direct and circumstantial, shows that, although the defendants were well acquainted with one another, nevertheless immediately preceding the homicide their movements were studied and stealthy, with the apparent purpose of avoiding attention and creating the impression that they were utter strangers to one another. That this was their purpose is evidenced by their conduct on the train on the way to Salinas, and their subsequent concerted and clandestine meeting in an obscure part of the railway station at Castroville. Added to all of this is the further fact, incriminating and unexplained, that the defendants Ho Kim You and Chew Bock Hue were in an isolated spot in the dead of night in the company of On Git and Yee Yum several days after the homicide, within a comparatively short distance of Salinas City. The cumulative effect of all of the circumstances immediately preceding, at the time of and following the homicide, readily responds to the inference that the defendants Ho Kim You and Chew Bock Hue were willfully and knowingly stationed at the door of the premises where the homicide occurred, as sentinels to watch for and warn against outside interference with the murderous work of the codefendants On Git and Yee Yum. This being so, the conclusion is inevitable that the evidence upon the whole case, direct and circumstantial, is amply sufficient to sustain the verdict upon the theory that the defendants in question aided and abetted the commission of the homicide.

Counsel for the defendants complain of the misconduct of the special prosecutor who was associated with the district attorney in the trial of the case. Several assignments of misconduct are made, and we shall note them in the order of their making.

The first objection under this head relates to a question propounded upon cross-examination to the witness Reilly, and will be best shown by the following excerpt from the record:

"Q. You know Judge Cook, don't you? A. Yes.

"Q. Did you see him * * * before the On Git case? A. No, sir.

"Q. Did you go up to his office? A. No, sir.

"Q. * * * Then the conversation that Judge Cook had with Frank Sargent that you asked $500 in the On Git case is not true, is it?

"Mr. Cook: I assign the statement * * * as prejudicial error, maliciously made to prejudice the jury, as no such statement was made by me to Mr. Frank Sargent or anybody else. I never saw this man and never talked with him.

"Mr. Hanley: That is not true.

"The Court: The jury will entirely disregard the statement made by Mr. Hanley, and the question is disallowed. You gentlemen will pay no attention to that statement.

"Q. That is not true? A. That is not true."

It is insisted that the mere asking of the question concerning the alleged conversation of Judge Cook with Frank Sargent was an intentional infringement of the rule of professional conduct which should govern prosecuting officers in the trial of a criminal case; and that such conduct was sufficiently grievous to warrant the reversal of the judgment. It would be a wild and wide stretch of imagination to say that the form of the question under discussion was the result of ignorance or inadvertence. To the contrary, it is very evident that the question was deliberately framed and asked for the purpose of placing before the jury in a highly irregular manner a matter which, if true, might have been rightfully and decently developed in evidence without violating the settled and well-understood rules of criminal procedure. The disposition of the special prosecutor to disregard the procedure provided by law, even in a case where a man was on trial for his life, is well illustrated by his persistence in repeating the objectionable question in the very teeth of the declaration of the trial court that the question would not be allowed. This was a deliberate defiance of the mandate of the law, which the trial court might well have punished as a contempt of court, or by an order excluding the offender from further participation in the trial of the case. This point will be finally disposed of later on in this opinion.

[14] Certain rulings of the trial court made upon the cross-examination of Chow Soon and Tom Git, witnesses for the defense, were undoubtedly erroneous. The purpose of this cross-examination in part was to elicit certain alleged facts concerning the private life of the witness Chow Soon, and in part to show that the defendant Chew Bock Hue and the codefendant On Git had been several times arrested for carrying concealed weapons, and that the defendant Chew Bock Hue had been previously arrested under the name of Ah Joe for the crime of assault with intent to commit murder. The questions objected to, however, failed of their purpose, in so far as the answers of the witnesses were concerned. In each instance the answer was in the negative. Therefore the error of the rulings in question must be held to have been harmless. People v. Brown, 76 Cal. 573, 18 Pac. 678; People v. Barney, 114 Cal. 554, 47 Pac. 41; People v. Chin Hane, 108 Cal. 597, 41 Pac. 697.

[15] It is insisted, nevertheless, that the mere asking of the questions last noted was prejudicial misconduct. No justification is attempted, and none could be made, of the cross-examination of the witness Chow Soon upon the subject of his having lived with a prostitute in Salinas. The fact that the witness was a Chinaman should not have operated to suspend the rules of evidence which ordinarily govern the impeachment of witnesses, nor does such fact mitigate the offense of willfully violating those rules. It must be presumed, however, that the jury knew and understood that the mere asking of a question did not constitute evidence; and the trial court of its own motion ultimately charged the jury to be governed in its deliberations solely by the evidence which was given by the witnesses, and not to be influenced by any matters outside of the evidence which might have been injected into the case by counsel on either side. Presumably the jury heeded the charge of the court. People v. Bradbury, 151 Cal. 675, 91 Pac. 497; People v. Burke, 18 Cal. App. 72, 122 Pac. 435.

[16] Equally indefensible is the cross-examination of the witness Tom Git. Conceding for the purpose of this discussion that the direct examination of this witness warranted cross-examination as to the presence of the defendants in San Mateo in the afternoon and evening of April 27, 1912, the date of the homicide, nevertheless it was highly improper for the special prosecutor to include in his questions the claimed collateral criminal conduct of the defendant Chew Bock Hue or any of his codefendants. Such questions were plainly intended to impress the jury with the belief that the defendant Chew Bock Hue was a lawless and desperate character and the associate of men of like character. That impression in turn was well calculated to induce the belief in the minds of the jury that the defendant Ho Kim You, on trial with Chew Bock Hue, was likewise an associate of lawless and desperate men. Such a belief, as a matter of course, must have had some weight with the jury to the detriment of the defendants; and therefore we would have some difficulty, even under the provisions of article 6, § 4½, of the Constitution, in affirming the judgment, were it not for the conceded fact that elsewhere in the record is to be found competent testimony, offered and received without objection, which tended to show that the defendants on trial and each of the codefendants were "highbinders, belonging to the Chinese fraternity known as the Sing Suey Ying tong, and that during the months of March and April, 1912, this tong was at war with the * * * Hop Sing tong or highbinders and hatchetmen." The term "highbinder," although of local origin, is generally understood as meaning "a rough, and now specifically one of a Chinese secret society said to be blackmailers." Webster's Dictionary. It is a matter of common knowledge that the several Chinese highbinder societies existing in this state frequently declare war upon one another, and that such wars are usually fought to the death by the gun and hatchet men of the opposing forces. In short, it is a matter of common knowledge that a highbinder is a man of evil character and murderous tendencies. Therefore it may be fairly said that the irregularity of suggesting to the jury, through the medium of the questions under discussion, that the defendant Chew Bock Hue and each of his codefendants were men of lawless and desperate character was without substantial prejudice, in the face of the fact, subsequently shown by proper proof,

that all of the defendants were not only the associates of highbinders, but were themselves highbinders.

[17] It is the rule generally that misconduct intended and likely to result in prejudice will not suffice to justify the granting of a new trial if upon the whole case it can be said that the possible effect of the claimed misconduct was subsequently removed by a proper admonition of the trial court to the jury, or that such effect was offset by the introduction of competent evidence concerning the matters and things involved in such misconduct. Regardless of the varying and, at times, in the past, inconsistent application of the rule in this behalf, we are convinced that the weight of authority in this and other jurisdictions favors the assertion that there is no presumption that misconduct will prevail with a jury to the detriment of a defendant in the face of an admonitory charge to disregard the same; but that, to the contrary, the presumption is ordinarily that the jury heeded the charge of the court. People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Salas, 2 Cal. App. 537, 84 Pac. 295; People v. Amer, 8 Cal. App. 137, 96 Pac. 401; Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; People v. Bradbury, 151 Cal. 675, 91 Pac. 497; People v. Burke, 18 Cal. App. 72, 122 Pac. 435. A careful consideration of the record and the evidence presented in the present case convinces us that the harm resulting from the mere asking of the questions complained of was in some instances minimized by the answers of the witnesses, and in the remaining instances counterbalanced by competent testimony; and that upon the whole such harm was ultimately undone by the trial court's admonition and charge to the jury to disregard the matters irregularly suggested, and be guided in arriving at a verdict solely by the evidence rightfully received.

[18] If, upon a consideration of the evidence rightfully and regularly adduced upon the whole case, the guilt of the defendants appeared to us to be reasonably doubtful, we would have but little difficulty and less hesitation in declaring that the misconduct complained of contributed to the verdict, and that as a consequence the conviction of the defendants was a miscarriage of justice. But, in addition to the fact that, in our opinion the effect of the several instances of misconduct was overcome, either by the charge of the court or by the subsequent introduction of competent and relevant evidence to the same point, we are not prepared to say, after a painstaking examination of the entire evidence, that the trial and conviction of the defendants did result in a miscarriage of justice. A calm, careful, and impartial consideration of the evidence in all of its various phases and angles, and, without reference to, or consideration of, the improper suggestions contained in the misconduct complained of reasonably satisfies us of the guilt of the defendants. And in addition we are convinced that the defendants would have been convicted without the aid of interposition of the irregular and improper suggestions of the special prosecutor. Therefore such irregularities cannot be held to be a controlling or even a contributing, cause of the verdict. It follows that the misconduct complained of will not warrant a reversal of the case. People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63.

[19] We cannot refrain from saying, however, that conduct on the part of prosecuting officers of the character under discussion not only impairs the orderly and effective administration of justice, but is well calculated to bring the profession of the law into disrepute. The increasing instances of flagrant and willful violations of the elementary rules of procedure which are being constantly called to our attention confirms us in the belief that the impression is abroad, or at least is entertained by some members of the profession, that the provisions of the recently adopted section 4½ of article 6 of the Constitution furnish a cure for all the ills of procedure and practice resulting from irregularities, great or small, ignorantly or intentionally perpetrated during the course of a criminal trial. This is indeed an erroneous impression, which can and will be corrected, and the safe and sane administration of justice assured by a resort to the remedy of ordering a new trial where the guilt of the defendant is to us doubtful, and it further appears to our satisfaction that the irregularity contributed materially to the procurement of the verdict. People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042; People v. Fleming (Sup.) 136 Pac. 291; People v. King (App.) 137 Pac. 1076.

Although section 4½, above referred to, makes it the duty of this court to affirm a judgment of conviction in a criminal case regardless of any error as to any matter of pleading or procedure, where, upon a consideration of the entire record, including the evidence, we are of the opinion that the conviction has not resulted in a miscarriage of justice, nevertheless it might be well for trial courts and prosecuting officers generally to keep in mind, in conjunction with their oaths of office, the fact that such provisions of the Constitution were not "designed to repeal or abrogate the guarantees accorded persons accused of crime by other parts of the same Constitution, or to overthrow all statutory rules of procedure and evidence in criminal cases." People v. O'Bryan, supra.

[20] Incidentally it may not be amiss to state that the determination of this court as to whether or not an irregularity in pleading or procedure has contributed to a miscar-

riage of justice in any given case must depend largely, if not entirely, upon the opinion which the justices of this court collectively form of the guilt or innocence of the defendant after having weighed the evidence in the individual case before us. In short, our determination as to what is or is not a miscarriage of justice must in every case be a mere matter of opinion which, in view of the varying facts of each case, cannot be based upon any hard and fast rule, but necessarily must be formed from the cold record without the valuable and oftentimes indispensable aid of hearing and seeing the witnesses who testified at the trial. Therefore trial courts and prosecuting officers, in the trial of criminal cases, should adhere closely to the settled lines of criminal procedure at every stage of the case, and thereby be assured that they are neither aiding in, nor contributing to, a miscarriage of justice, which, in cases where the evidence is evenly balanced, or the guilt of the defendant appears to us to be doubtful, will surely be reversed.

The judgment and order appealed from in each of the above-entitled causes are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

24 Cal. App. 470

PEOPLE v. YEE YUM. (Cr. 454.)

(District Court of Appeal, First District, California. May 13, 1914. Rehearing Denied June 12, 1914.)

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Yee Yum was convicted of murder in the first degree, and he appeals. Affirmed.

Carroll Cook, R. Porter Ashe, and Elliot M. Epsteen, all of San Francisco, and Daugherty & Lacey, of Salinas, for appellant. Attorney General Webb, for the People.

LENNON, J. In this case the defendant was charged with the crime of murder. He was convicted of murder in the first degree, and the punishment was fixed by the jury at imprisonment for life. Defendant has appealed from the judgment and from the order denying a new trial.

The main features of the case presented by the transcript are in all essential respects identical with the facts set forth in the companion case of People, etc., v. Ho Kim You (Crim. No. 456) 141 Pac. 950, this day decided. The defense interposed by the defendant in this case was also an alibi, and was supported by testimony which varied from the testimony offered by the defense in the case of Ho Kim You only in the particular that Dr. Bernal testified that the defendant Yee Yum was in his office in San Francisco at the hour of 8 o'clock on the night of the homicide. The points presented in this case were all presented in practically identical form in the case of Ho Kim You, and there decided adversely to the defendant. It would serve no useful purpose to review them in detail here.

For the reasons stated in the opinion in the case of Ho Kim You, the judgment and order appealed from in the present case are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

24 Cal. App. 477

PEOPLE v. RADER. (Cr. 321.)

(District Court of Appeal, Second District, California. May 15, 1914.)

1. Assault and Battery (§ 92*)—Criminal Prosecutions—Sufficiency of Evidence.

On the trial of a husband for assaulting his wife with a deadly weapon, evidence *held* sufficient to support a verdict of guilty.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137–139; Dec. Dig. § 92.*]

2. Criminal Law (§§ 1116, 1125*)—Appeal—Record—Matters Presented for Review.

The denial of motions to set aside the information and in arrest of judgment could not be reviewed, where the record did not show the grounds upon which they were made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2924, 2949; Dec. Dig. §§ 1116, 1125.*]

3. Criminal Law (§ 968*)—Motions in Arrest of Judgment—Grounds.

Under Pen. Code, § 1185, authorizing motions in arrest of judgment founded on any of the defects in the indictment or information mentioned in section 1004, the regularity of the preliminary examination before the committing magistrate could not be raised on a motion in arrest of judgment; section 1004, specifying the grounds of demurrer to the indictment or information, not authorizing a demurrer for irregularities in such examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2423–2432, 2435–2444; Dec. Dig. § 968.*]

4. Criminal Law (§ 1159*)—Appeal—Review—Questions of Fact.

The duty and privilege of determining questions of fact arising out of a conflict in the evidence rests exclusively with the trial judge and jury, and an appellate court cannot weigh the evidence and determine whether that offered by accused raised a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

5. Criminal Law (§ 706*)—Misconduct of Prosecuting Attorney.

On the trial of a husband for assaulting his wife, a witness, having denied that he told accused's father that the prosecution was being carried on through motives of revenge, was asked by the district attorney to tell what was said in the conversation between him and the father, and answered that the father said he thought they should be lenient with accused and give him another trial, and that he told him that he thought accused had had all the trial that any man could ask for, "since he has been turned out," whereupon the district attorney said: "You said since he was turned out; what was that part of the conversation that you had at that time with R?" *Held*, that the asking of this question was not prejudicial or objectionable conduct on the part of the prosecuting officer, as it merely repeated what the witness had already stated without objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

6. Witnesses (§ 350*)—Cross-Examination of Accused in Criminal Prosecutions.

Under Code Civ. Proc. § 2051, providing that a witness may be impeached by showing that he has been convicted of a felony, the district attorney was entitled to ask accused, on his cross-examination, whether he had previously been convicted of a felony, though the charge in the information that he had been so previously convicted had been stricken out for some reason, and though it was apparently claimed that accused had been pardoned, as upon advice of his counsel or the court he could have had the benefit of an instruction as to how he would be entitled to answer under such circumstances.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140–1149; Dec. Dig. § 350.*]

7. ASSAULT AND BATTERY (§ 88*)—CRIMINAL PROSECUTION—EVIDENCE—THREATS.

On the trial of a husband for assaulting his wife with a deadly weapon, evidence of prior threats to commit bodily violence toward the wife was properly admitted to show his purpose and intent.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 128, 131, 132; Dec. Dig. § 88.*]

8. WITNESSES (§ 387*)—CROSS-EXAMINATION OF ACCUSED IN CRIMINAL PROSECUTIONS.

Where, on the trial of a husband for assaulting his wife with a deadly weapon, accused denied having made threats of violence against his wife prior to the date of the alleged assault, it was proper cross-examination for the district attorney to state particular details showing the contrary of such denial and to ask whether or not the things so stated were true.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228–1232; Dec. Dig. § 387.*]

9. WITNESSES (§ 391*)—INCONSISTENT STATEMENTS—REBUTTAL.

Where a husband on trial for assaulting his wife denied threats of violence against the wife previous to the date of the alleged assault, it was within the discretion of the court to allow witnesses in rebuttal to show the making of such threats, even though the matter might have been more proper for proof as part of the main case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1248; Dec. Dig. § 391.*]

10. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF PROSECUTING ATTORNEY.

In a criminal case, though the prosecuting counsel in his argument was most emphatic and plain spoken in his denunciation of accused, there was no prejudicial error, where he called attention to the testimony, when his language was challenged as improper, thereby enabling the jury to determine for themselves whether his conclusions were justified, and, when the court instructed the jury that certain inferences drawn by him were too broad and not to be considered, a portion of the remarks were withdrawn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

11. WITNESSES (§ 61*)—COMPETENCY OF HUSBAND AND WIFE FOR OR AGAINST EACH OTHER.

Under Pen. Code, § 1322, providing that neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding, except in the case among others of criminal violence upon one by the other, a wife was a competent witness on the trial of her husband for assaulting her with a deadly weapon.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 163, 174–176; Dec. Dig. § 61.*]

12. ASSAULT AND BATTERY (§ 56*)—CRIMINAL OFFENSES—ELEMENTS.

Where a husband drew a pocketknife, at the same time seizing his wife about the head and stating that he was going to kill her, it was not necessary to constitute an assault with a deadly weapon that he should have actually cut her with the knife exhibited.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

13. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

On the trial of a husband for assaulting his wife with a deadly weapon, it was immaterial that his ill feeling towards the wife was caused by the conduct of her immediate relatives, and the sustaining of objections to questions asked her calculated to show this fact was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

14. ASSAULT AND BATTERY (§ 66*)—CRIMINAL OFFENSES—JUSTIFICATION.

That the motive or animus prompting an assault with a deadly weapon has been produced by improper statements or conduct of third parties, or even of the assaulted party, does not justify the assault where it is not necessary in self-defense.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 94, 95; Dec. Dig. § 66.*]

15. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.

On the trial of a husband for assaulting his wife, where she did not testify to any acts of accused or as to his whereabouts subsequent to the assault, a question asked her on cross-examination, as to whether he did not continue to live with her up to the date of the arrest, was not strictly proper cross-examination, and while the court, in the exercise of a reasonable discretion, might have properly admitted it as tending to affect her credibility as a witness, its exclusion was not error, especially where he made no attempt to prove this fact directly.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

16. ASSAULT AND BATTERY (§ 89*)—EVIDENCE—PRELIMINARY PROOF—SUFFICIENCY.

On the trial of a husband for assaulting his wife with a knife, where the wife, in response to a question as to whether the knife shown her was, according to her best recollection, the knife with which accused threatened to cut her testified without qualification that it was the knife, the knife was sufficiently identified to be received in evidence.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 128; Dec. Dig. § 89.*]

Appeal from Superior Court, Kings County; J. W. Mahon, Judge.

Frederick H. Rader was convicted of assault with a deadly weapon, and he appeals. Affirmed.

W. R. McQuiddy, of Hanford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of having committed an assault with a deadly weapon upon the person of his wife, and was sentenced to imprisonment in the state prison for a term of 18 months. He has appealed from that judgment.

[1] The evidence introduced on behalf of the people was that furnished chiefly by three witnesses, one being the wife of appel-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lant and the other two her father and sister. This testimony showed that appellant, on the night of the 11th of October, 1913, engaged in a wordy controversy with his wife, the subject being the matter of her persisting in attending a certain church, to which he objected; that finally he became enraged and drew a pocketknife, at the same time seizing her about the head and stating that he was going to kill her. At that moment the sister interfered, and the father entered the room at about the same time; whereupon appellant desisted in his attack and dropped the knife back into his pocket. Other evidence was introduced showing that at times prior to the date of the alleged assault appellant had uttered threats against the life of his wife and had previously attempted to cut her with a knife. On his own behalf the defendant denied in toto the narrative of the alleged occurrence as detailed by the three witnesses mentioned, and introduced the testimony of other witnesses to show that on the night in question he was not at home until an hour much later than that fixed by the witnesses as the time when the assault occurred.

[2, 3] A motion was made to set aside the information. The clerk's record, referring to proceedings had on that motion, contains the following statement:

> "Thereupon defendant by his counsel moves the court to set aside the information in this action upon the grounds stated, which motion after argument thereon was denied."

Nothing appears in the record from which it can be learned what grounds appellant based this motion upon, or what evidence, if any, was offered or showing made in support thereof. There is therefore no matter here presented upon which a review of the ruling made on the motion can be predicated. It will be deemed to have been correctly made. At the time appellant appeared before the trial judge for sentence a motion in arrest of judgment was made, based principally upon the ground that defendant had been improperly held to answer for trial to the superior court. The transcript of a part of the record of the proceedings had before the committing magistrate was offered in evidence in support of the motion. Appellant's counsel states in his brief that the objections raised by his motion in arrest of judgment were the same as those presented on the motion to set aside the information. Looking to the record, which must be the sole guide on a consideration of this appeal, it is not made to appear what the grounds of the motion to set aside the indictment were. If the appellant desired to have the question of the correctness of the ruling of the trial judge, made upon the last-mentioned motion, examined on appeal, he should have presented a showing of the grounds of the motion and offered his proof in support thereof, first to the trial judge and then have brought the record of those proceedings before this court. He would not be permitted to raise the question as to the regularity of the preliminary examination on the motion in arrest of judgment. The sections of the Code providing for the making of a motion in arrest of judgment and specifying the grounds thereof do not authorize this. Pen. Code, §§ 1185, 1004.

[4] It is contended that the evidence was insufficient to warrant the conviction of appellant. This claim may be answered briefly: The statement of the general substance of the evidence introduced on behalf of the prosecution, as hereinbefore set forth, shows that there was ample evidence upon which to find the verdict returned by the jury. Counsel for appellant would have this court weigh the evidence and determine whether that offered by appellant was sufficient to raise a reasonable doubt in his favor as against the proof made by the prosecution. Appellate courts have not the duty nor privilege of determining questions of fact arising out of a conflict in the evidence; that duty rests exclusively with the trial judge and jury.

[5] A number of objections were made to the admission and rejection of testimony. On cross-examination the witness George W. Sain was asked whether he had not said to the father of appellant that the prosecution was being carried on through motives of revenge. He replied that he had not so stated, and the district attorney then asked him what was said at the conversation between the witness and Rader. The witness replied that Rader, Sr., had said:

> "I think you ought to be lenient with Fred and give him another trial."

The witness continued:

> "I told him that I thought he had had all the trial that any man could ask for since he has been turned out. * * *"

This question followed:

> "You said since he was turned out; what was that part of the conversation that you had at that time with Andrew Rader?"

This question was objected to and the objection was sustained. Because of the asking of the question, it is claimed the district attorney was guilty of prejudicial misconduct. No prejudicial or objectionable conduct on the part of the prosecuting officer was shown. The witness had stated without objection details of the conversation between himself and Rader, Sr., and the statement objected to was only by way of repetition of what the witness had already said.

[6] The information filed against appellant contained in the first instance, in addition to the charge of assault with intent to commit murder, an accusation that appellant had previously been convicted of a felony. This charge of a prior conviction was stricken out before trial (for what reason does not appear). The defendant offered himself as a witness and testified on his own behalf. On cross-examination he was

asked whether he had not been previously convicted of a felony. The question was objected to and the conduct of the district attorney in asking it was assigned as wrongful and prejudicial to the rights of defendant. The witness answered that he had so been convicted, and when asked for what felony his answer was stopped by an objection which the court sustained. The court then instructed the jury that no consideration was to be given to evidence relating to a former conviction. The district attorney was entitled to ask of appellant, as of any defendant voluntarily giving testimony in aid of his defense, whether he had not been previously convicted of a felony. If, as it seems to be intimated, appellant had been previously convicted and pardoned for some offense, he could have, upon advice of his counsel or the court, had the benefit of an instruction as to how he would be entitled under such circumstances to answer the question. The question of the district attorney in the general form in which it was framed was pertinent, proper, and altogether permissible under the situation as the evidence disclosed it. Code Civ. Proc. § 2051. It may be noted that the district attorney by his first question did not point to any particular felony of which appellant may have been previously convicted, but asked him generally as to whether he had not suffered such previous conviction.

[7-9] Evidence of prior threats to commit bodily violence toward his wife was properly admitted against appellant, at least as tending to show the purpose and intent of appellant at the time he is charged with having committed the assault. People v. Chaves, 122 Cal. 134, 54 Pac. 596; People v. Piercy, 16 Cal. App. 13, 116 Pac. 322. On his direct examination the appellant was asked whether he had at any time prior to the date of the alleged assault threatened to cut his wife with a knife, or kill or shoot her. He replied that he had not. It was proper cross-examination for the district attorney to state particular details showing the contrary of that statement and ask for appellant's answer as to whether or not those things so stated were true; and it was within the discretion of the court to allow witnesses to be called in rebuttal of the denials of appellant, even though the matter may have been, as is suggested by counsel, more proper for proof as part of the main case of the people. It is not shown that appellant did not have an opportunity to produce all of the evidence he could or desired to produce on all matters at issue.

[10] Special counsel assisting the district attorney during the argument to the jury was truly most emphatic and plain spoken in his denunciation of appellant. When his choice of language was challenged as being improper, he relieved the objectionable statements of their improper character by calling attention to the testimony from which his inferences were drawn, and so the jury had the opportunity of determining for themselves whether the prosecutor's conclusions were justified. The court also at one juncture instructed the jury directly that certain inferences drawn by the prosecutor were too broad and that they were not to be considered. A portion of the objectionable remarks were thereupon withdrawn. As the record discloses the occurrences at the argument, it does not appear that the conduct of the prosecuting officer should be deemed to have prejudiced the jury against appellant.

[11] It is next claimed that the wife of appellant was not a competent witness to give testimony against him. This objection is based upon the provisions of section 1322 of the Penal Code, which generally prohibit a wife or a husband from testifying against the other in a criminal action. The prohibitive terms of the section, however, are modified by this clause of exception: "Except * * * in cases of criminal violence upon one by the other." Appellant was directly charged with an act of criminal violence committed against his wife.

[12] It was not necessary, in order to establish the commission of the crime, that appellant should have actually cut his intended victim with the knife which he exhibited. People v. Piercy, supra, and cases therein cited.

[13, 14] Whether the cause of ill feeling of the husband toward his wife was engendered by the conduct of the immediate relatives of the latter was immaterial, and there was no prejudicial error committed in sustaining objections to questions asked of the wife calculated to show that the interference of relatives had brought about that condition of feeling. An assault with a deadly weapon is not justified by a showing that the motive or animus prompting it has been produced by improper statements or conduct made by third parties, or even by the complainant. It is not claimed that the alleged assault was made in necessary self-defense of the person of appellant.

[15] The wife of appellant did not testify on direct examination to any acts of defendant occurring after the night when the alleged assault was committed, or as to his whereabouts from that time up to the date of his arrest, which occurred about seven days later. On cross-examination she was asked whether the appellant did not continue to live with her up to the date of his arrest. This line of examination was objected to on the ground that it was not within the scope of proper cross-examination and that it was immaterial and irrelevant. The objection was sustained. The matter sought to be elicited was, strictly speaking, not proper cross-examination, although the court in the exercise of a reasonable discretion in regulating the examination of the witness might have properly admitted the testimony as tending in some degree, if the jury might so view it,

to affect the credibility of the witness. The defendant on his own behalf testified fully in denial of all of the alleged facts upon which the charge was founded, but he did not testify, nor offer to testify, as to what relations he had sustained toward his wife after the night of October 11th. The record does not show that appellant was prevented from proving directly the facts which he sought to bring out on the cross-examination of his wife.

[16] It is objected that the court erred in admitting in evidence the knife claimed to have been the one with which the assault was committed, for the reason that sufficient identification thereof was not shown. The evidence gives no point to this objection. The wife of appellant when asked whether, according to her best recollection, the knife shown her was the knife with which appellant threatened to cut her, replied: "Yes, sir; that's the knife." The strength of this positive statement as to the identity of the knife was not weakened by any qualifying words of the witness.

There are a great many more instances specified by counsel for appellant where it is claimed the court committed prejudicial error in rulings upon the admission and rejection of testimony. Those that have been considered furnish a fair illustration of the general nature and force of these objections. It will not be advantageous or profitable to go to the great length necessary to a detailed discussion of these objections. A careful examination of the matters submitted does not warrant the claim that the alleged errors pointed out were such as to affect any substantial right of appellant. His conviction was made upon sufficient evidence, in substance competent and relevant to the charge contained in the information. The instructions given by the court to the jury presented a correct and sufficiently full statement of the law applicable to the issues.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

24 Cal. App. 509

PEOPLE v. YEE KING. (Cr. 488.)

(District Court of Appeal, First District, California. May 19, 1914. Rehearing Denied June 12, 1914; Denied by Supreme Court July 18, 1914.)

CRIMINAL LAW (§ 925½*)—NEW TRIAL—MISCONDUCT OF JURORS—UNAUTHORIZED VIEW.

Misconduct of jurors in visiting alone the scene of the crime is to be considered harmless, and not ground for new trial; it not being shown they saw or heard anything different from or contradictory of the evidence, or that their inspection resulted in an understanding of the evidence, or of any fact in the case, different from that conveyed to them by the testimony and diagram in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2248–2253; Dec. Dig. § 925½.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Yee King was convicted of murder, and, from the judgment and from an order denying new trial, he appeals. Affirmed.

Oliver Dibble, T. I. Fitzpatrick, and J. J. Greeley, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. This is an appeal from the judgment and from the order denying a new trial in a case where the defendant was convicted of murder in the second degree and sentenced to serve 20 years in the state prison.

The evidence adduced upon the entire case is substantially as follows: John C. Catlin, a witness for the people, testified that shortly before the commission of the homicide, at about the hour of 9 o'clock in the evening, he was walking down Stockton street towards its intersection with Washington street in San Francisco, in what is known as the Chinatown district. He came to the corner of Stockton and Washington streets, and continued along Stockton street about 125 feet when he heard a shot, and turning around saw the forms of three men, one of whom seemed to be struggling with the other two. He turned back to the scene of the encounter. There were four more shots. The witness noticed the flashes directed towards the body of the one man who seemed to be struggling with the other two, and who, after a futile effort to ward off his assailants, fell to the ground mortally wounded. Thereupon the assailants turned and ran in a northwesterly direction across Stockton street. Corporal Charles Goff, a police officer, who, at the moment of the shooting, was about half a block from the scene thereof, ran towards the point from which the report of the shots came, and saw two men running in a northwesterly direction. One wore a light gray suit and the other a dark suit. As he was pursuing them the man with the gray suit turned and fired. The officer, however, continued, and finally overtook him, whereupon the latter pointed his pistol at the officer's body but, without firing, turned and continued his flight. The officer managed to fell him with a blow of his hand, and after a struggle arrested and handcuffed him. The man arrested was Yee King, the defendant in this case. The autopsy surgeon found three bullet wounds in the body of the deceased.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The defendant took the stand and admitted that he was present at the scene of the shooting, and also that he carried a revolver similar to the one taken from him by the arresting officer, but denied that he was one of the assailants of the deceased, claiming that he was merely an innocent bystander. He admitted his flight, but stated that he fled because the two assailants of the deceased were about to attack him.

Incidentally it was shown in evidence that one Ah Moon, jointly charged with the defendant, was also arrested while running from the vicinity of the crime by Police Officers Nielson and O'Dowd at about the same time that Officer Goff arrested the defendant.

In addition to the foregoing there is the testimony of three other witnesses, who were present in the vicinity of the homicide at the time the shots were fired, and thereafter saw the flight and arrest of Yee King and Ah Moon.

But one point is presented for a reversal, and that involves the refusal of the trial court to grant the defendant's motion for a new trial, which was based entirely upon the grounds:

> "(1) That the jury received evidence out of court other than that resulting from a view of the premises; (2) that the jury were guilty of misconduct by which a fair and due consideration of the case was prevented."

The several remaining grounds of the motion for a new trial were not pressed at the argument of the motion, and they are not presented for consideration upon this appeal.

In support of the grounds of the motion for a new trial hereinbefore specified, certain affidavits were offered and received in evidence, wherein it was alleged that two of the jurors impaneled to try the cause had visited and viewed the scene of the homicide while the trial was in progress and before the taking of evidence had been concluded. Upon the hearing of the motion for a new trial special counsel for the people, while conceding the conduct of the two jurors in question to be as stated in the affidavits, objected that such conduct was not in and of itself sufficient to justify a new trial; and for that reason at first insisted that the motion be submitted for the court's decision upon the showing made by the defendant. The trial court, however, after stating that it had in mind the rule and its exceptions, that a juror will not be permitted to impeach his own verdict, suggested, out of an abundance of caution and in furtherance of justice, that the two jurors in question should be sworn and interrogated concerning the motive for their visit to the scene of the homicide and their conduct while there. Finally counsel for the people consented to this course, and also stipulated that such testimony might be considered as the equivalent of additional affidavits upon the question in controversy.

Under the circumstances of the present case, the procedure suggested and adopted was not only proper (People v. Chin Non, 146 Cal. 561, 80 Pac. 681), but does credit to court and counsel; and they are indeed to be commended for the caution and liberal sense of justice thus displayed. Thereupon the jurors in question were sworn, and the examination developed the following facts: During a noon recess in the trial of the case jurors E. B. Lindauer and John T. Welby met, and walked to the scene of the homicide, and while there "for a second or two" discussed certain features of the case to the extent of commenting upon and pointing out to one another certain objects and locations which were designated and delineated upon a detailed diagram of the scene of the homicide previously offered and received in evidence upon the actual trial of the case. Both jurors testified that they did not disclose the fact of their visit to the scene of the homicide to their fellow jurors, and that the incident was not subsequently referred to or discussed in or out of court at any time during the actual trial of the case or while the jury was deliberating upon the verdict.

It is not only conceivable but ordinarily very likely that an unauthorized view by jurors of the scene of a crime will result in the acquisition of material knowledge for or against the defendant concerning many essential features of a case which may be contrary to that conveyed by the evidence adduced at the trial. In such a situation it would indeed be difficult to say that the verdict of the jury was not induced in part at least by evidence received out of court other than that resulting from an authorized view of the premises. Such, however, is not the situation in the present case. The record shows that the jurors in question, upon their visit to the place of the crime, noted and commented only upon matters and things which had been previously presented for their consideration by the evidence adduced at the trial in open court. In short, the showing made upon the hearing of the motion for a new trial merely developed the fact that the unauthorized evidence received out of court was in effect but a reproduction of certain particular evidence previously adduced in court. No affirmative showing was made in the affidavits or by the testimony received upon the hearing of the motion for a new trial that the two jurors in question had seen or heard at the place of the homicide anything different from or contradictory of the evidence adduced at the trial; or that their unauthorized inspection of such place had resulted in an understanding of the evidence in the case concerning the relative situation of the parties and witnesses to the homicide, or any other fact in the case, which was in any wise different from that conveyed to them by the testimony of sworn witnesses and the details of the scene of the crime as depicted upon the diagram already in evidence at the trial.

This being so, it cannot be fairly said that the showing made in support of the motion for a new trial would have warranted the court below in finding that the visit of the two jurors to the scene of the homicide resulted in substantial injury to the defendant. That such visit was an irregularity amounting to serious misconduct must be conceded; but such misconduct is not per se sufficient to warrant the granting of a new trial. Prejudice must be shown to have followed; and, in the absence of an affirmative showing of resultant injury to the defendant in the present case, the verdict must stand. People v. Hope, 62 Cal. 291; People v. White, 20 Cal. App. 156, 128 Pac. 417; People v. Kramer, 117 Cal. 647, 49 Pac. 842; State v. Perry, 121 N. C. 533, 27 S. E. 997, 61 Am. St. Rep. 683; State v. Tilghman, 33 N. C. 513.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

24 Cal. App. 536

MOORE et al. v. FREDERICKS et al.

(Civ. 1307.)

(District Court of Appeal, Second District, California. May 23, 1914.)

1. DAMAGES (§ 5*)—"GENERAL DAMAGES."

General damages are those which necessarily and by implication of law result from the act or default complained of; or, otherwise stated, are those which involve the loss which naturally flows from and is presumed from the contract and its breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 4; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 4, pp. 3059, 3060; vol. 8, p. 7669.]

2. DAMAGES (§ 5*)—"SPECIAL DAMAGES."

Special damages are the natural, but not necessary, result of the act complained of.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. VENDOR AND PURCHASER (§ 349*)—FAILURE TO CONVEY—SPECIAL DAMAGES.

The element of the measure of damages, stated by Civ. Code, § 3306, for breach of an agreement to convey real property—the expenses properly incurred in examining the title and preparing the papers—is special; so that for recovery therefor the fact that such expenses were incurred, and the amount thereof, must be alleged.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039–1042; Dec. Dig. § 349.*]

4. VENDOR AND PURCHASER (§ 351*)—FAILURE TO CONVEY—GENERAL DAMAGES.

That the measure of damages for breach of contract to convey land is declared by statute (Civ. Code, § 3306) does not change the nature or element thereof—the price paid—from general damages to special damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047–1058; Dec. Dig. § 351.*]

5. VENDOR AND PURCHASER (§ 351*)—FAILURE TO CONVEY—COMPLAINT—DAMAGES—"BAD FAITH."

There being no allegation of bad faith, none of the damages alleged by the complaint, in an action for breach of contract to convey land, are to be deemed based on bad faith, within Civ. Code, § 3306, declaring recoverable, in case of bad faith, in addition to what is otherwise recoverable, the difference between the agreed price and the value of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047–1058; Dec. Dig. § 351.*

For other definitions, see Words and Phrases, vol. 1, p. 662.]

6. VENDOR AND PURCHASER (§ 349*)—FAILURE TO CONVEY—COMPLAINT—DEMURRER.

That the complaint, in an action for breach of contract to convey land in consideration of land conveyed, and $100 paid by plaintiff to defendant, alleging the damages suffered to be $2,000, fails to state the value of the land conveyed by plaintiff to defendant, while subject for special demurrer, does not make it open to general demurrer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039–1042; Dec. Dig. § 349.*]

7. VENDOR AND PURCHASER (§ 349*)—FAILURE TO CONVEY—COMPLAINT.

The complaint for breach of defendant's contract to convey land in consideration of land conveyed and money paid by plaintiff to defendant is not insufficient because failing to allege demand, and refusal thereof, for reconveyance and repayment of the land conveyed and money paid by plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039–1042; Dec. Dig. § 349.*]

8. VENDOR AND PURCHASER (§§ 349, 351*) — FAILURE TO CONVEY—COMPLAINT—DAMAGES.

The complaint alleging that by written contract plaintiff agreed to convey land and pay $100 to defendant, and did so, and defendant agreed to convey to plaintiff certain land, but had failed to do so, and that by reason of defendant's breach of the contract, plaintiff is damaged $2,000, for which sum he prays judgment, states a good cause of action for recovery of general damages only, which, under Civ. Code, § 3306, are the price paid and interest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1033, 1039–1042, 1047–1058; Dec. Dig. §§ 349, 351.*]

9. JUDGMENT (§ 118*)—DEFAULT—ACTION ON CONTRACT FOR DAMAGES.

By express provision of Code Civ. Proc. § 585, answer not being seasonably filed in an action on contract for recovery of money, or damages only, it is the clerk's duty, on enter-

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ing defendant's default, to immediately enter judgment for the amount demanded in the complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 234; Dec. Dig. § 118.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by S. D. Moore and another against Carl D. Fredericks and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Cyril H. Bretherton, of Los Angeles, for appellants. A. J. Mitchell, of Los Angeles, for respondents.

SHAW, J. Action to recover damages for breach of contract whereby defendants agreed to convey real estate to plaintiffs.

Defendants appeal upon the judgment roll from a judgment by default in favor of plaintiffs, entered after the overruling of defendants' general demurrer to the complaint.

The complaint alleged the making of a written contract between the parties whereby plaintiffs agreed to convey to defendants certain real estate and to pay them $100 in cash, and defendants on their part agreed to convey to plaintiffs certain lands fully described therein; that plaintiffs on their part fully complied with the terms of the contract by paying the $100 and conveying to defendants the lands as required by the agreement; that defendants on their part made default in the performance of the contract, in that they neglected and failed to convey to plaintiffs the lands so agreed by them to be conveyed; that by reason of defendants' breach in the performance of the terms of said contract plaintiffs are damaged in the sum of $2,000, for which sum they prayed judgment.

[1-5] Appellants insist the complaint fails to state a cause of action, and hence the court erred in overruling the demurrer interposed thereto. In addition to the making of the contract and the breach thereof by defendants, as shown by the complaint, it is alleged that by reason of such breach plaintiffs have been damaged in the sum of $2,000, for which judgment is demanded. While appellants concede the sufficiency of these allegations in stating a cause of action for the recovery of general damages, they insist that any damages resulting from breach of the contract must necessarily have been special in their nature. "General damages are those which necessarily and by implication of law result from the act or default complained of." Ency. of Law, vol. 8, p. 542. Or, as said in Wallace v. Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534, they are those which "involve the loss which naturally flows from, and is presumed from, the contract and its breach." Special damages are the natural, but not necessary, result of the act complained of. Section 3306, Civil Code, which declares a rule for the measure of damages in this character of actions provides:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

Damages due to expenses incurred in examining the title and preparing necessary papers in a given transaction and for which recovery may be had do not necessarily arise from the breach of a contract to convey real estate; hence they are special, and the fact that such expenses are incurred and the amount thereof, in order to recover therefor, must be specially pleaded. Not so, however, as to damages for failure to convey real estate where the consideration therefor has been paid. For such breach on the part of the one in default damage follows not only as the natural, but presumably necessary, result thereof. The fact that the statute prescribes a rule for ascertaining the amount of such damages in no wise changes their general character. We may indulge in the presumption that plaintiffs in drawing their pleading had in mind the statute declaring the measure of their damage. It is not alleged that any expenses were incurred in examining the title or preparing the papers; nor are there any allegations showing bad faith under which a recovery might be had for the "difference between the price agreed to be paid and the value of the estate agreed to be conveyed," and hence we cannot assume that any part of the damage alleged to have been sustained was based upon facts not alleged. The action, as stated in the complaint, was to recover the price paid, which, in this instance, was the value of plaintiffs' land so by them conveyed to defendants, plus the sum of $100 cash.

[6, 7] It is urged that the complaint fails to state how or in what manner plaintiffs have suffered damage in the sum of $2,000. In reply to which it may be said that, while the complaint, by reason of not stating the value of the land conveyed by plaintiffs, might have been subject to a special demurrer for uncertainty in this respect, none was interposed, and the defect, if such exists, is not reached by the general demurrer. The contention that the complaint is insufficient by reason of the fact that it fails to allege a demand for a reconveyance of their property and repayment of the $100 and refusal on the part of defendants so to do is without merit.

[8, 9] Our conclusion is that the complaint stated a cause of action for the recovery of general damages only, in the sum of $2,000, alleged to have resulted from defendants' breach of contract, and, since the facts alleged were not denied, it was the duty of the clerk, under the provisions of section 585, Code of Civil Procedure, upon entering default, to immediately enter judgment in accordance with the demand in the complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

24 Cal. App. 604

PEOPLE v. GRUBB. (Cr. 478.)

(District Court of Appeal, First District, California. May 25, 1914. Rehearing Denied June 23, 1914; Denied by Supreme Court July 24, 1914.)

1. PROSTITUTION (§ 4*)—PANDERING—SUFFICIENCY OF EVIDENCE.

On a trial for pandering, evidence *held* sufficient to support a conviction for an attempt to commit the crime.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. PROSTITUTION (§ 1*) — PANDERING — ATTEMPTS.

A person who procured for a female a room in a house of prostitution, with intent that she should occupy it for purposes of prostitution, was guilty of an attempt to commit the crime of pandering, where though she occupied such room for a short time, she refused to engage in sexual intercourse; the nature of the crime of pandering not being such as to preclude the possibility of an attempt.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

3. CRIMINAL LAW (§ 44*)—ATTEMPTS—ACTS CONSTITUTING.

To constitute an attempt to commit a crime, accused's acts must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*]

4. CRIMINAL LAW (§ 865*) — VERDICT — COERCING AGREEMENT.

Where, on a trial for pandering, an instruction, given after the jury had retired as to their right to find accused guilty of an attempt to commit the crime, was given in response to the jury's request for an instruction on the subject, it could not be regarded as an attempt to coerce the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 865.*]

5. CRIMINAL LAW (§ 112*)—VENUE—OFFENSES COMMITTED PARTLY IN TWO COUNTIES.

Where accused in Los Angeles offered to arrange for the prosecutrix to stay in San Francisco in a house of prostitution, wrote the keeper of such house, and made the necessary arrangements, and assisted the prosecutrix in leaving Los Angeles, and she was met in San Francisco by such keeper and taken to such house, accused could be prosecuted for an attempt to commit the crime of pandering either in Los Angeles county or in the city and county of San Francisco under Pen. Code, § 781, providing that when the acts constituting or requisite to the consummation of an offense occur in two or more counties, the jurisdiction is in either county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220–226, 230; Dec. Dig. § 112.*]

6. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—SHOWING INTENT.

On a trial for pandering, evidence as to the commission of previous similar offenses by accused was admissible to show the intent with which he sent the prosecutrix to the keeper of a house of prostitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Samuel Grubb was convicted of an attempt to commit the crime of pandering, and he appeals. Affirmed.

E. T. Barrett and Carl E. Lindsay, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Dep. Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of pandering, alleged to have been committed by willfully and feloniously procuring for a female person a place as an inmate of a house of prostitution. He was tried, and convicted of an attempt to commit pandering, and sentenced to 3½ years' confinement in a state prison.

[1, 2] From the record it appears that the defendant, upon learning from the prosecutrix (both of whom were at that time residing in Los Angeles) that she would like to go to San Francisco and there take up her residence, suggested to her that he could arrange for her to stay with a lady friend of his in that city, who, he said, had been his mistress, and who was at the present time there conducting a house of prostitution at 620 Jackson street. With the consent of the prosecutrix the defendant communicated with the keeper of that house, whose name was Rose Marks, and ultimately it was arranged that the prosecutrix should go to San Francisco and stay with Rose Marks for the purpose, according to the testimony of the prosecutrix, of engaging in the lodging house business. The communications passing between the defendant and Rose Marks, as narrated to the witness Wiskotchill by the defendant, are testified to by the witness as follows:

> "He said he did write a letter to this Rose Marks, asking her if she could use another girl in this house, * * * and that he received a reply from Rose Marks saying yes; that she could use another girl. He said he then answered that letter and said he would send her up."

The defendant assisted the prosecutrix in leaving Los Angeles, and she was met at San Francisco by Rose Marks, as had been previously arranged between the latter and the defendant, and was immediately escorted by her to the Jackson street resort. Upon arriving there Rose Marks assisted the prosecutrix to remove her wraps, and showed her to a room, saying, "Now this will be your room." The latter remained in that house that night four or five hours, and during that time was importuned to engage in sexual intercourse by visitors to the brothel, but refused all such importunities. About 2 o'clock that night the prosecutrix and Rose Marks left the Jackson street house and spent the remainder of the night at a hotel. The next day they returned to 620 Jackson street for a short time, and then went house hunting, apparently looking for a place where they, as partners and keepers, could conduct the business of prostitution. The record also shows that about a year prior to the circumstances giving rise to this case the defendant was in Los Angeles looking for girls for Rose Marks' house, and that upon that occasion he sent a girl to her house in San Francisco, who remained there for several months as a prostitute.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Whatever may have been the intent and purpose of the prosecutrix in coming to San Francisco, whether, as she claimed, to keep a respectable lodging house with Rose Marks, or to engage in prostitution, it is plain that the evidence warrants the conclusion that the defendant intended that she should occupy a room in the house of Rose Marks for the latter purpose. He did all he was in a position to do to effect that end, and the realization of his purpose was only defeated by the refusal of the prosecuting witness to engage in prostitution in the room procured for her. The evidence, therefore, supports the verdict of an attempt to commit the crime charged, unless, as asserted by defendant, there is no such crime known to our law as an attempt to commit pandering.

It is not disputed by appellant that a person prosecuted for a crime may be convicted of an attempt to commit it; but it is asserted that there are some crimes the nature of which precludes the possibility of an "attempt" to commit them; that the person charged is either guilty of the completed offense or not at all, and that the offense of pandering comes within this class. As an illustration the crime of assault with intent to commit rape is cited, where the attempt to commit the rape is the assault itself. And the reason why it is not possible to commit the offense of an attempt to pander is stated by the appellant to be that the essential ingredient in this crime, as charged against the defendant, is an intention on the part of the female, for whom a room or place is procured, to occupy it for the purpose of prostitution, and that where no such intent is shown to exist, all other acts are mere preparation, and that when such intent is shown to exist, the crime is complete, and is not an attempt.

So far as the general proposition is concerned as to the impossibility of attempting to commit the offense of procuring a place for a female person as an inmate of a house of prostitution, we think it quite clear that such an attempt is possible. An illustration readily occurs to the mind. If A., being a prostitute, requests B., her friend, to procure for her a room for the purpose of prostitution in the house of C., and B. applies to C. for such room, and his request is refused, it seems quite clear that an attempt to commit the crime has been made by B., but has failed of completion by the refusal of C. to give the room. And, while the case is not so clear as the illustration given, it also seems to us that if B. procures from C. a room in the latter's house of prostitution for A., having reason to believe and with the intent that A. will occupy it for the purpose of prostitution, and C. in concert with B. introduces A. into that room for that purpose, an attempt has been made by B. to commit the crime of procuring a place for A. as an inmate of a house of prostitution, although the offense is not completed because A., for reasons totally disconnected with B., refuses to occupy the room for the purpose indicated. But for the refusal of A. to occupy the place for the purpose intended by B., B.'s offense would have been complete.

[3] To constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances. 1 Whart. Crim. Law (10th Ed.) § 181; Clark & Marshall's Law of Crimes (2d Ed.) § 123. In the present case, the acts of the defendant would have resulted in the commission of the offense with which he was charged, but for the refusal of the prosecuting witness above indicated, and this refusal we hold to be the extraneous circumstances which prevented the completion of the crime.

These views are not in conflict with the case of People v. Matsicura, 19 Cal. App. 75, 124 Pac. 882. There the defendant was convicted of the crime of pandering, and not of an attempt; and, as the evidence there showed that the female person had not become an inmate of the house, and that a room had not even been selected for or allotted to her, the court held that the crime of pandering had not been committed. That case would be authority that the defendant here was not guilty of the completed offense, but it does not support his contention that he could not be convicted under the evidence of an attempt to commit it. On the contrary, the logical sequence of the reasoning in that case would lead to and support the conclusion arrived at in the case at bar.

[4] The defendant, as we have seen, was charged with the crime of pandering; and in the original charge to the jury no reference was made to their right to find him guilty of an attempt to commit such crime. After retiring, the jury returned into court for further instructions, and the court then instructed them on the subject of an attempt to commit the offense; and it is claimed by the defendant that the circumstances under which they were so charged amounted to an intimation by the court that it desired a conviction.

From a careful reading of the record it appears that a request for instructions as to an attempt was made by the jury, and hence it cannot be said that the trial judge, by giving them such instructions, attempted to coerce the jury.

[5] The interviews between the defendant and the prosecuting witness and some of the assistance rendered by him to her, which constituted the attempt to commit the crime charged, took place in the county of Los Angeles; and for that reason the defendant claims that the superior court of the city and county of San Francisco, where the case was tried, had no jurisdiction. The crime, as we have already seen, comprised a series of acts committed, some in Los Angeles, and some in San Francisco, under which circumstances the superior court of either of said counties had jurisdiction. Pen. Code, § 781.

[6] Over the objection of the defendant testimony was admitted tending to show that about a year prior to the commission of the offense here charged, the defendant at Los Angeles procured a place for another woman as a prostitute, at 642 Jackson street in San Francisco, also kept by Rose Marks, and that he told that woman that he was in Los Angeles trying to get girls for Rose Marks, who ran a house of prostitution in San Francisco. The defendant's intent in sending the prosecuting witness to Rose Marks was an essential ingredient in the crime charged, and in fact was the only substantial, controverted point in the case. It is plain that evidence of previous similar offenses by the defendant was admissible for the purpose of showing guilty intent. People v. Arnold, 17 Cal. App. 68, 74, 118 Pac. 729. It follows, therefore, that the court committed no error in admitting this testimony.

The judgment and order denying the defendant's motion for a new trial are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

24 Cal. App. 529

FOWLER v. FOWLER. (Cr. 332.)

(District Court of Appeal, Second District, California. May 20, 1914.)

1. Infants (§ 19*)—Proceedings in Juvenile Court—Right of Appeal.

The Juvenile Court Law of 1909, as amended in 1911 (St. 1909, p. 213; St. 1911, p. 658), does not authorize an appeal from an order of the Juvenile Court providing for sending a dependent child to a school at the expense of its mother.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 6, 8–15; Dec. Dig. § 19.*]

2. Infants (§ 19*)—Juvenile Court—Bill of Exceptions—Authentication.

Under the Juvenile Court Act of 1913 (St. 1913, p. 1304) § 30, providing relative to appeals that if the appellant questions the sufficiency of the evidence to warrant the findings, the evidence shall be incorporated in a bill of exceptions to which the opposite party may propose amendments, and which shall be settled by the judge, and that after the settlement thereof appellant shall file the original bill with the clerk of the Juvenile Court, who shall transmit it to the Appellate Court, with his certificate that it is correctly engrossed, and Code Civ. Proc. § 650, providing that, when settled, a bill of exceptions must be signed by the judge with his certificate that it is allowed and then filed with the clerk, a bill of exceptions on an appeal from the Juvenile Court could not be considered where there was nothing to show that it was ever settled, allowed, or signed by the judge who tried the case, except the clerk's certificate that it was regularly settled and allowed by the judge.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 6, 8–15; Dec. Dig. § 19.*]

3. Infants (§ 19*)—Proceedings in Juvenile Court—Orders.

In a proceeding on a petition alleging that the petitioner's daughter was a dependent person within the act concerning dependent and delinquent minor children, an order entered after such child had been declared dependent, reading, "to go to M. and board and go to public school at $25 per month at mother's expense or if mother arranges, she may go to Miss O.'s school at mother's expense" was unintelligible and uncertain in meaning, so as to be difficult of enforcement, and the court should make such further orders as to remove any doubt as to the intent and meaning of such order, as well as to specify the time during which the care and custody of the child and the payment by the mother should continue.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 6, 8–15; Dec. Dig. § 19.*]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of Helen Fowler, a dependent person. From an order, Alice P. Fowler appeals. Appeal dismissed.

A. J. Copp, Jr., of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Dep. Atty. Gen., for respondent.

SHAW, J. From such record as is presented, it appears that on November 25, 1912, Alice P. Fowler filed in the superior court a petition alleging that her daughter, Helen Fowler, 13 years of age, was a dependent person within the meaning of the act of the Legislature, entitled, "An act concerning dependent and delinquent minor children," etc., approved March 8, 1909, and amended April 5, 1911.

[1, 2] At the hearing of the matter on December 1, 1913, the court made an order as follows:

"December 1. Hearing; declared dependent; continued one week; remain in Juvenile Hall until further order."

And later made the following order:

"December 8. Remain in Juvenile Hall one week."

Thereafter the court made an order as follows:

"December 15. Hearing. To go to Montecito and board and go to public school at $25 per month at mother's expense; or, if mother arranges, she may go to Miss Orton's Pasadena School at mother's expense."

The appeal prosecuted by Alice P. Fowler purports to be from this last order. The proceedings under which Helen was declared a dependent person were had and taken, as appears from a copy of the petition, pursuant to the provisions of the juvenile act of 1909, as amended in 1911. These acts contain no provision for appeal from an order of the character here involved. Section 30 of the juvenile court law of 1913 (Stats. 1913, p. 1304) provides that an appeal may be had to the District Court of Appeal, and further provides the mode and manner of authenticating the record to be reviewed. By said section it is made the duty of the judge to find the facts of the case in the form of a special finding, and in case the sufficiency of the evidence to warrant the findings is questioned, the same shall be incorporated in a bill of exceptions prepared by the appellant, and the opposite party may propose amendments to such bill, which, after settlement by the judge, shall be engrossed and a copy thereof served upon the opposite party and the Attorney General, and the original thereof, together with proof of service, filed with the clerk of the juvenile court, "who shall immediately transmit the same to the court to which the appeal is taken, with his certificate that such bill of exceptions is correctly engrossed." Section 650, Code of Civil Procedure, relating to the settlement of bills of exception, provides that when settled the bill must be signed by the judge. While in the case at bar the clerk certifies that the bill of exceptions presented is correctly engrossed, there is nothing showing that it was ever settled, allowed, or signed by the judge who tried the case. True, the clerk further certifies that it was "*regularly settled and allowed by the judge*," but we know of no law which permits a bill of exceptions to be authenticated merely by the clerk of the court certifying that the judge has duly settled and allowed it. Neither under the act in accordance with which the procedure purports to have been taken, nor under the act of 1913, is there any record presented authenticated in a manner which entitles appellant to a review of the question presented. It is therefore unnecessary to discuss the validity of the act of 1913. Suffice it to say that the record presented, even were it properly authenticated, fails to present any facts upon which appellant bases her contention that the law was not passed by the Legislature.

[3] While the appeal, for the reasons given, must be dismissed, it may not be improper to call attention to the fact that the order is unintelligible and uncertain in meaning to a degree that would render it difficult of enforcement, and suggest that if the law and facts warrant the court in so doing, it should make such further order or orders with reference to the care and custody of the child and payment by appellant for services rendered it, so as to remove any doubt as to the intent and meaning of the order, as well as specify the time during which it shall continue.

The appeal is dismissed.

We concur: CONREY, P. J.; JAMES, J.

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24 Cal. App. 592

SOCIEDADE DO ESPIRITO SANTO v. SANTA CLARA VALLEY BANK et al. (Civ. 1216.)

(District Court of Appeal, Third District, California. May 23, 1914.)

1. APPEAL AND ERROR (§ 1042*)—REVIEW—HARMLESS ERROR.

Where there were several defendants, the error in striking out a paragraph of the answer of one of them was harmless where the answer of another defendant contained a like denial and the court made findings of fact on the issues thus raised.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110–4114; Dec. Dig. § 1042.*]

2. PLEADING (§ 122*)—ANSWERS—DENIALS.

A defendant cannot deny on information and belief matters within his personal knowledge; a positive answer being required in such cases.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. § 122.*]

3. PARTIES (§ 82*)—NECESSARY PARTIES.

A cross-complaint filed by an individual is defective for want of parties, where no relief was prayed as an individual and the only relief asked was the payment of a sum of money to the members of an unincorporated association.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 132; Dec. Dig. § 82.*]

4. APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR.

The sustaining of a demurrer to the cross-complaint of one of the defendants was harmless, where a demurrer to a similar cross-complaint by another defendant was overruled and all of the issues raised thereby were determined by the findings of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089–4105; Dec. Dig. § 1040.*]

5. PARTIES (§ 94*)—MISNOMER.

That plaintiff was only a voluntary, unincorporated association instead of a corporation as appeared by its name, was no defense to an action by plaintiff for money received by defendants for its benefit.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 155–159, 177; Dec. Dig. § 94.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by the Sociedade do Espirito Santo against the Santa Clara Valley Bank and others and A. G. George. From a judgment for plaintiff, defendant George appeals. Affirmed.

Will M. Beggs, R. C. McComish, Louis Oneal, and Jas. P. Sex, all of San Jose, and Weinmann, Wood & Cunha, of San Francisco, for appellant. H. A. Gabriel, of San Jose, F. I. Lemos, of Hayward, C. A. Thompson, of Santa Barbara, and Leib & Leib, of San Jose, for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BURNETT, J. The action was to recover the sum of $942.61, which plaintiff alleged had been received by the defendants for the use and benefit of plaintiff. The appeal is by A. G. George alone and is from the judgment on the judgment roll. Defendant George filed an answer and cross-complaint, the first paragraph of which is as follows:

"This defendant has no information or belief sufficient to enable him to answer paragraph 1 of said complaint, and therefore denies that the Sociedade do Espirito Santo ever was or is now a corporation, or ever was organized or existing under or by virtue of, or pursuant to the laws of the State of California, or any other state."

In the second paragraph of said answer and cross-complaint is the following statement:

"This defendant has no information or belief sufficient to enable him to answer, and therefore denies that prior to the bringing of this action, or at all, the plaintiff demanded from said defendants, or any of them, the payment of said sum of $942.61."

On motion these averments were stricken out, and this action of the court and its order sustaining a demurrer to appellant's cross-complaint constitute the grounds for his contention that the judgment should be reversed.

There seems to be no merit in the appeal and extended consideration of the points made by appellant is deemed unnecessary. Indeed, we may as well adopt the succinct statement in respondent's brief as a sufficient justification of the action of the lower court. This brief, to which no reply has been made by appellant is as follows:

[1] "1. If it was error to strike out paragraph 1 of defendant George's answer, the error was without injury. The answer of the defendant Santa Clara Valley Bank contained a like denial on information and belief, and the court made its finding of fact on the issue thus raised.

[2] "2. It was not error to strike out paragraph 2 of the defendant George's answer. He had actual knowledge of whether demand had been made upon him, and his denial thereof on information and belief was an evasion of the statute. A defendant cannot deny knowledge of his own acts; nor can he deny knowledge of allegations which include personal transactions with him. In such cases a positive answer is required. 1 Ency. of Pl. & Pr. p. 813; Brown v. Scott, 25 Cal. 189, 196; Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. 844; Gribble v. Col. Brew. Co., 100 Cal. 67, 34 Pac. 527.

[3, 4] "3. The demurrer to the cross-complaint was properly sustained. Defendant George did not file his cross-complaint on behalf of the members of any unincorporated association but as an individual. The prayer of his cross-complaint does not demand any relief for himself, but asks the court to order the money paid to some unincorporated association that is not a party to the action. There was therefore a defect of parties cross-defendant and a defect of parties cross-complainant.

"Said cross-complaint is uncertain for the reasons stated in paragraph 5 of plaintiff's demurrer to the cross-complaint. The sustaining of the demurrer to the cross-complaint was without injury to the defendant George for the reason that the defendant Santa Clara Valley Bank demurred to said cross-complaint and said demurrer was overruled. Answer was filed to said cross-complaint by the defendant bank, and all the issues raised by the cross-complaint were tried by the court and determined by the findings."

[5] Indeed, an examination of the record discloses the fact that the only material issue was whether said $942.61 belonged to an incorporated or to an unincorporated association known by the name of "Sociedade do Espirito Santo." But, as we may presume the identity of the thing from the identity of the name, the only serious controversy seems to have been over the question whether said society was incorporated or not. This, of course, would be no matter of defense, and if it had been it could have been settled by an examination of the public records.

At any rate, the cause was determined by the court upon its merits, and no good reason whatever has been suggested for interference with the judgment. It is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 563

PEOPLE v. McGEE. (Cr. 249.)

(District Court of Appeal, Third District, California. May 23, 1914. Rehearing Denied June 23, 1914.)

1. BRIBERY (§ 1*)—OFFENSES.

Accused, who was engaged by the sheriff to obtain evidence of the illegal sale of intoxicating liquors, verified a complaint charging S. with an unlawful sale. Before trial, he informed the district attorney that he would not testify unless the county paid him certain sums claimed to be due, and the district attorney said that he would be compelled to testify. Between then and the trial he accepted money from S. to absent himself from the trial. *Held*, that accused, though not under subpœna, was one about to be called as a witness within Pen. Code, § 138, declaring that any person who is about to be called as a witness, who receives or offers to receive a bribe to influence his testimony, or to absent himself from trial, is guilty of a felony.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 2, 3; Dec. Dig. § 1.*]

2. BRIBERY (§ 6*)—OFFENSES—INDICTMENT—SUFFICIENCY.

In a prosecution for soliciting and receiving a bribe with the understanding that accused, who was about to be called as a witness, should absent himself, an indictment, alleging that accused, who was the complaining witness in a prosecution against one S. for the unlawful sale of intoxicants, knowing he was a material witness, solicited and received a bribe to influence his testimony and to absent himself from trial, is sufficient, although it did not directly aver that accused was about to be called as a witness.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.*]

3. WITNESSES (§ 345*) — IMPEACHMENT — CONVICTION.

As Pen. Code, § 17, provides that when a crime, punishable by imprisonment in the state prison, is also punishable by imprisonment in the county jail or fine in the discretion of the court, it shall be deemed a misdemeanor for all purposes after judgment imposing punishment other than imprisonment in the state's prison, a conviction of assault with a deadly weapon, where accused was punished only with imprisonment in the county jail, is a misdemeanor, and so is not, under Code Civ. Proc. § 2051, limiting impeachment in that way to convictions for felony, admissible to impeach him as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126–1128; Dec. Dig. § 345.*]

4. Criminal Law (§ 1171*)—Appeal—Harmless Error.

In a criminal prosecution, where the district attorney by a series of questions brought out that accused had been convicted of an assault with a deadly weapon, although he was sentenced only to imprisonment in the county jail, and stated before the jury that he would try accused, who denied that he was ever convicted of a felony for perjury, the error is reversible, though the court rejected the record of the conviction when offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

5. Bribery (§ 1*) — Offenses — Who are "Witnesses."

One who swore to an indictment charging an illegal sale of intoxicants is not therefore a witness, within Pen. Code, § 138, providing that any witness who receives a bribe to influence his testimony or to absent himself from trial is guilty of a felony, the term "witness" being used as defined by Code Civ. Proc. § 1878, declaring that a witness is a person whose declaration under oath is received in evidence for any purpose whether such declaration be by oral examination, deposition, or affidavit, and the complaint not being admissible in evidence.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 2, 3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 8, pp. 7511–7513, 7837.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

William McGee was convicted of crime, and he appeals. Reversed and remanded.

C. N. Riggins, of Napa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was employed by the sheriff of Napa county, about the 1st of September, 1913, to obtain evidence against one Mary Salowsky for selling liquor without a license, contrary to a certain ordinance. Under this employment he visited the place in question, and on September 11, 1913, he swore to a complaint in the justice court of St. Helena township, charging said Salowsky with a violation of said ordinance. She was arrested and her case was set for trial for September 23, following. By consent it was continued till October 3d and thereafter was reset for October 14th at 9:30 a. m. On Sunday, October 12th, two days before said trial was to be had, defendant visited the house conducted by said Mary Salowsky and, according to the testimony of the people's witnesses, the following occurred: McGee said he wanted to have "a little talk" with her, and in response to her inquiry, "What is it?" he stated that he was the prosecuting witness in her case, that it was "a pretty strong case," and:

> "How would that be? I will drop that case against you. The county owes me so much money, and, if you will let me have this money that the county owes me, I would go away and quit and leave the state, and of course I can't go on nothing, I have to have some money."

Mary Salowsky replied:

> "This is kind of unexpected to me, but of course I can give you no deciding answer tonight. I have to think the matter over."

He replied, "You know very well the case comes up Tuesday." It was then agreed that she should call him up the next day at the Brooklyn Hotel in Napa and give him a definite answer. Defendant, however, remained in St. Helena, and on Monday he so telephoned to her, and he agreed to be at her house at 4 o'clock on that day. Mrs. Salowsky informed the officers and her attorney of defendant's proposition, and in the afternoon Officers Cook and Dockery went to the house and the matter was talked over, the sum of $90 obtained and marked and delivered into the custody of Mary Salowsky, when the defendant appeared approaching the house. The officers concealed themselves so as to hear and observe what occurred. The following conversation took place between McGee and Mrs. Salowsky:

> Mrs. Salowsky: "How much money was it you wanted? I did not understand you whether it was $19 or $90." Mr. McGee: "Ninety dollars." Mrs. Salowsky: "Don't you think that is a little too much?" Mr. McGee: "No, if you hire an attorney it will cost you probably that much for an attorney, and if you get convicted, why it would probably be a heavy fine." Mrs. Salowsky: "Well, how about Wilson then?" Mr. McGee: "I have got that all fixed with Wilson." Mrs. Salowsky: "How about Maloney?" Mr. McGee: "He doesn't know anything at all; for the $90 I will beat it. Your case comes up to-morrow, and for the $90 I will beat it out, and you will be acquitted because the prosecuting witness won't be there." Mrs. Salowsky: "All right." She then gave him the money, and he said: "This is what I call a square deal." The woman then said: "Sit still. I will bring you a drink."

Immediately thereafter the officers appeared and placed the defendant under arrest.

[1] It is the claim of respondent that by this and some other evidence hereafter to be noticed the case is clearly brought within the inhibition of section 138 of the Penal Code, which provides that:

> "Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial or proceeding upon which his testimony is required, is guilty of a felony."

Every fact constituting a constituent element of said offense was sufficiently established by the evidence for the people. That he offered to receive and did receive a bribe upon the understanding that he would absent himself from the trial of Mrs. Salowsky appears as plain as language can make it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The only other considerations in this connection are: Was defendant a witness in the case against Mrs. Salowsky, or was he about to be called as such?

> "A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." Section 1878, Code Civ. Proc.

If we concede the point made by appellant that on the said 12th day of October he was not a witness in the sense of the statute, it can be of no avail, for the reason that it was shown that he was "about to be called as a witness" in the case. This is a fair deduction from the following circumstances: He was employed by the officers to secure evidence against Salowsky, and he did secure it. He swore to the complaint charging her with the crime. He declared to her that the case was set for trial for Tuesday and, in effect, that he expected to be a witness and was ready to testify against her. The sheriff testified that at the time of the arrest of Mrs. Salowsky he told McGee that the latter would be wanted as a witness in the case, and the district attorney testified that on Saturday, October 11th, he had a conversation with defendant in which he told the latter that the case was set for the 14th and instructed him to be present to testify as a witness, that McGee stated that he would not come unless the county paid him what was due, and the district attorney replied that he would find a way to make him attend. It is of no consequence that he was not thereafter subpœnaed or that the trial of Mrs. Salowsky was again continued. This resulted from the conduct of defendant in relation to the bribe. It is manifest that the intention was to proceed with the trial and compel McGee to attend and be a witness; but the commission of the greater offense by appellant interfered with the plan in reference to the trial of Mrs. Salowsky. It may be remarked that the district attorney, until the time of defendant's refusal to attend, had a right to expect that McGee would be present at the trial, if not subpœnaed.

We think it a reasonable inference from the evidence that at the time defendant solicited the bribe he was "about to be called as a witness" in the Salowsky case in the sense in which that expression is used in said statute.

[2] The point is made that the indictment does not sufficiently set forth said offense, but as to this we think appellant is in error. Therein it is definitely averred with the time and place that:

> The defendant "did willfully, unlawfully, corruptly, and feloniously offer to receive and did receive a certain bribe in the sum of $90 from one Mary Salowsky upon the express understanding and agreement with the said Mary Salowsky that he, the said Wm. McGee, would be influenced in his testimony thereby and would absent himself as a witness from a certain trial and proceeding wherein said Mary Salowsky was defendant and wherein said Wm. McGee was complaining witness, said case or proceeding being entitled 'In the Justice's Court of St. Helena Township, County of Napa, State of California. The People of the State of California, Plaintiff, v. Mary Salowsky, Defendant, Complaint, Criminal.' Said complaint was then and there filed in the said justice's court of St. Helena township, on the 11th day of September, 1913. The said Wm. McGee then and there well knowing that he was a material witness for the people of the state of California, and that he would be called as such in said above-entitled trial and proceeding."

The only possible objection of any moment to the indictment is that there is no direct averment that defendant, at the time of the alleged offense, was a witness or was about to be called as a witness in the trial of said Mary Salowsky. However, that he was about to be called as a witness is a necessary inference from the allegations that appear in the indictment, and it is entirely manifest from the evidence that appellant was not prejudiced by any want of certainty in that respect.

[3, 4] Probably the most serious question in the case arises from the alleged misconduct of the district attorney. After the first witness for the people was called, the record shows the following:

> "Mr. Coombs: I would like, if the court please, to ascertain if the defendant has pleaded under his true name. Mr. Riggins: He has so pleaded. The Court: I won't go into it any further. Mr. Coombs: I want to find out if he has pleaded in his true name. He could plead otherwise if he wanted. Mr. Riggins: I take an exception to the statement and remark of the district attorney and assign it as misconduct. The Court: I instruct you, gentlemen of the jury, of course you are to pay no attention as to what passes between the court and counsel. You are deaf whenever that occurs."

Again, when the defendant was called in his own behalf, the following occurred:

> "Mr. Riggins: Q. Mr. McGee, did you know Mr. Wilson? A. I do. Q. You know Mr. Kelton, the sheriff of this county? A. Yes, I do. Mr. Coombs: I object to any further line of questions until Mr. Riggins qualifies the witness. He has not asked him his name, if the court please. Mr. Riggins: I will do so if the court wants it. The Court: He may not have any name and he may. Mr Riggins: He has given his name as William McGee. Mr. Coombs: He never has given his name under oath. Mr. Riggins: We object to the remark of the district attorney. The Court: You can ask him about it. That is a matter of cross-examination."

The record shows the following proceedings on the cross-examination of the defendant:

> "Mr. Coombs: I will ask you, Mr. McGee, if you were not convicted of the crime of felony in the city and county of San Francisco on the 3d day of September in the year 1909? A. No, sir. Q. At that time you were convicted of a felony under the name of Patrick McGee? A. I was never convicted of a felony in my life. Q. I will ask you if you were ever tried in the city and county of San Francisco of the crime of assault with a deadly weapon? Mr. Riggins: Object to the question as incompetent, irrelevant, immaterial; and we take an exception to the asking of the question by the district attorney and assign it as misconduct. The Court: Yes. Mr. Coombs: If your honor

please, the witness has denied this. I want to lay the foundation now to show that the witness at that time was convicted of a felony under the name of Patrick McGee, and that Patrick McGee and the defendant in this case are one and the same person. The Court: Ask him if he was convicted of a felony under the name of Patrick McGee. Mr. Coombs: Yes. The Court: You asked him that, and he said, 'No.' If you want to impeach that statement, you ought to know how to do it. You can ask him the nature of the offense. The objection will be sustained."

Again, when Sophie Catherine McGee was called by the people in rebuttal, the following occurred:

"Mr. Coombs: Your name is Sophie McGee? A. Yes, sir. Mr. Coombs: You were formerly the wife of the defendant in this case, were you not? A. Yes, sir. Q. You recognize him, do you? A. Yes, sir. Q. What is his correct name, if you know? A. William McGee. Q. Has he any other name? Mr. Riggins: Objected to upon the grounds incompetent, irrelevant, immaterial, not rebuttal, assign the asking of the question as misconduct of the district attorney and note an exception thereto. The Court: Overruled. A. Well, he has a nickname. Q. What is it? A. Patrick. Q. I will ask you, Mrs. McGee, if you know whether or not William McGee, the defendant in this case, whose nickname was Patrick McGee, was ever convicted of a felony in the state of California? Mr. Riggins: Object to the question as irrelevant, incompetent, immaterial, not the best evidence, and further specify the asking of the questions as misconduct and take an exception thereto. The Court: Oh, that is nonsense. Mr. Riggins: I do take an exception. If the defendant was convicted of a felony and he has the judgment roll, the introduction of the judgment roll is the evidence, and the asking of all these questions is simply for the purpose of prejudicing the jury. Mr. Coombs: That is just what we are asking these questions for, to introduce the judgment roll, if your honor please. The Court: You have proven now that his nickname is Patrick McGee. Mr. Coombs: Patrick McGee. The Court: Very well. I will sustain the objection to the question as to whether he has ever been convicted of a felony because the record is the best evidence. Mr. Riggins is right about that. What I meant a moment ago was assigning all these matters as misconduct on the part of the district attorney. Mr. Coombs: That is ridiculous. The Court: It is taking up the time of the court. Mr. Riggins: I do assign it and take exception. The Court: I do not think it is the right way to practice law."

After some further discussion the district attorney said:

"I offer at this time a document entitled on the cover 'Number 2221,' Superior Court, State of California, in and for the city and county of San Francisco, Department No. 12, The People of the State of California v. Patrick McGee. Judgment, Filed this 8th day of December, A. D. 1909. H. I. Mulcrevy, Clerk. By Lawrence Buckley, Deputy Clerk."

An objection was made, the document was handed to the court, and the district attorney said, "I will try him for perjury when I get through here, too." The court then asked the district attorney if he had looked at this copy of the judgment roll and the district attorney replied:

"It is proper evidence. It is a felony. The judgment states that. I call your honor's attention to it."

The court sustained the objection to the evidence. The offered record showed that McGee was convicted of an assault with a deadly weapon and sentenced to the county jail. The offense was thereafter to be deemed for all purposes a misdemeanor. Section 17, Pen. Code. The record was therefore clearly inadmissible, as the statute limits impeachment in that manner to the judgment of conviction of a felony. Section 2051, Code Civ. Proc.

But as far as any effect upon the jury is concerned, the record might as well have been admitted. In fact, from the course of procedure as narrated above several exceedingly hurtful impressions must have been created in the minds of the jurors, among them, that the defendant was trying to conceal his identity, that he had been convicted of an assault with a deadly weapon, that he had committed perjury in denying that he had been convicted of a felony, and that his counsel was not acting in good faith in interposing his objections, but was really trifling with the court.

In view of the foregoing untoward incidents, it would seem to be an injustice to the defendant to allow the conviction to stand. We may assume that the district attorney was not guilty of intentional misconduct, but the prejudicial effect of the course pursued was not ameliorated by that circumstance. Indeed, having confidence, as no doubt they had, in his good faith, the jurors would be more strongly influenced against the defendant than if they believed the district attorney were attempting to take an unfair advantage of the one on trial. We think a fundamental and essential right of appellant was invaded and that in all probability the error affected the verdict. People v. Derwae, 155 Cal. 592, 102 Pac. 266; People v. Fleming, 136 Pac. 291; People v. Tufts, 139 Pac. 78.

While the evidence, as before stated, is sufficient to support the verdict, yet the peculiar facts of the case demand a new and fair trial according to the established rules of juridical procedure.

[5] In contemplation of another trial, it is deemed proper to indicate more specifically what we understand to be the true theory upon which the prosecution must rest. We may approach it by setting out the following instruction proposed by defendant:

"I instruct you that the offense defined by section 138 of the Penal Code, under which this indictment is found, is not committed by a complaining witness receiving or offering to receive a bribe after he has sworn to the complaint and the same has been filed unless he is also a witness or about to be called as a witness at the trial of the case, and you cannot find the defendant to have been a witness as charged in the indictment from the fact that he swore to the complaint in the justice court against Mary Salowsky, unless you also find that at the time of the alleged bribery he was a witness or about to be called as a witness at the trial of the case."

This instruction should have been given. To constitute the offense covered by said section 138 of the Penal Code, the party charged must, at the time the offense is alleged to have been committed, either be a "witness" or "about to be called as a witness." The term "witness" is undoubtedly used in the sense defined by the statute. Indeed, the said section 138 was so construed by the court in giving the definition of the term "witness" that is found in said section 1878 of the Code of Civil Procedure. The defendant was not at that time a witness as thus defined. It is true he had sworn to a complaint, but that was not to be used as "evidence" at the trial. It had performed its function as a basis for the warrant of arrest, and it did not reach forward and constitute defendant a witness at the time he is alleged to have received a bribe from said Salowsky. There was some reason for believing that the jurors might conclude that he was a witness for the reason that he had sworn to the complaint, and therefore it was important that they be instructed as indicated. The people's case must rest, therefore, upon the other contingency, that defendant was about to be called as a witness, as there was no evidence that he was at the time actually a witness in the cause. Defendant was indicted and tried for a peculiar statutory offense, and, of course, the evidence must measure up to the standard prescribed by the statute. The crime is not the common-law offense of obstructing justice. This is provided for in section 136 of the Penal Code. Many of the cases cited apply to such an offense, but are not controlling here.

We think the judgment and order denying the motion for a new trial should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 519

SMYTH v. TENNISON. (Civ. 1500.)

(District Court of Appeal, Second District, California. May 19, 1914.)

1. LANDLORD AND TENANT (§ 323*) — CROPPING AGREEMENTS—CONTRACT OF EMPLOYMENT—RIGHTS GIVEN.

The contract by which defendant was to mature a crop on plaintiff's land, and plaintiff was to give him one-fourth of the crop for doing it, is one of employment, and does not create the relation of landlord and tenant, or in any way transfer to defendant right of possession to any part of the grain when threshed.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1350, 1351, 1355, 1356; Dec. Dig. § 323.*]

2. LANDLORD AND TENANT (§ 331*) — CROPPING AGREEMENTS—BREACH OF CONTRACT—REMEDY.

For refusal of plaintiff to give, as agreed, to defendant, for maturing a crop, one-fourth of the grain, defendant's remedy is by action for breach of contract; and his surreptitious taking of that part of the grain gives him no right of possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1360–1362, 1379–1387; Dec. Dig. § 331.*]

3. CONTRACTS (§ 176*)—NEW TRIAL (§ 66*)—ERROR OF JURY—INTERPRETING ORAL CONTRACT.

While the interpretation of an oral contract is, in the first instance, for the jury, their interpretation being clearly erroneous, the trial court should, on application, set aside the verdict and grant a new trial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767–770, 917, 956–979, 1041, 1097, 1825; Dec. Dig. § 176;* New Trial, Cent. Dig. §§ 132–134; Dec. Dig. § 66.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. L. Smyth against W. F. Tennison. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Reversed.

Frank Birkhauser, of El Centro, for appellant. A. L. Sebille, of Brawley, for respondent.

SHAW, J. Action in claim and delivery. It appears that plaintiff was the owner, and in possession of a piece of land upon which he had grown a crop of milo maize. About August 1, 1912, as shown by the testimony of defendant, he and plaintiff entered into an oral agreement whereby plaintiff employed defendant to perform the labor in cultivating and bringing the crop of grain to maturity.

> "The agreement between us," says defendant, "was that he would give me one-fourth of the crop for maturing it from that time on, and he would guarantee me $500 out of the job. I went to work under those conditions. * * * I quit about the 15th of January. That crop consisted of about 2,000 sacks, according to the threshers' tally. * * * Mr. Smyth was to pay all the bills and give me one-fourth of the crop."

It further appears that defendant performed labor in the cultivation of the crop until the same was matured, and that about December 1st plaintiff, at his own expense, had it harvested, threshed, put into sacks, and stacked or piled up upon his land; that on the night of January 15th, without plaintiff's knowledge or consent, defendant, using plaintiff's team of mules therefor, took and hauled away to a place which he had rented, 500 sacks of the grain. Whereupon plaintiff instituted this action whereby he recovered possession of the property so taken by defendant and sold the same. The case was tried before a jury which found the value of the property replevined by plaintiff to be $562.50, and rendered a verdict in favor of defendant. Judgment followed, from which, and an order denying plaintiff's motion for a new trial, plaintiff appeals.

[1-3] Among other grounds upon which the motion for a new trial is based is insufficiency of the evidence to justify the verdict. It conclusively appears that plaintiff at all times was the owner and in possession and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

control of the land upon which the crop was planted and grown, and it must follow, in the absence of some act whereby he transferred his right, that he was the owner and entitled to possession of the crop so grown upon the land after its severance from the soil. Encyc. Law, p. 486; Halleck v. Mixer, 16 Cal. 574; Kimball v. Lohmas, 31 Cal. 154. As showing such transfer of right, defendant relies solely and alone upon the alleged agreement, the existence of which is denied by plaintiff. Conceding, as we must, the making of the contract as claimed by defendant, it does not purport to be other than a contract for the employment of defendant. It cannot be construed as creating the relation of landlord and tenant between the parties, nor as transferring the right of possession to the grain. At no time until surreptitiously asported, for the reason, as stated by defendant, "I thought he (plaintiff) might sell them (the sacks) before giving me my share," did defendant have possession of the grain. In thus gaining possession he was a trespasser and obtained no rights by such wrongful taking. Defendant's remedy, in case plaintiff refused to comply with the agreement and give him one-fourth of the grain for the labor performed, was an action upon the contract for a breach thereof, rather than the peculiar proceeding adopted for the enforcement of his rights. It is true, since the contract was oral, its interpretation in the first instance was a question of fact to be determined by the jury; but, since such interpretation was clearly erroneous, it became the duty of the trial court, upon application therefor, to set the verdict aside and grant the motion for a new trial. Our conclusion renders it unnecessary to discuss the alleged misconduct of the jury assigned as another ground in support of the motion.

The judgment and order appealed from are reversed.

We concur: CONREY, P. J.; JAMES, J.

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24 Cal. App. 515

TAYLOR v. SANSON et al. (Civ. 1461.)

(District Court of Appeal, Second District, California. May 19, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 87*)—POWERS—COMPROMISE OF CLAIMS.

Under Code Civ. Proc. § 1588, authorizing an executor to compromise a claim when for the best interest of the estate, an executor may compromise with a debtor without first obtaining authority from the probate court, and the compromise must be approved if the facts establish at least prima facie that the executor acted for the best interests of the estate, and that the debtor was then or about to become insolvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 384–392; Dec. Dig. § 87.*]

2. EXECUTORS AND ADMINISTRATORS (§ 87*)—POWERS—COMPROMISE OF CLAIMS.

Where attorneys, collecting a judgment for $901.75 for a client, since deceased, under contract entitling them to retain the reasonable value of their services, transmitted to the client's executrix a check for $114.75, retaining the balance, the act of the executrix in appropriating the check and receipting therefor did not prevent her from subsequently suing the attorneys to recover the balance of the judgment, minus the reasonable value of the services of the attorneys, in the absence of anything to show insolvency of the attorneys or probability that the estate could not collect a greater amount than was first paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 384–392; Dec. Dig. § 87.*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Emily Sophia Taylor, as executrix of Thomas Edwin Wright, deceased, against Thomas A. Sanson and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions to amend conclusions of law and enter judgment in accordance therewith.

Shaw & Stewart, of Los Angeles, for appellant. Duke Stone, W. F. Palmer, and J. W. Hocker, all of Los Angeles, for respondents.

JAMES, J. This action was brought by plaintiff, as executrix of the estate of Thomas Edwin Wright, deceased, to recover the sum of $600 alleged to have been collected by the defendants as money belonging to the estate of plaintiff's testator, and for the use and benefit of said estate. By the answer of the defendants it was set up that they as attorneys at law had, under an express employment therefor, performed legal services for and on behalf of decedent, which included the collection of money on a judgment, amounting to $901.75; that out of this money they were entitled to retain the reasonable value of their services, after deducting which it was alleged, they forwarded a check for the difference to the executrix, who accepted the same in full satisfaction of all claims of the estate against the defendants. The appeal is taken from a judgment entered in favor of defendants, and is presented on the judgment roll alone.

The findings of fact set forth the details of the employment by decedent of the defendants in their capacity as attorneys at law and the collection of the money on the judgment in the amount of $901.75, and determined that defendants held a lien upon the amount so collected for the reasonable value of their services, which reasonable value is found by the court to be the sum of $595. It further appears from the findings that the defendants retained $800 of the $901.75, claiming that the services rendered were worth that amount, and that they did forward a check for the difference, which amounted to $114.75, to the executrix, with a statement in writing reciting in effect that the check was delivered in settlement of the claim and account of the estate against the defendants. It further appears by the findings that the executrix received the check and cashed the same and appropriated the proceeds thereof, but before cashing the check or appropriating the proceeds she stated to the defendants that she would not accept the check in full settlement of all claims of said estate against the defendants. Further finding is made that the receiving of the check and the cashing of the same and appropriating the proceeds thereof by the executrix was at no time approved by the superior court. The court concludes that there was an accord and satisfaction, and that the cashing of the check and the appropriating of the proceeds thereof by the executrix bound the estate in compromise of its claim against the defendants, which claim was determined by the court to be the sum of $595 only. After receiving and cashing the check mentioned, the executrix commenced this action to recover what she claimed was due and owing to the estate as a sum in addition to that received by her as represented by the check.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The question is presented as to whether, under the facts narrated, an executrix or administrator of the estate of a deceased person has power to bind the estate by compromise of a claim such as that shown by the evidence in this case. If the executrix could have by express agreement discharged the defendants from the payment of all further amounts over the $114.75, then it may be said that her actions as shown respecting this claim would constructively amount to such an agreement. Lapp-Gifford Co. v. Muscoy Water Co., 134 Pac. 989. At common law the power and control of an administrator over the property, especially the personal effects, of a decedent was almost absolute. The rules of common law, however, as affecting this subject have been considerably modified by statutes. In our state it is provided that the property in all assets of a decedent passes not as under the common law to the administrator, but to the heirs of the decedent. Civ. Code, § 1384. In the Code of Civil Procedure the power and authority of an administrator or executor are generally covered by specific provisions of the statutes. Upon the subject of the right of an executor to compromise with debtors of an estate, section 1588, Code of Civil Procedure, provides as follows:

> "Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court or a judge thereof, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interests of the estate."

It has been held under this section that an executor was not required to first obtain authority from the probate court to compromise with a debtor, but that he might do so without such precedent authorization, provided the compromise was for the best interests of the estate, which action on the executor's part must be afterwards approved by the probate court. Moulton v. Holmes, 57 Cal. 337. Where the facts reasonably establish that the executor, in compromising a claim, acted in good faith under facts which reasonably indicate that the best interests of the estate will be subserved, the probate court would not be authorized in withholding its approval of the act of the executor. However, such facts must be shown as will establish, prima facie at least, that the executor has acted for the best interests of the estate which he represents. In cases where a compromise is made with a debtor, a reasonable showing that such debtor was then or about to become insolvent, or that in all reasonable probability the debt could not be collected by suit, would undoubtedly justify the making of the compromise. It has been held that an executor has no authority to discharge a judgment for a sum less than the amount for which it was rendered. Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Siddall v. Clark, 89 Cal. 321, 26 Pac. 829. A leading case in which the question of the powers of executors and administrators with respect to the control of the property of the estate are quite exhaustively treated of is that of Maddock v. Russell et al., 109 Cal. 417, 42 Pac. 139.

[2] It must be presumed that a person dealing with an executor or administrator as such is aware of the limitations and conditions affecting the power of such representative of the estate. Applying that presumption to the facts of this case, it must then be assumed that the defendants were aware that the executrix could not compromise with them as to the amount claimed by the estate, and that if she did so her action was conditional upon an approval by the probate court, which approval would be conditional also on it being made to appear that the action of compromise was for the best interests of the estate. None of the features of insolvency of the debtors, or of the probability that the estate could not collect a greater amount than that paid, was shown by the findings to have existed. The executrix, under the facts as determined by the trial judge, was without authority to compromise the claim, and the action brought by her on behalf of the estate to collect an additional amount could be maintained, notwithstanding the receipt and appropriation by her of the check for $114.75. The findings perhaps, as suggested by respondents, might have been made more complete, and have presented more succinctly the ultimate facts which the court was called upon to resolve; but sufficient facts are determined to show that the conclusion of law as drawn therefrom by the court is erroneous.

No question is made as to the right of defendants to withhold the reasonable value of their services and deduct the same from the amount of money collected on the judgment, without presenting a claim against the estate for approval in the usual way.

The judgment is reversed, with direction to the trial court to amend its conclusions of law, and to enter judgment in favor of the plaintiff in accordance with the facts as found consistent with the conclusions expressed in this opinion.

We concur: CONREY, P. J.; SHAW, J.

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24 Cal. App. 549

PEOPLE v. BONZANI. Cr. 251.)

(District Court of Appeal, Third District, California. May 23, 1914.)

1. RAPE (§ 51*)—NONCONSENT—SUFFICIENCY OF EVIDENCE.

Evidence, in a rape case, *held* sufficient to justify a conviction on the ground of nonconsent; the testimony of prosecutrix not being on its face intrinsically incredible and wholly unworthy of belief.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

2. CRIMINAL LAW (§ 1159*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Under Const. art. 6, § 4, declaring that Courts of Appeal shall exercise, "on questions of law alone," appellate jurisdiction in criminal cases, unless the evidence on which a verdict of guilty is based is, on its face, incredible or inherently improbable, being otherwise sufficient to support the verdict, there cannot be a reversal of the judgment, or of an order refusing a new trial, on the ground that the evidence does not support the verdict.

[Ed. Note.—For other cases, see Criminal Law; Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. RAPE (§ 57*)—INCONSISTENT STATEMENTS BY PROSECUTRIX—QUESTIONS FOR JURY.

There being testimony of extrajudicial statements of prosecutrix in rape appearing inconsistent with the theory of force, it is for the jury to say whether such testimony is truthful, whether, if made, the statements are actually inconsistent with her testimony, and, if inconsistent, whether they are to be accepted in place of her testimony, or in impeachment of it.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.*]

4. RAPE (§ 54*)—CORROBORATION—NECESSITY.

It is not necessary for conviction of rape that prosecutrix be corroborated.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

5. RAPE (§ 57*)—CORROBORATION—QUESTION FOR JURY.

Whether subsequent acts and condition of prosecutrix in rape corroborated her on the question of nonconsent and force *held* a question for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.*]

6. CRIMINAL LAW (§ 1144*) — APPEAL — PRESUMPTION IN FAVOR OF VERDICT — REMARK OF JURORS.

Whatever may have been meant by one of the jurors when, they having returned for further instruction, he, on asking what the penalty would be in case of conviction, said he thought "defendant was guilty to a certain extent," it cannot affect the presumption that the verdict of guilty was arrived at only on a fair and impartial consideration of the evidence under the rules of law as charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

7. CRIMINAL LAW (§ 1134*)—NEW TRIAL—SUFFICIENCY OF EVIDENCE—DOUBT OF TRIAL JUDGE.

The remark of the judge, when pronouncing judgment on the verdict, that he "had some little question about the technical violation of the law" is not to be considered as showing he had an unequivocal opinion that the verdict was not justified; having which it was his duty to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986–2998, 3056, 3067–3071; Dec. Dig. § 1134.*]

8. RAPE (§ 51*) — RELATION OF PROSECUTRIX AND DEFENDANT—EVIDENCE.

The burden of the people, in a rape case, of showing the female was not the wife of defendant is sufficiently discharged by the fact that she had known him only about two weeks, that their names were different, and that he testified he was a married man, and that his wife was in Italy.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Antone Bonzani was convicted of rape, and appeals. Affirmed.

G. A. Whitehurst, of Newman, and A. J. Carlson, of Modesto, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against by the district attorney of Stanislaus county for the crime of rape, and upon his trial was by the jury adjudged guilty of said crime. This appeal is by the defendant from the judgment.

The principal point upon which a reversal of the judgment is urged is that the evidence is insufficient to justify the verdict.

The alleged crime was committed on a ranch situated about a mile north of Crow's Landing, in Stanislaus county, on the 20th day of August, 1913. The prosecutrix, or the female with and upon whom the crime charged is alleged to have been perpetrated, is one Mrs. Bell de Bell. At the time of the commission of the alleged crime, she was about 50 years of age, and was of unusual corpulency, weighing, as she testified, about 220 pounds.

The defendant is an Italian, and, at the time of the occurrence which is the foundation of the charge in the information, was able to speak the English language only to a very limited extent, yet, when essaying a conversation in that language, he was generally able, by means of signs and gesticulations suitable to thoughts which he desired to express or convey, to make himself understood with reasonable facility and clearness.

The ranch at which the alleged crime was committed was owned by the "Paul Crow Stock Company," presumably a corporation, and it was used for the purpose of a dairy business. The first husband of the prosecutrix was named Crow, and she was the mother of two children—one, a son, who had attained manhood's estate, and a married daughter, a Mrs. Larkins. The son of the prosecutrix was in immediate control of the ranch and the dairy business thereon conducted; but, at the time of the commission of the crime charged against the defendant, he was absent from home, and Mrs. de Bell was temporarily in charge. Mrs. Larkins did not reside on the ranch. Mrs. de Bell's usual and principal occupation was that of cooking for persons employed on the ranch.

The defendant, it appears, entered into the employment of the company, at said ranch, on the 1st day of August, 1913, and his duties were to milk about 30 head of cows, separate the cream, and feed the hogs and calves. Thus, as is apparent, he was employed for 19 days prior to the day upon which he is alleged to have committed the crime charged in the information.

The defendant and the prosecutrix were alone on the ranch when the crime charged was committed, and were consequently the only immediate witnesses thereto. It is therefore manifest that the jury, in reaching the conclusion represented by their verdict, were mainly influenced by the testimony of the prosecutrix.

The defendant admitted, not only upon the witness stand at the trial, but at the time of his arrest, that he had had sexual relations with Mrs. de Bell on the day named in the information, but insisted that such relations were sustained with her consent. On the other hand, the prosecutrix at all times declared that the defendant accomplished the act of sexual intercourse with her by means of force and violence, and against her will and consent; that, without avail, she resisted him with all the physical force of which she was capable.

Her story, as given at the trial, is, in substance, as follows: That, on the 15th day of August, 1913, after supper had been partaken of, she went out on the porch of her house. There were then no other persons at the ranch but the defendant and herself; her son having left the ranch earlier in the day. While she was sitting on the porch, the defendant approached her and attempted to take liberties with her, taking hold of her knee and hand. She vigorously protested against these liberties, saying to him, "Will you please keep your hands off me?" whereat he bade her "good-night" and departed for the "bunk" in which he slept. This conduct on the part of the defendant inspired the prosecutrix with fear of him, and on the following night (Saturday) she went to a neighbor's house and there remained until early the next morning, when she returned to her home and prepared breakfast for the defendant. On that evening—Sunday, August 17th—while she was standing on the porch, the defendant repeated his previous conduct toward her and caught hold of her arm. She then said to him: "Take your hands off me; * * * don't you put your hands on me again. I am here alone, and I want you to be a gentleman, and I am a lady, and want to be treated as such." The defendant then released his hold on the prosecutrix and stepped back, at the same time remarking, "You a strong woman," to which she replied, "Don't put your hands on me again," whereupon he left for his sleeping apartment.

On the 20th day of August the defendant and the prosecutrix ate supper together between the hours of 7 and 8 o'clock p. m. After they had finished supper, the defendant remained in the dining room; but the prosecutrix stepped out on the porch. She shortly returned to the dining room, and, after going in and out of the house several times, she handed the defendant a cigar, after which, while she was standing near the door leading to the porch, the former grabbed her by the arm and attempted to force her further into the house. She resisted him with all her physical power and succeeded in getting out on the porch; he still clinging to her. She begged him to cease his hold upon her, and to let her alone; but he still clung to her, finally catching her by the shoulders and throat and throwing her upon a couch, which was then on the porch, and upon which the prosecutrix had occasionally slept. Thus getting her down on the couch, the defendant held her by the throat with one hand and attempted to raise her clothes with the other. He threw his body upon hers, and, after considerable wrestling between the two, he arose and, while holding her down with one foot, disrobed himself, after which he renewed his efforts to force sexual connection with her, and finally succeeded. She testified that he inserted his privates into hers, but said that the penetration did not extend beyond an inch. After accomplishing sexual relations with the prosecutrix, the defendant left the house and repaired to his "bunk." Shortly thereafter Mrs. de Bell left the premises and started to go to the home of a neighbor, one Ora Munson, whose house is situated about one mile distant from her own home. She testified that during all the time that the defendant was engaged in prosecuting his assault upon her she was convinced, from the appearance of his face, that he was determined to accomplish his purpose at any cost; that consequently she labored under the fear that he might inflict upon her great bodily injury, if, indeed, he did not take her life. She declared that he choked her and held onto her arm with such tenacity and violence as to cause bruises thereon, and that the bruises so caused did not entirely disappear until shortly before the trial. As soon after the assault as it was practicable for her to do so, she caused word to be conveyed to her son and daughter, by telegraph, that she desired their presence at the ranch at once.

The witness Munson, to whose home the prosecutrix started immediately after she was assaulted, testified that, at about 11 o'clock of the night of the 20th of August, he was awakened by the scream of a woman, and that he thereupon and immediately arose from his bed, went outside the house, and listened. The sound of the voice seemed to come from the direction of Mrs. de Bell's house, and Munson hurriedly dressed and ran across his field in that direction and met the prosecutrix walking through said field. She was then approximately an eighth of a mile from the witness' house.

> "She was in a very exhausted and excited state," said Munson. "In fact," he continued, "she swooned down to the ground when I met her, and she lay on the ground a minute or two before I could help her up. I assisted her to my house and let her rest awhile and put her in my car and drove to Crow's Landing, to the hotel, and summoned Mrs. Oswald, in whose charge I left her."

Mrs. Alice Oswald, proprietress of the hotel at Crow's Landing, testified: That Mrs. de Bell was brought to her hotel, at about 11:30 o'clock on the night of the 20th of August, in an exhausted condition, or, to use the precise language of the witness, "she was completely gone up;" that she assisted Mrs. de Bell to bed and later gave her a hot bath; that the prosecutrix remained in bed all of the succeeding day; that she (witness) examined Mrs. de Bell's clothing and found that they were "full of his [defendant's] filth."

Dr. F. H. Gates, a physician, testified that on the morning of August 21st he professionally visited Mrs. de Bell, at Mrs. Oswald's hotel, and that he found her in bed, suffering from "extreme shock, both mentally and physically"; that he discovered a bruise upon her upper left chest. The doctor prescribed a treatment for her nervous condition.

The witnesses Davis and J. E. Newsome testified that the defendant, after his arrest, admitted to them that he had had sexual connection with Mrs. de Bell at the time stated in the information.

No other testimony than that of which the foregoing is a brief epitome, except the deposition of the prosecutrix taken at the preliminary hearing of the charge before a magistrate and her rebuttal testimony contradicting certain statements involved in the testimony of the defendant, was submitted by the people to the jury.

[1] The first and the principal question with which we are concerned on this appeal is: Is the evidence upon which the verdict was obviously predicated, and of which the above statement involves a fair synoptical résumé, so deficient in probative force as to justly justify this court in declaring, as a proposition of law, that it is incapable of upholding or sustaining the verdict? In other words, is this court warranted in holding that the testimony of the prosecutrix appears upon its face to be wholly unworthy of belief, and that the jury were not therefore justified in returning a verdict of conviction?

[2] Manifestly, in answering the question thus propounded, it is not within the province of this court to consider adversary testimony, or the testimony presented by the defendant contradicting that produced by the people. The Constitution declares that the Courts of Appeal shall exercise, *on questions of law alone*, appellate jurisdiction in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered. Article 6, § 4, Const. From that provision of our organic law, it follows that, unless the evidence upon which a verdict in a criminal case has been planted is, upon its face, incredible, or is inherently improbable, and it is in all other respects sufficient to support the verdict, a reversal of the judgment or an order refusing a new trial upon the ground that the evidence does not support the verdict is not allowable.

But, before taking up the proposition vigorously pressed by the defendant, and upon which is mainly founded his claim of right to a reversal, it is only fair to refer briefly to the testimony submitted to the jury in support of his defense.

As before stated, the defendant, while admitting that he had carnal connection with Mrs. de Bell on the occasion specified in the information, denied that it was accomplished by a resort by him to force or violence. Indeed, he asseverated at all times that the act was not only consented to by the prosecutrix, but that it was virtually the result of her own solicitation. The witnesses McGinnes and E. T. Newsome gave testimony of certain extrajudicial statements made by Mrs. de Bell after the assault, and which tended to discredit her testimony, and to show that the sexual relations between her and the defendant were freely consented to by her. Thus it appears, as generally it so appears in all cases of contested issues of fact, that there is a decided conflict in the evidence upon the question of the alleged criminal culpability of the accused.

[3] The testimony of the extrajudicial statements of the prosecutrix, made after the commission of the assault, and which statements bear the appearance of being inconsistent with the theory that the defendant accomplished the act by the use of force, was, like all other testimony which is not unreasonable upon its face, for the jury's consideration, to be by them given such weight as they conscientiously believed it to be justly entitled to. It was, in other words, for the jury to say: (1) Whether the testimony disclosing the alleged inconsistent statements was truthful; (2) whether, if truthful, the statements so made were, when carefully scrutinized, actually inconsistent with the testimony of the prosecutrix at the trial; and (3) if inconsistent, whether they should be accepted in the place of her sworn testimony, or in impeachment thereof. As is said in the leading California case upon the question of the province and power of

juries in criminal cases, People v. Durrant, 116 Cal. 179, 200, 48 Pac. 75, 79:

> "If a witness should absolutely discredit his own testimony by swearing to opposite statements, so that one or the other must be false, under our laws his testimony is not of necessity to be rejected. It is still evidence in the case. Under such circumstances the jury must receive and weigh it. They are bound to look upon it with suspicion and distrust, and *may* reject it. But, upon the other hand, they may as they determine accept as true one or the other of the contradictory asseverations. Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence. Blythe v. Ayres, 102 Cal. 254 [36 Pac. 522]. Ad questionem juris respondeant judices, ad questionem facti respondeant juratores; and than this no maxim of the old law has been more carefully preserved in its integrity under our system. Where it is not clear that the verdict must have been rendered under the influence of passion or prejudice, our examination of the record is only to determine whether legal evidence has been offered sufficient to warrant a conviction, for the verdict of the jury is their declaration that it is this evidence which has been by them accepted"—citing many cases.

But the force of counsel's argument in support of their position that the verdict is without the necessary support to uphold it is directed against the testimony or story of the prosecutrix. It is vigorously insisted that her testimony is intrinsically incredible, and that, as without her testimony the verdict manifestly cannot stand, it is within the legal power and, indeed, the duty of this court to nullify or set aside the result reached by the jury. To support this position, counsel for the defendant, in their briefs, subject the testimony of the prosecutrix to an analytical and critical examination, emphasizing certain apparent weaknesses and asserted inconsistencies in various parts of her story and her conduct on the occasion of the commission of the act. It is, in the first place, pointed out that she was, when the crime charged was perpetrated, a large, vigorous woman, weighing about 220 pounds, and therefore fully capable, physically, of so resisting the force invoked by the defendant, whatever it might have amounted to, as to have prevented the accomplishment by him of actual intercourse or even the slightest penetration. It is further pointed out, as conduct inconsistent with the story that the act of the defendant was accomplished without her consent, that after the first assaults by the defendant—on the 15th and 17th of August—the prosecutrix still remained on the ranch alone with the accused. The fact is also emphasized that a few moments prior to the assault on the 20th of August she gave the defendant a cigar; the inference from that fact being, so the argument goes, that she entertained a kindly rather than an unkindly feeling toward him, or, in other words, that she nursed no feeling of resentment against his former conduct toward her. The statement of the prosecutrix that the defendant held her down on the couch by means of one of his feet, while, at the same time, he was engaged in the act of disrobing himself, is likewise characterized as absurd and wholly unbelievable, and that it imparts to the whole story related by the prosecutrix the fatal infirmity of innate untruthfulness. These and other statements, which may seem to give some color to the theory that the verity of the story of the prosecutrix is questionable, conclusively show, it is urged, that her testimony is, upon its face, wholly unbelievable, and that therefore it is within the legal competence of this court so to hold.

But we cannot say that the story told by Mrs. de Bell, viewing it as a whole, is inherently improbable. While it is true that she is or was then a woman of unusual obesity, it does not appear, aside from that fact, that she was of great strength and physical vigor. It does not necessarily follow that, because a person may be of extraordinary avoirdupois, he is possessed of corresponding or even approximately corresponding physical strength and vigor. On the contrary, it is known to be frequently true that where avoirdupois amounts to obesity, or to the development of flesh out of proportion to the human body or frame, a deterioration in strength and the want of physical vigor and endurance follow. Mrs. de Bell testified that she resisted the defendant with all her power and, by every means available to her, attempted to prevent him from accomplishing sexual relations with her. Moreover, she testified that she was very much frightened—in fact, so determined to accomplish his purpose did the defendant appear to be, she said, that she was in constant fear that he would inflict upon her serious bodily injury, or perhaps might take her life. She described his appearance at the time as that of a man with a fixed determination to accomplish at any cost the act upon which his mind was set. He clutched her by the throat and thus held her until he had effected a penetration of her private parts. Men often become demons on such occasions, or while attempting an outrage by force upon the opposite sex, and it is not to be wondered that, under the circumstances as she described them, dreadful, as they were, in the extreme, the prosecutrix should have become greatly terrorized, and so become bereft of her physical courage and strength. Often has it been said, as the effect of the argument is here, that it would ordinarily be impossible for a man to accomplish the act of sexual intercourse with a female of mature years against her will and consent—that but slight resistance on her part would ordinarily be sufficient to prevent the accomplishment of the act. This theory is plausible, in the abstract, and perhaps may be sustainable in those cases where it is made to appear that the female, during the unsavory combat, has succeeded in preserving her courage or a mental attitude which has enabled her to maintain and apply her full normal power of resistance; but it is obviously true and is often the fact, as the jury by the evidence was authorized to believe was so in this case, that a person, when enveloped by appalling circumstances, will lose his courage and with it his normal strength, and so become practically helpless in the hands of one who may have a criminal or sinister design which may be the more readily executed when his victim is reduced to that condition. This proposition is recognized by our law in the case of robbery, which, as so defined, is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force *or fear*." Section 211, Penal Code. And the proposition may be said to be particularly true in cases of rape, where the assaulted party is of the weaker sex. So in all such cases, of which this is typical, since there is evidence in the record tending to show that the prosecutrix was much frightened and terrified, it is always with the jury to say, where there is some credible evidence of the fact, whether the female was, at the time of the assault, possessed of such fear as would likely have the effect of impairing, if not altogether destroying, her ability to so resist her assailant as to prevent actual intercourse.

As to the fact that she remained on the ranch alone with the defendant after his first attempted familiarities with her, Mrs. de Bell explained that at that time there was then no other person than herself to look after the ranch and the dairy business, and that she therefore felt impelled to remain there, although she was in constant fear of the defendant. We perceive nothing so unreasonable in this explanation as to justify us in holding that the jury should have repudiated it, nor is there anything in the fact of her remaining on the ranch under the circumstances indicated, as so explained, which renders her testimony in the main unreasonable or improbable, per se.

Referring to the circumstance of the giving of a cigar to the defendant by her a few moments prior to the attack made upon her, Mrs. de Bell explained that, after she and the defendant had finished supper, he remained in the dining room and displayed no disposition to depart therefrom, and that, being in fear of him from his previous actions toward her, she was anxious for him to leave the house and go to his "bunk." She further explained that she had observed that he was fond of smoking, and that, in the belief that thus he would be led to go outside for the purpose of smoking it, she gave him the cigar. It was for this reason, and no other, she asseverated, that she gave him the cigar. This explanation is not, upon its face, unreasonable, and therefore the circumstance of the giving of the cigar to the defendant, as so explained, cannot be held to stamp the essentially vital parts of the story of the prosecutrix as improbable. It was, in other words, for the jury to determine whether the motive of the prosecutrix in giving the defendant the cigar was that of friendliness or a desire to encourage his attentions, or whether her explanation of that circumstance was truthful or sufficiently reasonable to justify them in accepting it.

But there are some other circumstances, of which testimony was received, and to which we may now briefly advert, which apparently stand in strong corroboration of Mrs. de Bell's version of the occurrence.

[4, 5] It may first be observed that while, admittedly, it would always be more satisfactory if, in cases of rape, where guilt actually exists, testimony other than that of the prosecutrix supporting or tending to support her story were available and submitted to the jury, a verdict of conviction in such cases may, nevertheless, stand on her testimony alone, for the law does not require her to be corroborated to support the charge. In this case, however, as stated, the prosecutrix appears to have been corroborated by the circumstance that at a late hour of the night of the assault, and a few hours after it took place, she stealthily, or unknown to the accused, fled from her home, with the intention of going to that of a neighbor—Ora Munson. When a short distance from the latter's home, she began screaming, which was heard by Munson, then in bed, who hastily proceeded out into his field, in the direction from which the sound of her voice came, and found her suffering from what appeared to be a severe nervous shock. Munson at once conveyed her to the hotel of Mrs. Oswald, at Crow's Landing, where she remained in bed for over 24 hours, suffering, so the doctor called to attend her stated, from severe physical and mental collapsion, due to an extreme nervous shock. The jury were warranted in concluding that her condition, thus described, was the consequence of her previous terrible experience with the defendant, and, as so viewing that circumstance, could justly have held it to be, as undoubtedly they did so regard it, strongly corroborative of the story as told by the prosecutrix on the witness stand, for it is hardly conceivable that, were it true that she freely and voluntarily assented to the act of sexual intercourse with the defendant, she would have left her home at the dead hour of the night under the circumstances as shown and have revealed to others the fact of her illicit relations with the accused, or that such a condition of mind and body as she was found to be in only a few hours after the act had been committed would have developed.

[6, 7] But it is earnestly suggested that the legal integrity of the verdict was questioned, not only by the court below, but by one of the jurors, and that these circumstances should be considered by this court in connection with its consideration of the question whether the verdict is, as a matter of law, sufficiently supported.

It appears that, after retiring and deliberating for a time upon the case without reaching a conclusion, the jury were returned into court, to be further instructed and their minds refreshed as to certain testimony. While thus in court, one of the jurors asked the court what the penalty would be in the event that a verdict of guilty was reached, saying that he thought the "defendant was guilty to a certain extent." It further appears that, when pronouncing judgment on the verdict, the judge remarked that he "had some little question about the technical violation of the law" by the defendant. Upon both these propositions counsel lay considerable stress. But they possess no importance and can justly exercise no influence in the determination of the question of the propriety or impropriety, legally, of the verdict.

Precisely what the juror meant by the opinion expressed by him that the defendant was guilty only to a limited extent, we are unable to divine. It may be that he intended to say that at that particular moment he was of the opinion that the defendant's conduct, as he viewed it through the evidence before him, amounted to nothing more than a futile attempt to commit the act. Certainly, after listening to the charge of the court, it is not for an instant supposable that, accepting the testimony of the prosecutrix that the defendant accomplished only a partial insertion of his privates, he conceived or, rather, misconceived it to be in accord with the law to measure the degree of the defendant's criminal culpability by the extent of the penetration accomplished. But, whatever may have been the idea at the base of the opinion so expressed, the important fact remains that, after again retiring for deliberation upon the case, a verdict of guilty was reached, and the presumption is that it was arrived at only upon a fair and impartial consideration of the evidence under the rules of law as declared to the jury by the court.

As to the statement of the judge, above referred to, it is to be said that, if thereby he intended to express a doubt as to the guilt of the accused under the evidence, then what is said in People v. Brecker, 20 Cal. App. 205, 209, 210, 127 Pac. 666, 669, where a similar proposition arose and was considered, constitutes a reply to the intimation here that by said statement this court should be to some extent governed in determining whether the verdict should be upheld. In that case it is said:

> "A judge may and in many cases doubtless does have *some doubt* as to whether a verdict of guilty should have been returned, and yet such doubt might not be sufficient to generate an unequivocal opinion that the verdict was not justified, and, when the court is not of an opinion of that character as to a verdict of guilty, it has no right to grant a new trial, or to permit a *doubt* not sufficient to create such an opinion to override the functions which are, under our law, peculiarly those of the jury. * * * We have a right to presume, from the fact that the motion for a new trial was denied, that the doubt of the court as to the justification of the verdict did not reach the dignity of such an opinion of the jury's conclusion as to warrant it in setting aside the verdict. We must assume, in other words, that, had it entertained such opinion, it would have promptly done its duty by granting a new trial."

[8] The only other point urged for a reversal is that the people failed, so it is claimed, to prove that the prosecutrix was not the wife of the defendant. That it is essential in and incumbent upon the people to plead and prove, in cases of rape, that the female upon whom the crime is alleged to have been committed is not the wife of the accused is an elementary proposition in this state, and we think that the people in this case sufficiently discharged the burden thus imposed.

There is, it is true, no direct testimony upon that point. The defendant testified, however, that he was a married man, and that his wife was in Italy. This testimony, considered in connection with the fact that Mrs. de Bell had known the defendant but a little beyond a half a month before the assault was committed, and the further fact that the names of the prosecutrix and the defendant are not the same, is sufficient to justify the inference that they were not husband and wife when the crime alleged took place, and the presumption arising from the verdict is that the jury drew such inference from the testimony, and that thus they were convinced beyond a reasonable doubt that they were not husband and wife at that time.

We have carefully scrutinized the record and have failed to find any legal reason for disturbing the verdict.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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24 Cal. App. 586

BRIGGS v. HALL. (Civ. 1204.)

(District Court of Appeal, Third District, California. May 23, 1914.)

1. BROKERS (§ 56*)—ACTION FOR COMPENSATION—SUFFICIENCY OF SERVICES.

To entitle a broker to commissions, he need not have personally conducted the negotiations between the principal and purchaser resulting in a sale, nor have been present when the bargain was completed, nor need the principal have known at the time that the purchaser had been found by the broker; but it is indispensable and sufficient that the efforts of the broker were the procuring cause of the sale, and that through him the parties were brought into negotiations, though they themselves negotiated the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 85–89; Dec. Dig. § 56.*]

2. BROKERS (§ 86*)—ACTION FOR COMMISSION—EVIDENCE—SUFFICIENCY OF SERVICES.

Evidence in an action for a stipulated broker's commission for effecting a sale of real estate *held* to show that plaintiff's assignor was not the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. § 86.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. BROKERS (§ 57*)—RIGHT TO COMMISSION—PRINCIPAL'S BREACH OF CONTRACT.

A principal's breach of his contract that before its expiration he would not, without the broker's consent, offer it for less than the sum mentioned therein, by a sale for less than that amount, made the principal liable for the agreed commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

4. BROKERS (§ 82*)—ACTION FOR COMMISSION—PLEADING.

A broker suing for a commission for the sale of real estate on the ground of the principal's breach of his contract not to sell it below a certain price without the broker's consent should set that ground forth in his complaint, even though in another count he presents the theory of a sale through his agency.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. § 82.*]

5. BROKERS (§ 86*)—EVIDENCE—VIOLATION OF AGREEMENT.

In a broker's action for an agreed commission for effecting a sale of real estate, evidence *held* not to show the owner's violation of his covenant not to sell for less than the amount mentioned in the brokerage agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116–120; Dec. Dig. § 86.*]

6. COURTS (§ 121*) — CALIFORNIA SUPERIOR COURT—JURISDICTION.

In an action to recover $650 as a commission for effecting a sale of real estate, the superior court, though its minimum jurisdiction is placed at $300, was authorized to direct judgment for any amount shown by the evidence to be due, even though less than $300.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413–426, 428, 450, 452, 458, 459, 466; Dec. Dig. § 121.*]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by H. Briggs against A. J. Hall. Judgment for defendant, and plaintiff appeals. Reversed, with directions to enter judgment for plaintiff.

See, also, 20 Cal. App. 372, 129 Pac. 288.

L. G. Scott, of Sebastopol, and T. J. Butts, of Santa Rosa, for appellant. Perrier & Libby, of Sebastopol, for respondent.

BURNETT, J. The action was brought on an assigned claim for a broker's commission in the sale of real estate. Attached to the complaint is the contract of agency executed by the owner of the property from which we quote as follows:

> "In consideration of their efforts to sell the within-described property, I hereby appoint Lyman & Briggs of Sebastopol, California, to act as agents for the sale of said property for the sum of thirteen thousand dollars, and I agree not to offer the same for a less price before the expiration of this contract without the consent of said agents. I agree that in case of the sale of said property by said Lyman & Briggs, or should the purchaser receive information of said property through said agents, to pay them a five per cent. commission on such sale, or exchange. * * * I reserve the right to sell said property myself, or to sell said property through the agency of any one else, but I hereby agree that in case such sale be made by myself, or through any other agency, in consideration of their services to pay said Lyman & Briggs a commission of two per cent. on sale price. Number of acres 31¼. Price $13,000.00. * * * Personal property that goes with the place: All farming tools now on place, berry chests, apple boxes. First payment, $6,500. Terms on balance to suit purchaser, but not to run longer than three years."

The case was here before on an appeal from the order of the trial court granting defendant's motion for a new trial after a jury had awarded plaintiff the amount sued for. 20 Cal. App. 372, 129 Pac. 288. The order granting the motion for a new trial was affirmed on the ground of an erroneous instruction. It sufficiently appears from said opinion that said order could also have been upheld on the theory of a conflict in the evidence. And in this connection it may be well to allude to an erroneous implication as to the case of Newman v. Overland Pac. Ry. Co., 132 Cal. 74, 64 Pac. 110, involved in the following statement of Briggs v. Hall, 20 Cal. App. on page 374, 129 Pac. 288:

> "We may consider any of these assignments with the exception, possibly, of the insufficiency of the evidence. We speak of the last with some hesitancy, because of the declaration made in Newman v. Overland Pac. Ry. Co., 132 Cal. 74, 64 Pac. 110, that," etc.

The fact is that the quotation itself from the Newman Case shows clearly enough that said order in question could have been affirmed on the ground that there was a substantial conflict in the evidence, but, through inadvertence, a doubt was suggested that really could not arise when the language of said quotation is properly considered.

[1] The first contention of appellant here is that the firm of Lyman & Briggs was the procuring cause of the sale within the contemplation of the decisions. He cites, as illustrative of the familiar doctrine, Duncan v. Kearney, 72 Conn. 585, 45 Atl. 358, and Justy v. Erro, 16 Cal. App. 519, 117 Pac. 575. In the former it is held that a real estate agent who first calls the attention of the purchaser to the land and advises him to buy it is entitled to his commission, though the deal is finally negotiated directly with the owner through the agent of the purchaser, the court saying:

> "The trial court might reasonably find the information given Smith [the purchaser] by the plaintiff, that the defendant's property on Prospect street was for sale, with the advice to see the defendant in regard to the purchase, to be the foundation on which the negotiation resulting in such sale was begun."

In the Justy Case it is declared that:

> "It is not necessary that the broker should personally have conducted the negotiations between the principal and the purchaser leading to the sale, nor that he should have been present when the bargain was completed, nor that the principal should at the time have known that the purchaser was one found by the broker. It is indispensable and sufficient that the effort of the broker was the procuring cause of the sale, and that, through his agency, the purchaser was brought into communication with the seller, although the parties themselves negotiated the sale."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The principle is undoubtedly well established, and there is some evidence in the record to support the inference, that plaintiff's assignors gave advice and information that led the vendee to purchase the property. The trial court, however, found:

"(4) That said lands and premises were sold through the efforts of Hansen & Caya, real estate agents, located at Sebastopol, Cal.

"(5) That said Lyman & Briggs were not the procuring cause of said sale; they did not procure a contract for the purchase of said premises from Geo. H. Johnson nor from any other person; they did not bring the parties together or introduce said Geo. H. Johnson to defendant herein."

[2] There is no doubt that the sale was consummated through the efforts of said Hansen & Caya, and there is also substantial support for finding No. 5.

Johnson, the purchaser, himself testified that:

"Mr. Morford called my attention to the Hall place in December of 1910. Then I met Mr. Caya about the middle of December. Mr. Caya and I went out to look at a piece of property beyond there. He says: 'Here's the Hall place, we have it listed.' There wasn't much said about it that I remember of until a short time before I bought the place. I saw Mr. Morford on the street and asked him if he thought it was a good buy. 'Yes, sir,' he said, 'it is a good buy; it will pay for the work and the interest.' Also a Mr. Ryan told me it was a good buy, and my wife and I talked it over and made up our minds to buy it."

It is true that the witness also talked with Lyman and Briggs about the property, and they informed him of their contract of agency, and advised him to purchase, but this was after Johnson had seen the place and after his said conversation with Morford, and also with Caya. It also appears that Lyman & Briggs did not take Johnson to the place at any time nor introduce him to the owner of the property. It is therefore a fair inference that plaintiff's assignors were not the procuring cause of the sale.

[3-5] Another theory upon which plaintiff claims the commission is that the property was sold by the owner for less than $13,000. The contract of agency, as already seen, provided for such contingency, and admittedly, if the owner violated said provision, he would be liable for the commission.

It is true, though, that if he intended to rely upon this circumstance, according to the usual and orderly method of pleading, he should have set it forth in his complaint. In one count he might have presented the theory of a sale through the agency of his assignors, and in another count of a sale by the owner for less than $13,000, in violation of his agreement. The issue as to the two distinct contingencies, upon either of which he might recover, could thus have been formally and clearly presented. The complaint, though, as held in the former opinion, may be comprehensive enough to include the latter contention. At any rate, at both trials, the whole transaction was put in evidence, without objection, and the case was tried upon the theory that the violation by the owner of this agreement not to sell the property for less than $13,000 was an issue in the case.

As to this, the position of appellant is that a rebate to the purchaser was made by agreement between the owner and Hansen & Caya of one-half of the commission, amounting to the sum of $317, and also of the sum of $280 by reason of a shortage in the acreage discovered by a survey of the land. In addition it is claimed that some personal property not mentioned in said contract of agency was transferred as an additional inducement for the purchase of the said real estate.

There is however, in the record, we think, support for the conclusion that there was no violation by the owner of his covenant not to sell for less than $13,000. He testified that he knew nothing of the rebate of commission until after the sale. He could not be held responsible, of course, for any private agreement of that character between the purchaser and the agent. We must accept his statement and assume that he acted in good faith.

There is also evidence that the agreement as to the survey of the land was subsequent to the agreement to purchase it for the sum of $13,000. Mr. Johnson testified:

"The next day, on the 12th, after I gave him the check for $500, the money was paid over and the mortgage was given that day, $13,000. Mr. Hall put up the deed while the title of the property was being perfected. I put up the money in the bank, $6,500 in drafts and $6,500 in mortgage."

He also testified that "we agreed to survey the place, and if there was a shortage he would pay it back," and furthermore that this was after the said transaction as to the deed and mortgage.

Of the personal property the farming implements were covered by the said contract of agency, the chickens were donated by the wife of the owner, and the only thing left—one small pig—is hardly of enough consequence for the law to regard.

[6] One other consideration requires attention. It appears from the findings that the contract of agency relied upon by plaintiff was executed by the owner of the property, and that within the time during which it was to be binding the property was sold by agents, Hansen & Caya, for the sum of $13,000. But, as already seen, the owner agreed that if the property was sold by himself or through any other agency than Lyman & Briggs he would pay the latter "a commission of two per cent. on sale price." The legal and logical conclusion from the findings is, therefore, that plaintiff is entitled to judgment for the sum of $260. It is not a valid objection to this that the court was without jurisdiction to award that amount. The suit having been brought to recover the sum of $650 the court had authority to direct judgment for any amount shown by the evidence to be due. In Derby v. Stevens, 64 Cal. 289, 30 Pac. 820, it is said:

"If in the same action he demands a judgment for less than $300 against any of the defendants, the superior court has no jurisdiction to enter a judgment in plaintiff's favor against those defendants of whom he has so demanded less than $300. But when the plaintiff has demanded $300 or more as against any defendant, the district court had, and the superior court has, jurisdiction to enter a judgment for less than $300 against said defendant."

"In ordinary legal actions the so-called ad damnum clause of the complaint, when stated in good faith (Fix v. Sussung, 83 Mich. 561 [47 N. W. 340] 21 Am. St. Rep. 616, and notes), affords the test of jurisdiction, and, if the amount equals or exceeds $300 the superior court obtains jurisdiction, and may render judgment for any lesser sum the evidence may justify." Miller v. Carlisle, 127 Cal. 330, 59 Pac. 785.

Of course, a separate count in the complaint seting forth this theory would have been demurrable on jurisdictional grounds, but, the whole transaction having been shown without objection, and the court having found as aforesaid, the plaintiff should be awarded the relief to which he appears entitled.

The judgment is reversed, therefore, with directions to enter judgment for plaintiff for the sum of $260.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 595

RIVERDALE RECLAMATION DIST. NO. 805 v. SHIMMIN et al. (Civ. 1172.)

(District Court of Appeal, Third District, California. Dec. 27, 1913. On Rehearing, May 23, 1914.)

1. Drains (§ 81*)—Reclamation Districts—Assessments—Contests.

In an action by a reclamation district under Pol. Code, § 3493½, to determine the validity of an assessment for building a levee, the landowner may show that there has been a material overrating of benefits and consequent injuries to taxpayers, whether the overrating is the result of fraud or negligence of the commissioners of assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 81.*]

2. Drains (§ 81*)—Reclamation Districts—Assessments—Contests.

The presumption created by Pol. Code, § 3463, declaring that an assessment list of commissioners of assessment, levying an assessment in a reclamation district, is prima facie evidence of the matters therein contained, and that the charges are in proportion to the whole expense and the benefits, may support a finding of the propriety and equality of an assessment, but does not apply where the commissioners have testified fully as to the method pursued by them in apportioning the charges on the land; and in that case the court must look to their testimony to determine the propriety and equality of the assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 81.*]

3. Drains (§ 81*)—Reclamation Districts—Assessments—Contests.

Where commissioners levying an assessment in a reclamation district for the cost of a levee arbitrarily adopted the theory that no assessment should be less than $1 nor more than $10, and considered benefits, without taking into account the value of the land at the time of the assessment and its probable enhancement from the improvement, the court could set aside the assessment on parol evidence showing a wide departure in the result reached by the commissioners from the proportionate increases in the value of the various tracts in the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 81.*]

4. Drains (§ 79*)—Reclamation Districts—Assessments—Contests.

Commissioners of assessment, in levying an assessment in a reclamation district for the construction of a levee, should consider the levees previously constructed and their relation to the protection of the land from overflow, and should consider the existing conditions of the land at the time of the assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 76; Dec. Dig. § 79.*]

5. Drains (§ 79*)—Reclamation Districts—Assessments—Contests.

Commissioners of assessment levying an assessment in a reclamation district for the cost of a levee must determine the value of the land before and after the construction, and the difference is the measure of the benefits, and the value is either the intrinsic or market value, and, where the construction increases market value, the property receives a benefit by the amount of the increase; but the landowner cannot be charged with general benefits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 76; Dec. Dig. § 79.*]

6. Drains (§ 81*)—Reclamation Districts—Assessments—Contests.

Where the inequalities of an assessment in a reclamation district for the cost of an improvement are palpable and important, so that it would be a gross injustice against some of the landowners to enforce the assessment, the court will set it aside, though many of the landowners paid their assessments without complaint, and a few over objection.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. § 81.*]

On Rehearing.

7. Drains (§ 79*)—Reclamation Districts—Assessments—Contests.

The method of levying an assessment in a reclamation district for the construction of an improvement by ascertaining the difference between the market value of the land before and after the improvement, and making the difference the measure of the benefit, is not the only method that may be adopted to ascertain the proportionate benefits to the land in the district from the improvement.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 76; Dec. Dig. § 79.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Riverdale Reclamation District No. 805 against W. F. Shimmin and others. From a judgment for plaintiff, defendants appeal. Reversed.

Cartwright & Cashin, of Fresno, for appellants. M. K. Harris and Sutherland & Barbour, all of Fresno, for respondent.

BURNETT, J. The action was brought by respondent, under section 3493½, Political Code, to determine the validity of an assessment levied on the lands of appellants and others situated within said reclamation district. The amount involved was $16,500, and it was to be expended principally for the purpose of erecting a levee along the north line of the district; this line being the south bank of a certain water course known as Murphy slough. It is stated by appellants that:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The regularity of the organization of plaintiff is not involved in the action, and the matters at issue were the legality of the method adopted by the commissioners of assessment in apportioning the amount of the assessment on the different parcels of land in the district."

The assessment is questioned on various grounds, one of which is that:

> "The commissioners of assessment, in estimating the benefits which the various pieces of land in the district will derive from the proposed works of reclamation, failed to take into consideration the greater proportionate increase in market value of lands adjoining Murphy slough which will, by the construction of the new levee, and for the first time, be reclaimed from overflow, and the less proportionate increase in market value of lands in other portions of the district already reclaimed and protected from overflow at the time of the formation of the district."

[1] There is no doubt of the rule that, in an action like this to test the legality of the assessment, the landowner may show in defense that:

> "There has been a material overrating of benefits and consequent injuries to the taxpayers, whether such overrating be the result of fraud or negligence of the commissioners." Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Reclamation District v. Phillips, 108 Cal. 310, 39 Pac. 630, 41 Pac. 335; Reclamation District v. Sels, 117 Cal. 164, 49 Pac. 131.

[2] In applying the rule, however, we must observe the principle contended for by respondent and stated in Reclamation District No. 7 v. Sherman, 11 Cal. App. 399, 105 Pac. 277, as follows:

> "It is clear that the statute contemplates that considerable discretion shall be exercised by the commissioners in the determination of the question as to benefits which will accrue to the several tracts of land included in the district, that, while an arbitrary assessment cannot be levied, the judgment of the commissioners upon the assessment, after a view of the lands contemplated by the statute, must be presumed to have been the result of a consideration of all the elements necessary to a just apportionment of the assessment."

The foregoing is manifestly in line with the provision of section 3463 of the Political Code to the effect that the assessment list of the commissioners, or a certified copy thereof, is prima facie evidence of the matters therein contained, and that said assessment was levied in proportion to benefits to be derived from said works of reclamation. This presumption, under some circumstances, might be, and no doubt often is, sufficient to support a finding of the propriety and equality of the assessment; but here it can hardly be said that there is any room for the play of the presumption, since the commissioners themselves testified directly and fully as to the method pursued by them in apportioning the charges upon the land, and we must look rather to their testimony as a guide to what they did.

[3] J. B. Lewis, one of the commissioners, testified:

> "The scale on which we assessed the lands was one to ten. As I understood it that was as little an assessment as we could put on any piece of land—$1—and $10 was as high as we could put on. We were not permitted to put on more than that and nothing less than that. That no land could be assessed for more than $10, and no land could be assessed for less than $1."

Mr. George Forsythe testified to the same effect as to the scale, and furthermore:

> "We went on the land and estimated principally from the map. We went on every piece of land. All three of the commissioners were together at the time of the assessment and talked the matter over."

The other commissioner, H. L. Ward, testified similarly, and in addition:

> "In arriving at what would be the proper assessment, we considered the benefits derived by the land. It depended first on the quality of the land. A good piece of land can be benefited more than a poor piece can, that is nearly almost. The other is the way it lies with reference to the levees, and land lying close to the levee gets more seepage than the piece further away, the same quality of land a quarter of a mile from the levee is really benefited more than a piece of land adjoining the levee, and also a liability of land next to the levee to be damaged more than one further away. We didn't take into consideration any of the old leveed ditch banks or artificial barriers that would tend to protect some of the lands in the district, and those protected by these artificial means were assessed just the same as if the artificial protection had not been placed there. We didn't take into consideration those ditch banks and other levees because they were in private ownership. We didn't take into consideration the value of the lands at the time of the assessment and the probable enhancement of the value of the various pieces of land after the construction of these works. The basis was simply the benefit to be derived. The benefit of real property would enhance its value if it was a benefit to it. We didn't take into consideration that the lands of Mr. Cerini, lying north of the old levee, were subject to annual overflow, and were not sufficiently safe from flood to render them valuable for cultivation, while the lands lying south, and partially protected, were all in a state of cultivation. We took into consideration simply what would be the benefit, assuming that these ditches or this old levee were not there at all. We didn't take into consideration the present valuation of these lands and the probable increase of the several parcels after the construction of the new levee. I consider that the increased value is a measure of the benefit."

As to other land in the district he declared also that they did not take into account its value at the time of the assessment and its probable enhancement from the construction of the improvement.

In the first place, it may be remarked that the integrity of the commissioners is not called in question, nor is it doubted that they acted in good faith; the attack being upon the method of the assessment and the accuracy of the result. Nor is it claimed that absolute equality is possible, or that insubstantial irregularities in the course pursued should vitiate the assessment made. The contention is, however, that "direct and invidious discrimination was practiced in favor of the landowners adjoining Murphy slough," principally for the reason that "this commission, in apportioning the assessment, failed to take into consideration the effect of the proposed improvement on the value of the lands adjoining Murphy slough, and which lands, previous to the construction of the levee, had never been and could not be cultivated, and which lands, as shown by the evidence, would increase to treble its former value."

We shall not attempt a full analysis of the course adopted by the commissioners. It may be suggested, though, that there was no warrant for their assumption that $1 an acre was the lowest and $10 the highest assessment that could be levied. If they were satisfied that some of the land was benefited to the extent of $20 or more per acre, and other land not more than 50 cents, they should have so apportioned the assessment.

[4] Again, the scale adopted was an arbitrary one, and though it might be a convenience, and not necessarily productive of injustice, the manner of its application, as declared by the commissioners, exhibits the element of conjecture as a prominent factor in the determination of the comparative values of the various tracts of land. It is also true, we think, that the commissioners should have taken into consideration the levees that had been constructed and their relation to the protection of the land from overflow. It is true that little importance might have been attached to this circumstance, and small allowance made for it; but it was a feature intimately connected with the consideration of any additional benefit that might be afforded by the construction of the proposed levee. The commissioners should take into consideration existing conditions of the land as it is at the time of the assessment. Reclamation District v. Burger, 122 Cal. 447, 55 Pac. 156.

[5] But the most serious objection grows out of the indifference of the commissioners to the consideration of the value of the land at the time of the assessment and after the completion of the improvement. The only practicable and, it would seem, the only possible measure of the benefit to the land is found in its value. The land is benefited as its value is increased. If the land is increased in value to the extent of $50 an acre, it is, of course, benefited to that amount. The true method is to determine, then, the value of the land before and after the construction of the improvement, and the difference is the measure of the benefit. And this value is either the intrinsic or the market value. But whether one or the other, the result is the same, since we have no way of determining the *intrinsic* except by applying the test of the *market* value. This matter is discussed in City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585, wherein it is held that the market or exchange value of the property is the only criterion of its actual value, and "actual value," as used in section 1249 of the Code of Civil Procedure, means "actual market value."

There seems no dissent from the rule quoted by appellants from the authorities as follows:

> "Undoubtedly the simplest, fairest, and most just rule and one which conforms to the underlying theory of local assessments is that the existence and amount of special benefits is to be determined by the effect of the improvement upon the market value of the property which it is claimed is benefited by such improvement. If the construction of such improvement increases the market value of such property, such property receives a benefit, and the amount of such benefit is measured by the amount of such increase." Chicago Union Traction Company v. Chicago, 204 Ill. 363, 68 N. E. 519, and 207 Ill. 544, 69 N. E. 850; Marion Bond Co. v. Johnson, 29 Ind. App. 294, 64 N. E. 626; City of Allegheny v. Black's Heirs, 99 Pa. 154.

In Re Furman Street, 17 Wend. (N. Y.) 649, in an action to determine the damages and benefits from the opening of a street, it was said, through Bronson, J.:

> "There can be no other practicable guide for the commissioners than the intrinsic value of the land, and that value depends on the uses to which it may be applied or the price it will bring in the market."

In the case of Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160, in the consideration of an assessment for the construction of drains, the court quotes with approval the following from Judge Cooley:

> "The only safe and practicable course, and the one which will do equal justice to all parties, is to consider what will be the influence of the proposed improvement on the market price of the property."

It is admitted that the landowner should not be charged with general but with special benefits only, and it is equally clear that special benefits are coextensive with the augmentation of value.

Of course the consideration of market value is a matter largely of opinion as is the question of benefits; but it is impossible to determine the latter apart from the former, and no better test can be suggested or applied to the problem than the increased price that the land would probably bring in the market after the improvement is completed. Indeed, bearing in mind the fact that the benefit to the land is to be estimated by a pecuniary standard, it seems hard to conceive how any conclusion could be reached, without considering the probable increase in the market value. The proper course is manifestly as we have suggested; the commissioners applying their own knowledge of values, and supplementing this, if necessary, by information obtained from others. Substantially this course should be adopted, although there may be no conscious recognition of each definite step in the process.

It does not necessarily follow from the foregoing that an assessment made according to the method pursued by the commissioners here should be set aside. Such scale may be adopted, and the land classified as was done, and, unless the apportionment were shown to be clearly unequal and unjust, it should not be disturbed. Of course the main desideratum is the conclusion as to the proportionate benefits. And the commissioners might make a substantially just and accurate adjustment by the method which they adopted. The trouble here is, however, that all the evidence shows a wide departure in the result reached from the proportionate increase in the respective values of the various tracts of land. We may take the testimony of S. Zanolini as an example of all the evidence on the subject:

> "I am familiar with land values in that neighborhood. I know what the prices have been for the last 20 years, what has been sold. I know the market value of property generally in that neighborhood. I consider the market value of my land there about $125 an acre. In my judgment my land will not increase in value by reason of the old levee. I think Mrs. Adams land without this new reclamation worth about as much as mine—the same with Mr. Andrews and Mr. Hancock. The lands lying north of this old levee and were subject to overflow only was worth about $30 an acre for what pasture they could get out of it. I would consider $30 an acre a fair price for it. Assuming that this new reclamation levee will make that land as safe as the land south of the old levee, that land will be worth $125 an acre. It is better land than I have got, richer land. * * * I think that Mr. Harlan's, Mr. Barritt's, and Mr. Schmidt's land north of the levee would have been worth about $30 an acre, without reclamation. The land belonging to Mr. Barritt, Mr. Harlan, and a portion of Mr. Schmidt's reclaimed by the new levee is worth about $125 to $150 an acre, because it is good rich land."

It is not contended that the assessment was anything like what the foregoing estimate would require, nor was any attempt made at the trial to refute the testimony of defendants and their other witnesses as to values.

[6] It is stated by respondent that:

> "Many of the landowners within the district have paid their assessments without complaint. A few more objected to paying. We submit that, if any irregularities are found to exist in the assessment, they are not of sufficient importance to justify the invalidation of the entire assessment and the consequent entanglement of the affairs of the district."

Such consequences, if possible, should, of course, be avoided. But according to the record before us, the inequalities of the assessment are palpable and important, and it would be a gross injustice to some of the landowners to enforce the charges as made by the commissioners. It may be suggested, also, that on a new trial plaintiff might be able to show that the assessment is not so greatly disproportionate to the increase in the values of the land as to demand a different adjustment.

But, as before indicated, the record showing no substantial conflict, and all the evidence pointing to the conclusion that the assessment was not at all in proportion to benefits, we think the judgment and order denying the motion for a new trial should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. [7] When the cause was called for argument on the rehearing, it was stated by its counsel that respondent had concluded to abide by the former judgment of this court reversing the lower court, and that steps had already been taken to secure another assessment of the lands within the district. It was furthermore stated that as far as respondent was concerned the petition for rehearing was the result of a misunderstanding on the part of one of the attorneys for the reclamation district. Respondent was willing to confess error; but, in view of possible embarrassment that might be occasioned to other districts if we should reaffirm the portion of the former opinion referring to the method of assessment by ascertaining the difference between the market value of the land before and after the improvement, it was suggested that the reversal be placed upon the other grounds discussed. There seems to be no valid objection to this course, and, while commending to commissioners the propriety of adopting the method of assessment outlined in the former opinion, for the purposes of this case it is not necessary to hold, and we do not hold, that said method is the only valid one that may be adopted to ascertain the proportionate benefits to the land.

For other iregularities stated, and in accordance with respondent's admission of error, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 514

UNITED STATES NAT. BANK OF LOS ANGELES v. JONES et al. (Civ. 1496.)

(District Court of Appeal, Second District, California. May 19, 1914.)

1. LIMITATION OF ACTIONS (§ 182*)—PLEADING—NECESSITY.

To be relied upon, limitations must be pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676–680, 682, 695, 705; Dec. Dig. § 182.*]

2. JUDGMENT (§ 251*)—FINDINGS—ISSUES TO SUSTAIN.

A judgment based on findings on issues not raised by the pleadings will be reversed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

3. APPEAL AND ERROR (§ 1008*)—DETERMINATION—POWER OF APPELLATE COURT.

The appellate court cannot change findings of fact and direct a different judgment to be entered thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. § 1008.*]

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*For other cases see same topic and section NUMBER in Dec. Dig & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge pro tem.

Action by the United States National Bank of Los Angeles against C. E. Jones and another. From a judgment for defendants, plaintiff appeals. Reversed.

Flint, Gray & Barker, of Los Angeles, Rupert B. Turnbull, of Pasadena, and Carroll Allen and Bertin A. Weyl, both of Los Angeles, for appellant. Tipton & Cailor, of Los Angeles, for respondents.

JAMES, J. Suit on a promissory note alleged to have been executed by respondents and four others. In the original complaint filed by plaintiff it was alleged that the defendants were copartners doing business under the name of Victorville Reduction Company. The note was signed thus: "Victorville Reduction Company, per Scott Newcomer." An amendment to the complaint was filed, for the purpose, as is recited in the order allowing such amendment to be made, to make the complaint "conform to facts proved." By the amendment the cause of action was changed from one upon the note to one in form a common count for money loaned. In the findings filed by the judge pro tem. it was recited that plaintiff had dismissed its action as against all of the defendants first named, excepting the two respondents here. The judgment was in favor of the respondents, from which plaintiff appealed. The appeal is presented upon the judgment roll alone.

[1] Among the findings is one that the cause of action is barred by the statute of limitations. The bar of the statute was not pleaded either in the answer filed to the original complaint, or that stipulated to be considered as made to the amendment to the complaint. It is urged by the appellant that on the findings of fact as made plaintiff was entitled to judgment. The findings as to the facts other than that the bar of the statute had interposed are confusing and indefinite.

[2, 3] It will not be necessary to discuss them in detail or with particularity, because the judgment must be reversed for the reason that the court found in favor of respondents as to the bar of the statute of limitations, when there was no issue as to such limitation having interposed. Even though it might here be concluded, as appellant contends, that a copartnership was sufficiently found to have existed between the respondents and Newcomer at the time the debt was incurred, which is not at all clear, this court cannot change findings of fact and direct a different judgment to be entered thereon.

The case should be retried and the facts found anew.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

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24 Cal. App. 531

PEOPLE v. RIVERA. (Cr. 336.)

(District Court of Appeal, Second District, California. May 21, 1914.)

OBSTRUCTING JUSTICE (§ 16*)—PEACE OFFICER—RESISTANCE—EVIDENCE.

Evidence *held* insufficient to sustain a conviction for resisting a peace officer in the performance of his duty in attempting to arrest one alleged to have been guilty of disturbing the peace.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 32; Dec. Dig. § 16.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

F. C. Rivera was convicted of resisting a peace officer, and he appeals. Reversed.

Rivera, Potter & Folsom, of Los Angeles (N. C. Folsom, of Los Angeles, of counsel), for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

JAMES, J. Defendant appealed from a judgment directing that he be imprisoned in the county jail of the county of Orange for a period of eight months following a conviction on the charge of having resisted a peace officer while in the performance of his duties. A motion for a new trial was made, and defendant has also appealed from the order denying that motion.

The evidence was insufficient to justify the conviction of appellant. The information of the district attorney charged that:

> He (the appellant) "did willfully, unlawfully, and feloniously resist, delay, and obstruct a public officer, to wit, Phillip Germann, a duly appointed, qualified, and acting deputy city marshal of the city of Anaheim, Cal., and also a deputy sheriff of the county of Orange, in the discharge and the attempt to discharge the duty of his office, to wit, in the attempt to arrest a man whose name is supposed to be Gregorio Gonsales, who was then and there willfully, unlawfully, and maliciously disturbing the peace and quiet of the neighborhood of North Los Angeles street in the city of Anaheim, Cal."

The evidence, which is exhibited in full by the reporter's transcript, shows that on the night of January 3, 1914, at about 8 or 8:30 o'clock, some persons had engaged in a "fight," and as a result thereof one of the men had been stabbed with a knife; that appellant was not known to have been present or to have participated in the difficulty referred to, but that he was at a saloon in Anaheim on that night and near the scene of the disturbance; that he was drinking and became intoxicated; that the peace officer named in the information began to search for the person who had stabbed the other and in the course of his search, and about two hours after the cutting affray had taken place, he came upon appellant, who was standing on the sidewalk of one of the streets; that appellant immediately pulled from his pocket a revolver which was found afterwards to have been loaded; that the officer forthwith

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disarmed him, struck him over the head, and handcuffed him to a tree, where he left him for a time and continued his search for the man who had used the knife. It was not shown as to whether the latter was ever arrested, or whether in fact he had been guilty of the crime of disturbing the peace as charged in the information; but whether he was so guilty or not, all of the evidence showed that at the time the officer encountered appellant it was, as before mentioned, about two hours after the cutting affray had occurred. But conceding that proof of a resistance offered to the officer subsequent to the time of the commission of the alleged disturbance of the peace could properly be made under the information, still there is an entire want of any proof, direct or by circumstance, to show that the intent of appellant at the time the officer encountered him was to delay or obstruct the officer in his endeavors to find and arrest the man designated as Gonsales. If the officer had attempted properly to arrest appellant and he had met with such resistance as was shown, after the appellant had been apprised of the purpose to arrest him and of the fact that the man attempting so to do was a peace officer, then a conviction might have been proper; but such was not the charge upon which appellant was being tried; neither was he being tried for an assault committed against the officer. The record has been carefully scrutinized, and the examination thereof leaves no doubt as to the correctness of the conclusion that appellant was improperly convicted.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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24 Cal. App. 522

PEOPLE v. HARDEN. (Cr. 466.)

(District Court of Appeal, First District, California. May 20, 1914.)

1. WITNESSES (§ 79*)—INCOMPETENCY—BURDEN OF SHOWING.

In a prosecution under Pen. Code, § 288, for lewd and lascivious conduct with a child under 14, the burden of showing the incompetency of the child, who was within one month of six years of age, within Code Civ. Proc. § 1880, defining persons incompetent to testify, and including children under 10 years who appear incapable of receiving just impressions of the facts to which they testify or of relating them truly, was upon the party objecting to its competency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 201–204, 216; Dec. Dig. § 79.*]

2. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION OF TRIAL COURT—RULING ON COMPETENCY OF WITNESS.

In a prosecution for lewd and lascivious conduct with a child under 14, the action of the trial court after an examination of the child, who was within one month of six years of age, showing that she knew the difference between truth and falsehood, and appreciated the moral obligation to tell the truth, in permitting her to be sworn and to testify as a witness, was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066; Dec. Dig. § 1153.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—CONCLUSIVENESS OF VERDICT — PASSION AND PREJUDICE.

In a prosecution for lewd and lascivious conduct with a child under 14, evidence for the state in an essential feature *held* so thoroughly discredited, and in part so inherently improbable, as to render it of little value, so that the court was justified in assuming that a verdict of conviction was obtained as the result of passion or prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

4. CRIMINAL LAW (§ 1159*)—APPEAL—CONCLUSIVENESS OF VERDICT.

Appellate courts will not ordinarily disturb a verdict upon the ground of the insufficiency of the evidence, when there is a conflict in the evidence, though the rule may be departed from in exceptional cases in which the preponderance of evidence against the verdict is so great as to produce a conviction that in rendering it the jury were influenced by passion or prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Frank A. Harden was convicted of lewd and lascivious conduct with a child under 14 years of age, and from the judgment and the order denying him a new trial, he appeals. Reversed.

A. G. Lyon, of San Francisco, for appellant. Atty. Gen. U. S. Webb and Deputy Atty. Gen. John H. Riordan, for the People.

PER CURIAM. The defendant in this case after two trials was convicted of the felony defined by section 288 of the Penal Code. He was sentenced to 12 years confinement in the state prison at San Quentin. The appeal is from the judgment and the order denying him a new trial.

The information generally follows the language of the statute defining the crime of which the defendant was convicted.

[1, 2] A reversal is urged primarily upon the ground of the insufficiency of the evidence to support the verdict. Incidentally it is insisted that the trial court abused its discretion in permitting the child alleged to have been the victim of the crime to be sworn, and to testify as a witness upon the trial. At the close of the trial of the case the child was within one month of being six years old; but we are not prepared to say that the ruling of the trial court, permitting her to be sworn and to testify as a witness, was an abuse of discretion. Upon the objection of the defendant that the child was under 10 years of age, and apparently incapable of receiving just impressions of the facts

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

concerning which she was to be examined, she was subjected to a very thorough examination as to her competency by the trial court. We think it was sufficiently shown that she knew the difference between truth and falsehood and appreciated the moral obligation to tell the truth. The burden of showing the incompetency of the child within the meaning of section 1880 of the Code of Civil Procedure is upon the party objecting (People v. Craig, 111 Cal. 460, 44 Pac. 186), and the determination of the trial judge is conclusive upon this court in the absence, as here, of an affirmative showing of an abuse of discretion. People v. Bernal, 10 Cal. 66; People v. Baldwin, 117 Cal. 244, 49 Pac. 186; Clark v. Finnegan, 127 Iowa, 644, 103 N. W. 970.

No claim is made that the testimony of the child, if capable of belief, is not alone sufficient to support the verdict; but in this behalf it is earnestly urged that her testimony and that of her mother, when considered in the light of many and material contradictions, and in conjunction with the conduct of the mother following the commission of the offense, must be held by this court to be so inherently incredible as to be no evidence at all.

Briefly stated, the record shows the facts and circumstances immediately preceding and attending the commission of the offense to be as follows: The defendant was a married man living with his wife and nine year old daughter. On the 2d day of January, 1913, the defendant in person rented from the mother of the child housekeeping apartments in the second story of a dwelling house in San Francisco, the lower floor of which was then occupied as a home by the mother and her child. On the 3d of January, 1913, the defendant went to the home of the mother for the purpose of sweeping the apartments which he had rented, and while thus engaged the child entered the apartments. The child was the only witness who testified to the actual commission of the offense; and her story, as told in her testimony, is to the following effect: She with her little broom joined the defendant in the work of sweeping, and while so engaged the defendant committed the alleged offense. Thereupon the child went downstairs in response to a call from her mother. In passing it may be well to note that the mother subsequently testified that when she called to the child to come downstairs "Mr. Harden (the defendant) stepped to the doorway and said that she was having a good time, and begged me to let her stay there when she was having a good time. I at first told him no, and then * * * I said that she could stay." The defendant, as a witness in his own behalf, while admitting the presence of the child in his apartments on the occasion referred to, absolutely denied the story of the child. The testimony of the child upon direct and cross-examination with reference to the details of many minor, but nevertheless material, matters is in manifest conflict. A discussion of those details might in part serve to show the uncertain and unsatisfactory nature of the child's testimony. Such a discussion, however, is not absolutely necessary to the development of the paramount point in the case, and therefore a due regard for decency prompts us to pass on to other features of the child's testimony which alone will suffice to serve the purpose in hand.

Upon direct examination the child stated that she had told her mother all of the things concerning the defendant's conduct which she had testified to in court. She was positive that she did not tell her mother of what the defendant did to her until after he moved in, but how long after she could not remember. She did not know how long a day or a week was. Her mother told her never to go to the defendant's apartments again. At first she said that she never again went upstairs to the defendant's apartments, and then she said that she had gone there on several occasions, and alone, for the purpose of playing with the defendant's child. During the cross-examination it was admitted by the district attorney that the child had "testified correctly" at the preliminary examination. Thereupon the record of the child's testimony as given at the preliminary examination was read in evidence, wherein it appears that she knew how long a day was; that she knew that "every seven days is Sunday," and that five Sundays had passed before she told her mother of what the defendant had done to her. At this point in the cross-examination the record of the child's testimony as given upon the first trial of the case was read in evidence, which showed the following questions and answers:

> "Q. Did you tell her the same day? A. Well, yes. Q. Wasn't it five or six days afterwards? A. No, the same day in the nighttime. Q. The same day in the nighttime you told her? A. Yes. Q. Now Maxine, you remember, little girl, that you testified before in this case? * * * A. Yes. Q. * * * Did you tell the other judge that you did not tell your mother until five Sundays went by? A. I don't remember. Q. Don't you think it was five Sundays passed before you told you mother? A. No. Q. Didn't you tell the judge that? A. I don't remember. Q. Now, Maxine, do you tell me now and all these gentlemen that you told your mother the same night? A. Yes. Q. * * * They [the Hardens] have a little baby, haven't they? A. Yes. Q. And you used to go up there every day and play with the little baby? A. Not every day. Q. Almost every day? A. Yes. Q. And mamma went up with you? A. Yes, sir. Q. And Mr. and Mrs. Harden were there? A. Yes. Q. And mamma did not tell you to keep away from there? A. No."

Further along in the cross-examination of the child she testified that after she had first told of the defendant's misconduct her mother had not mentioned the subject to her again, and that her mother did not tell her what she was to say upon the trial. Here the record of the child's testimony taken at the preliminary examination was again called into evidence, and showed that she had testified that her mother had told her what to say at the preliminary examination concerning the alleged conduct of the defendant, and also to say that she had told her mother of such conduct on the day of its occurrence.

It will thus be seen that the testimony of the child upon the second trial of the case concerning the time when she told her mother of what the defendant did to her is in pronounced and irreconcilable conflict with her testimony upon the same subject given at the first trial of the case, and that her testimony upon both trials in the particular stated was hopelessly at variance with her testimony as given at the preliminary examination. We cannot conceive of a plausible theory, and none has been suggested, upon which the jury might have rightfully reconciled the manifest and material variance in the child's testimony, as given at various times upon the vital question as to when she first informed her mother of the defendant's conduct; and the clear conflict in her testimony as given from time to time relative to the equally important question as to whether or not her mother had told her not to go to the defendant's apartments again is apparently incapable of explanation. At all events, no explanation of the uncertainties and inconsistencies appearing in the child's testimony was made or attempted at the trial, and no such explanation has been made or attempted here upon behalf of the people; and when we consider the uncertainties and apparently irreconcilable inconsistencies appearing in the child's testimony as a whole, in conjunction with the undisputed and unexplained fact that the child was told by her mother what to say with reference to certain essential features of the alleged offense, we are of the opinion that the question of the defendant's guilt or innocence was not carefully and dispassionately considered by the jury.

[3, 4] This conclusion is fortified by a consideration of the mother's testimony. She testified upon cross-examination in substance that, notwithstanding the fact that the child had informed her of the offense within two or three days after its commission, she never mentioned the subject to either the defendant or his wife; that thereafter the child with the knowledge of the mother visited the apartments of the defendant to play with the latter's child; that on several occasions during six or seven weeks following the offense she, the mother, visited the family of the defendant; that such visits occurred as often as two or three times a week, and that upon some, if not all, of those occasions the defendant was present; that the defendant upon at least one occasion after the alleged commission of the offense entered her apartments and conversed with her generally. In short, it is an undisputed and unexplained fact in the case that for six or seven weeks following the alleged commission of the offense as told by the child, the mother of her own volition cultivated and continued friendly social relations with the defendant and his family. This admitted and unexplained fact tended strongly, we think, to show either that the child had not told her mother of the alleged offense, or that the mother gave no credence to the story told by the child. This must be so, we think, because it is altogether inconceivable that the mother would so long suffer in silence the shame and indignity alleged to have been inflicted upon her child. Without exception the first impulse of a mother would be to openly denounce the defilement of her daughter, and then drive the defiler from her home into the hands of the police. That the mother did not do so in the present case seems to us to be inherently improbable, and was a circumstance which, unexplained and considered in conjunction with the clear contradictions appearing in the testimony of the child, utterly discredited in its entirety the evidence upon which the conviction of the defendant rests. Under such circumstances "it is inconceivable that a jury, free from passion or prejudice, would not at least have entertained a reasonable doubt as to the guilt of the defendant." People v. Hamilton, 46 Cal. 540. In other words, it is our opinion that the testimony adduced upon behalf of the people in the present case was in an essential feature so thoroughly discredited, and in part so inherently improbable, as to render it upon the whole of little, if any, value as evidence; and therefore we are justified in assuming that the verdict obtained was the result of passion or prejudice rather than a calm and impartial judgment resulting from a dispassionate consideration of the evidence. People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; People v. Brown, 47 Cal. 447; People v. Ardaga, 51 Cal. 371.

In arriving at this conclusion we are not unmindful of the general rule, and the reason therefor, that appellate courts will not ordinarily disturb a verdict upon the ground of insufficiency of the evidence when there is conflict in the evidence. As was said in the case of People v. Hamilton, supra:

> "The rule is a most salutary one, and ought not to be lightly departed from. Nevertheless there are exceptional cases, in which the preponderance of evidence against the verdict is so great as to produce a conviction that in rendering it the jury must have been under the influence of passion or prejudice. * * * A charge of so heinous a nature, when supported by even the slightest evidence, arouses in the public mind an intense indignation against the supposed culprit; and it is not surprising that the same feeling sometimes finds its way into the jury box. That it did so in the present case we have no doubt."

The language just quoted applies with peculiar aptness, we think, to the facts of the case at bar. Upon the whole we are convinced that the ends of justice will be best subserved by a reversal of the judgment, and, if necessary, a retrial of the case. While it is not apparent that upon a new trial the testimony of the child could be truthfully reconciled and rendered more certain, or that the mother of the child might at this late date satisfactorily explain her conduct in the premises, nevertheless those are questions which the lower court and the district attorney, in the exercise of a sound discretion must determine.

For the reasons stated the judgment and order appealed from are reversed.

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24 Cal. App. 540

PEOPLE v. KISER. (Cr. 318.)

(District Court of Appeal, Second District, California. May 23, 1914.)

1. Witnesses (§ 269*)—Cross-Examination.

Where a state's witness testified that she saw decedent outside of accused's apartments when decedent came to the house, but did not notice his appearance, a question on cross-examination, whether decedent presented any strange appearance on entering the door to accused's apartments, was properly excluded as not responsive to the direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

2. Homicide (§ 165*) — Evidence — Admissibility.

Where accused, who had killed his wife and a third person, was tried for the killing of the third person, and it was shown incidentally that the wife was also killed, and accused was permitted to show the principal facts as to the relations of all the parties, accused could not complain of the exclusion of evidence as to his relations with his wife, and thereby prevent the jury from understanding that he did not intend to kill her.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.*]

3. Criminal Law (§ 552*)—Evidence—Question for Jury.

The direct testimony of accused may be so contradicted by circumstantial evidence alone that the jury need not believe it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259–1262; Dec. Dig. § 552.*]

4. Homicide (§ 165*) — Evidence — Admissibility.

Where accused, who had killed his wife and a third person, was tried for killing the third person, and the court permitted evidence of the previous relations of the parties to determine whether accused, as a reasonable man, was actually in fear for his life, objections to questions as to the circumstances of the third person leaving the woman prior to her marriage to accused, and as to what accused might have told a witness about a quarrel between him and his wife long before his marriage to her, were properly sustained as calling for evidence too remote.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.*]

5. Witnesses (§ 268*) — Cross-Examination —Proper Cross-Examination.

Where a state's witness testified to hearing shots fired and to seeing the wife of accused running out of the house, a question on cross-examination whether the witness had any conversation with any of the officers, and what they told her as to the shooting of decedent, was properly excluded as not proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

6. Witnesses (§ 270*)—Cross-Examination—Relevancy.

The rule that where a part of a conversation has been proved the remainder may be brought out by the opposing party on cross-examination is subject to the limitation that the court may exclude the parts of the conversation not relevant to the part introduced, and where questions allowed on cross-examination covered the direct examination, it was not error to exclude other questions calling for a part of the conversation which was on immaterial matters.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955–957; Dec. Dig. § 270.*]

7. Homicide (§ 339*)—Harmless Error—Erroneous Rulings on Evidence.

Where the relations of accused to his wife and decedent were fully shown, and it was shown that the wife had, on Friday prior to the killing of decedent on Sunday, stated to accused that decedent had said to the wife that he would get even with her for marrying accused, the error in sustaining an objection to a question asked accused whether his wife told him whether she was afraid that decedent would carry out his threats was not prejudicial to accused, though the fact of the wife being afraid might have furnished accused, who had never met decedent, with some ground of apprehension.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

8. Criminal Law (§ 1037*)—Misconduct of District Attorney—Assignment of Misconduct.

The misconduct of the district attorney will not be considered on appeal, where no assignment of misconduct was made at the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

9. Criminal Law (§ 829*) — Instructions — Sufficiency.

Where the court charged that the jury could not go outside the evidence, and could not reject arbitrarily the evidence of any witness, but must fairly consider all the evidence, that accused was presumed to be innocent unless proven guilty, and that if, on the proof, there was reasonable doubt, accused was entitled to an acquittal, the refusal to charge that if any juror should be of the opinion that accused had not been proved to be guilty to a moral certainty and beyond a reasonable doubt, the juror should vote in favor of acquittal, and should adhere to his opinion until convinced to a moral certainty and beyond a reasonable doubt of the guilt of accused, was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Elijah Franklin Kiser was convicted of murder in the second degree, and he appeals. Affirmed.

Earl Rogers, H. L. Giesler, and W. H. Dehm, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was brought to trial upon an information charging him with the crime of murder in the killing of one Harry Sharpley, a human being. Upon a verdict of guilty of murder in the second degree, judgment was entered that the defendant be imprisoned for a term of 10 years in the state prison at San Quentin.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On Sunday morning, September 7, 1913, the defendant and his wife, Gertrude Kiser, were living on South Wall street in the city of Los Angeles in two rooms which they had occupied for about three days. With them were two children of Mrs. Kiser. The daughter, Lucille, was 13 years old, and the boy, Ralph, was 9 years old. At about 9 o'clock on the morning of September 7th, the defendant with his wife and the two children were in the rooms above mentioned. At that time Harry Sharpley, having been admitted to the hallway dividing the two sections of the house, knocked on the door of the Kiser apartments and was admitted. Sharpley had breakfast with the family, and the children went out to play. After some time defendant and Sharpley went out and walked the street together for a few blocks and then returned to the Kiser rooms. Finally, at about 12 o'clock, the defendant fired five shots from a revolver and killed both his wife and Sharpley. Two shots took effect upon Mrs. Kiser and two upon Sharpley. The defendant is the only surviving eyewitness of the tragedy.

The defendant testified to facts which, if true, would prove that Sharpley was the aggressor; that Sharpley had assumed a threatening attitude toward Mrs. Kiser; that she screamed and defendant called on Sharpley to stop; that thereupon Sharpley struck the defendant; that defendant then began to fire and continued to fire while the two men struggled against each other; that the bullets which struck Mrs. Kiser were not intended for her; and that the shooting of Sharpley was wholly in self-defense. By the testimony of several witnesses it was shown that Mrs. Kiser ran out of the house after she was hit. Both of the children testified that several shots were fired after Mrs. Kiser came outside, and this testimony is not contradicted. According to this evidence, Sharpley was killed by shots which were fired after Mrs. Kiser ran out of the house.

Mrs. Kiser had lived with Sharpley at the city of Salt Lake and at the city of San Diego, but was not his wife. Lucille said on direct examination that her mother and Sharpley were married at San Diego, and on her cross-examination said that they were married at Salt Lake City. In both of these statements the witness was probably mistaken. Throughout the trial it was assumed, both by the prosecution and by the defense, that the woman in question was not the wife of Sharpley, and defendant has no ground for complaint that the court refused to allow testimony that her marriage to Kiser was a valid marriage. Sharpley having left this woman at San Diego in the spring of 1913, she ascertained the address of defendant, Kiser, and wrote to him about her dependent circumstances. He thereupon went to San Diego and married her. Without objection from the state, he was permitted to testify that she was his wife from and after the time of that marriage, which occurred on June 3, 1913. Soon after the last-mentioned date Sharpley returned to San Diego, but there was never any personal meeting between him and Kiser until September 7th. The defendant says that when Sharpley returned to San Diego the defendant had trouble with his wife about this man, that his wife asked him to come to Los Angeles, and that if he would do so, "we probably would not have any more trouble." The family arrived at Los Angeles and took the rooms on Wall street on the Thursday preceding Sunday, September 7th. On Friday the defendant bought the pistol with which he did the shooting the following Sunday. According to his own testimony, he told the officers after the shooting that he bought it "to protect my home with, and so that man didn't come there and harm my wife, myself, and my family." On Thursday, the 4th, Mrs. Kiser wrote a letter to Sharpley at Riverside, and it was read by the defendant before it was mailed. According to the defendant's testimony, she told Sharpley in this letter that they had arrived in Los Angeles, and that if he wanted to see them he would have to come up here, and gave him the number of the house where they were living. According to Lucille's testimony, Kiser told his wife what she was to say in the letter, but he denies this. It is manifest that there is evidence entirely sufficient to support the verdict of murder in the second degree. The only questions requiring discussion here relate to the order denying defendant's motion for a new trial and the alleged errors claimed as grounds for a new trial.

[1] The first point is that the court refused to allow evidence of the manner, demeanor, and sayings of Sharpley when he arrived at the house of defendant. This claim is unfounded. The defendant testified fully about Sharpley's visit there from beginning to end. It is true that the court did not allow the state's witness Elizabeth Dougherty to testify on cross-examination in answer to the question as to whether Sharpley presented "any strange appearance" upon entering the door to defendant's apartments. Mrs. Dougherty had just testified that, although she was in the hallway outside the defendant's apartments when Sharpley came to the house, she did not notice his appearance. The question ruled out was not responsive to any part of the direct examination, and the objection was properly sustained.

[2] We do not agree with the contention that the court by its rulings tended to prevent the jury from understanding that the defendant did not intend to kill his wife. Under this head it is claimed that the court shut out very largely the testimony offered as to Kiser's relations with his wife. We

think that there was no prejudicial limiting of such testimony. The charge upon which defendant was being tried related solely to the killing of Sharpley. Incidentally it had to be shown as part of the transaction that Mrs. Kiser also was killed. Defendant was allowed to show the principal facts as to the relations of all the parties, as we have outlined them in the preceding paragraphs. No specific assignments of errors in these rulings are pointed out in the briefs, except those to which we shall refer.

[3] It is claimed that there is no evidence disproving Kiser's statements as to what took place during his struggle with Sharpley. It is true that there is no testimony directly disproving those statements, but the circumstantial evidence was such that the jury was not obliged to believe the defendant. It is argued that "the bullets appear to have all been fired while the revolver was held in an upward direction as though fired by one whose adversary had the upper hand." This is not true, except possibly as to the bullet which passed through the arm of Mrs. Kiser and the bullet which passed through the arm of Sharpley. The bullet which killed Sharpley passed through his lungs from the left to the right side, ranging downward. The bullet which killed Mrs. Kiser entered her back and ranged very slightly upward.

[4] The court did not err in such limitations as it placed upon the testimony showing the relations between Sharpley and Mrs. Kiser and between Mr. and Mrs. Kiser with reference to Sharpley. The rulings of the court in sustaining objections made to questions about the circumstances of Sharpley leaving the woman at San Diego prior to her marriage to Kiser were proper rulings. Those circumstances were not material to the issues before the court. The same is true of the court's refusal to allow the witness Beaumont to relate what the defendant may have told him about a quarrel between him and Mrs. Kiser in Kansas, which was long before his marriage to her. The court sustained objection to a question calling on the defendant to relate the circumstances of his first meeting with Gertrude Kiser at Wichita, Kan. The object of the question was stated to be to show the state of his mind at and leading up to the time of the tragedy. This was entirely too remote from the transactions under inquiry before the court. It was proper that a reasonably fair and full statement of the previous relations of the parties should be permitted to go to the jury, so that it might determine whether or not the defendant as a reasonable man was actually in fear of danger to his life. This the court did permit without abuse of its power to regulate the trial by cutting off useless extensions of the inquiry to remote and irrelevant matters.

It is claimed that the court erred in refusing to admit evidence of Sharpley's statements concerning the defendant immediately before the shooting. Apparently the question referred to was one addressed to Mrs. Dougherty, and therefore the statement, if any was made, must have been some hours before the shooting. It appears from her own testimony that she did not hear any statement made by Sharpley concerning the defendant. She testified that her apartment was separated from the Kiser apartment by a narrow hall; that she went to the main door of the house when Sharpley arrived, and Sharpley said:

> "Is there a woman here with two small children? (Objection was made to this statement, and the objection was sustained.) Q. Then you heard no conversation between Mr. and Mrs. Kiser that morning? A. No, sir; I did not. Q. Did you hear any conversation between any persons in that apartment on that Sunday morning? A. No, sir; I did not."

There was nothing in any of the questions asked, nor in any of the statements made by defendant's counsel to the court, which indicated a desire on the part of the defendant to prove by Mrs. Dougherty that Sharpley had made any threats against defendant, or any hostile statements concerning him, or that any such threats or statements were brought to the attention of defendant. The record does not sustain the contention that the court wrongfully directed the witness to leave the stand and cut off counsel from further interrogation. The court did not refuse any request for further examination of the witness.

[5] On cross-examination of Mrs. Sproul, who had testified for the prosecution in regard to hearing shots fired, and that she saw Mrs. Kiser run out of the house, defendant's counsel asked her if she had any conversation with any of the officers in the case and what they told her in regard to the shooting. At this point the court interfered and directed defendant's counsel that he need not ask the witnesses to tell what the officers told them. The direct examination of this witness had been limited solely to what she herself heard and saw, and no suggestion was made of a reason for asking her about conversation with the officers. All of the evidence indicates that no officer was present when the shooting occurred, or near enough to hear the sound thereof. The questions were not proper cross-examination for any purpose shown or indicated to the court.

[6] The court did not err in sustaining objections to questions asked on cross-examination of Detective Myers, a San Diego officer who testified on behalf of the state. Myers had testified to statements made by Kiser to him at San Diego at a time when Kiser was complaining that Sharpley was interfering with his family, statements to the effect that he would "take it into his own hands." On cross-examination, in reply to questions by defendant's attorney, the witness was allowed to review this same subject-matter, including also Kiser's statement to the witness that Kiser was married to the woman, and

was properly treating and providing for her and her children. The only questions ruled out (so far as not covered by other questions and answers permitted) were: "Did he tell you as to his family relations, how they were with Mrs. Kiser?" Also, "Did he tell you about Sharpley deserting Mrs. Kiser in some town in Kansas?" The contention is that the court erred because the defendant had the right to disclosure of all of the conversation described in the direct examination of the witness. The rule that where part of a conversation has been shown in testimony the remainder of that conversation may be brought out by the opposing party on cross-examination is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced. A party claiming that the court has erred in its exercise of discretion as to such a matter of cross-examination must show by the record some definite and legal purpose in the asking of the excluded question. Here an examination of the questions and answers which were admitted on cross-examination, shows that they covered the topics of the direct examination very fully, and that the excluded questions, so far as not included in other admitted questions, were upon immaterial matters.

With respect to the court's ruling in sustaining objections to questions asked on cross-examination of the witness Glenn and on cross-examination of the witness Mrs. Boulay, we reach a conclusion similar to that discussed in the preceding paragraph. The additional items sought to be produced were either not material or were so far collateral and of minor importance that the court was justified in limiting the testimony, and no one was prejudiced thereby.

[7] The defendant testified that on Friday evening, September 5th, Mrs. Kiser told him that Sharpley had said that he would get even with her for getting married. The court then sustained objection to the following question asked of defendant by his counsel: "Did Mrs. Kiser say to you whether or not she was afraid, and had any fears of Sharpley carrying out his threats?" This objection should have been overruled. The threat was shown by the preceding answer. The only material matter then remaining was whether the defendant had any reasonable ground to entertain fears concerning Sharpley as to that threat. But in view of the fact that Mrs. Kiser was acquainted with Sharpley, and the defendant had never met him, the fact of her being afraid might have furnished the defendant with some ground of apprehension. We are of the further opinion, however, that this error of the court, when the matter is considered in connection with all of the evidence, does not furnish a reasonable ground for reversal of the order denying a new trial. The facts, as to the relations of these parties, were very fully shown to the jury.

[8] After the witness Mrs. Boulay had testified for the defendant as to his good reputation at San Diego, the district attorney asked some questions about a supposed quarrel between Kiser and his wife. Upon objection being made, the district attorney said: "That's the statement she made to the officers." Complaint is now made that this was misconduct on the part of the district attorney. It is a sufficient answer to say that no assignment of misconduct was made at the time. People v. Babcock, 160 Cal. 545, 117 Pac. 549.

[9] The court refused defendant's request for the following instruction to the jury:

> "If any one, or any member, of you, after deliberating on and considering all the evidence in this case, shall be of the opinion that the defendant has not been proved to be guilty to a moral certainty and beyond a reasonable doubt, those of you entertaining such opinion should vote in favor of acquittal, and should so adhere to your opinion until convinced to a moral certainty and beyond a reasonable doubt of the guilt of the defendant of the alleged crime by and from the evidence and the law alone in this case."

The defendant relies upon People v. Dole, 122 Cal. 486, 495, 55 Pac. 581, 68 Am. St. Rep. 50, where it was held that a very similar instruction should have been given. In People v. Perry, 144 Cal. 748, 756, 78 Pac. 284, 287, it is pointed out that the judgment in People v. Dole was not reversed solely or principally upon the refusal to give that instruction, and the court holds that the refusal to give such instruction may be cured by the giving of other instructions clearly pointing out the duty of the jurors to base their verdict upon the evidence alone. In his concurring opinion in the Perry Case, Justice Shaw said:

> "Upon further consideration of the question I am satisfied that the refusal of such an instruction should not be considered an error of sufficient importance to justify a reversal in any case where the jury are fully instructed that the verdict must be based upon the evidence alone."

In the case at bar the jury were told very plainly that they had no right to go outside of the evidence admitted by the court and no right to reject arbitrarily the evidence of any witness, and that they must fairly consider all of the evidence in the case. They were further told that every person is presumed to be innocent until he is proven guilty, and that if upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. We conclude that even if the court's refusal to give the requested instruction was an error, nevertheless, it was error without prejudice.

The judgment of the court and the order denying defendant's motion for a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

24 Cal. App. 533

WRIGHT et ux. v. BOGGESS et al.

(Civ. 1464.)

(District Court of Appeal, Second District, California. May 23, 1914.)

1. Pleading (§ 35*)—Surplusage — Action for Breach of Covenant.

Where a complaint, in addition to alleging the breach of a covenant against incumbrances in a deed, alleged a contract whereby plaintiffs agreed to convey to defendants certain real property, subject to investigation by one of the defendants as to its value in exchange for property of the defendants, which was to be free of incumbrances other than a certain mortgage and lease, and that such property was incumbered by the lien of an assessment thereon, such allegations as to the contract were mere surplusage, there being no allegation that the defendant mentioned had ever inspected the property or approved it, that plaintiffs had ever conveyed their land in performance of the contract, or that there was any pretense on the part of either party to perform or comply with the contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76–80; Dec. Dig. § 35.*]

2. Covenants (§ 107*)—Actions for Breach —Conditions Precedent—Payment of Incumbrance.

While a covenant against incumbrances is broken by the existence of an incumbrance as soon as made, it is merely a covenant to indemnify the grantee, and, until he has removed or extinguished the incumbrance, he cannot recover the amount thereof, especially in view of Civ. Code, § 3305, providing that the detriment caused by the breach of a covenant against incumbrances is the amount actually expended in extinguishing the principal or interest thereof.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 173, 174; Dec. Dig. § 107.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by S. H. Wright and wife against J. W. Boggess and others. From a judgment for plaintiffs, defendants appeal. Reversed.

John E. Daly and James H. Daly, both of Long Beach, for appellants. Wm. M. Rex, of Los Angeles, for respondents.

SHAW, J. Action to recover damages for the breach of an implied covenant contained in a grant deed made by defendants to plaintiffs. Judgment went for plaintiffs, from which defendants appeal on the judgment roll.

[1] The complaint purports to declare a cause of action, not alone upon the implied covenants of the deed, but, in addition thereto, alleges that on May 20, 1913, plaintiffs and defendants entered into a written contract whereby plaintiffs agreed to convey to defendants a quarter section of land therein described for certain property owned by defendants, described as the Pacific Apartments. The agreement, as stated therein, was made subject to investigation by J. W. Boggess as to the value of plaintiffs' property which they proposed to give in exchange for the Pacific Apartments, which was to be free of all incumbrances other than a certain mortgage and lease; that defendants' property at the time of the execution of the contract was incumbered by an assessment for the cost of certain street work, which constituted a lien thereon in the sum of $327.90. Conceding the truth of these allegations, no facts are set forth constituting a cause of action upon the contract, which, moreover, was made subject to the condition that J. W. Boggess should, after inspection of plaintiffs' property, approve the same. Whether he ever approved is not made to appear; nor is it alleged that plaintiffs performed their part of the contract by conveying their quarter section of land to defendants; indeed, so far as shown by the complaint, there was no pretense on the part of either or any of the parties to perform or comply with the terms of the contract. Hence, all reference in the complaint to the contract and the existence of an incumbrance against the property of defendants at the date of its execution was mere surplusage.

If a cause of action is alleged, it is by reason of the following allegations, wholly independent of and in nowise connected with the contract, namely: That on June 3, 1913, defendants executed a grant deed conveying the property therein described (which is identical with that described in the contract) to plaintiffs, the sole and only consideration therefor, as shown by the complaint, being the sum of $10; that by said grant there was implied on the part of defendants a covenant that the estate thereby conveyed was free of incumbrance done, made or suffered by the grantors, or any person claiming under them. It is further alleged:

> "That at the time of the execution of said grant deed the premises were subject to a tax or street lien theretofore duly assessed, charged and levied upon said premises by the city of Long Beach, county of Los Angeles, state of California, and the officers thereof, in the sum of $327.90, which tax was at the execution of said deed, and is now, by law a lien against said premises."

The court gave judgment for $327.90, and costs, as prayed for.

[2] Among other alleged grounds for reversal, appellants insist that the complaint fails to state a cause of action, and that it is insufficient to support the judgment. That the street assessment constituted an incumbrance upon the property must be admitted. Conceding also that such lien was covered by the covenant implied by the execution and delivery of the grant deed, and being an incumbrance done, made, or suffered by the grantor, nevertheless the complaint not only fails to show any payment or discharge of the lien, but affirmatively shows that the assessment "is now by law a lien against said premises." While the covenant against incumbrances was broken as soon as made (Salmon v. Vallejo, 41 Cal. 484), yet, as respects the measure of damages recoverable, it must be deemed merely a covenant to indemnify the grantee for damages or loss sustained. If plaintiffs have paid nothing toward removing

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or extinguishing the lien, they are not entitled to recover the amount thereof. Section 188, Rawle on Covenants for Title; Coburn v. Litchfield, 132 Mass. 449. Moreover, it is expressly provided by statute that:

> "The detriment caused by the breach of a covenant against incumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof." Section 3305, Civ. Code.

Since this is true, and the complaint not only is barren of any allegation showing the actual expenditure of any sum in the extinction of the lien, but affirmatively shows the continued existence thereof, it is clear that it fails to support the judgment rendered.

It is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

168 Cal. 253

In re BELL'S ESTATE. (S. F. 6698.)

(Supreme Court of California. July 7, 1914.)

1. Executors and Administrators (§ 283*)—Disputed Claims—Jurisdiction—Probate Courts—Equity Powers.

The superior court, sitting in probate, is a court of general jurisdiction, with power to apply legal and equitable principles in the determination of questions arising in the administration of the estate, and hence, in proceedings to compel an administratrix to pay an allowed claim, it had jurisdiction to entertain and enforce a defense of set-off.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1120–1131; Dec. Dig. § 283.*]

2. Set-Off and Counterclaim (§ 13*)—Availability — Nature of Proceedings — Probate Proceedings—"Actions."

A proceeding against the administratrix of a deceased person to compel the payment of an allowed claim is an "action," within Code Civ. Proc. §§ 438, 440, providing for the allowance of the defense of set-off in actions.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 15, 21, 22; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 1, pp. 128–140; vol. 8, p. 7563.]

3. Executors and Administrators (§ 283*)—Disputed Claims — Proceeding against Administratrix—Judgment for Excess—Jurisdiction.

Jurisdiction of the superior court, sitting in probate, to allow a set-off in a proceeding against an administratrix to compel her to pay an allowed claim was not affected by the fact that the court could not award judgment in favor of the administratrix for any excess, the court being authorized by Code Civ. Proc. § 440, to adjudge that the two demands are compensated in so far as they equal each other, leaving to the administratrix the right to assert a claim for any excess in other proceedings.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1120–1131; Dec. Dig. § 283.*]

4. Banks and Banking (§ 317*)—Insolvency—Set-Off—Enforcement of Remedy.

Where the receiver of an insolvent trust company, against which an administratrix had a claim for an unpaid deposit, applied to the probate court for an order compelling the administratrix to pay an allowed claim for an indebtedness of her intestate to the trust company, the administratrix was not limited to an action against the receiver to recover her deposit claim nor to the assertion of such right in the insolvency proceedings, but was entitled to plead her demand as a set-off to the claim of the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

5. Banks and Banking (§ 317*)—Insolvency—Set-Off.

Where an administratrix had a claim against a receiver of an insolvent trust company on an unpaid deposit account, and the receiver had a claim against the intestate, the superior court in the insolvency proceedings had jurisdiction to determine the validity of the claims and enforce the set-off.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

6. Interest (§ 22*)—Claims against Decedent's Estate—Allowance—"Judgment."

Allowance of a claim against a decedent's estate prior to an order directing payment is not a "judgment," and hence does not draw interest at 7 per cent. per annum, under Civ. Code, § 1920, prescribing such rate on recovered judgments.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43–53; Dec. Dig. § 22.*

For other definitions, see Words and Phrases, vol. 4, pp. 3827–3842; vol. 8, pp. 7695, 7696.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the accounts of Teresa Bell, as administratrix of Thomas Bell, deceased. From an order directing the administratrix to pay an allowed claim in favor of the California Safe Deposit & Trust Company, she appeals. Reversed.

See, also, 141 Pac. 1181.

T. Z. Blakeman, of San Francisco, for appellant. Drown, Leicester & Drown, of San Francisco, for respondent.

LORIGAN, J. This appeal is from an order made in the estate of Bell, deceased, directing the appellant, administratrix, to pay an allowed claim of the California Safe Deposit & Trust Company, an insolvent corporation (hereafter to be designated the Trust Company or Bank), against said estate.

This and another appeal taken by the administratrix from an order of the superior court dismissing her petition in intervention, filed in the insolvency proceeding against said trust company (People, etc., v. California Safe Deposit & Trust Co., Respondent, Teresa Bell, as Administratrix, etc., Intervener and Appellant [No. S. F. 6487] 141 Pac. 1181) were presented together. The opinion of this court in the appeal last mentioned, filed this day, is referred to for a detailed statement of the facts under which the question involved here is presented. It may be stated, however, generally, as to the present appeal, that the respondent, as receiver of the trust company, petitioned the court in the matter of the estate of Bell, deceased, for an order directing the administratrix to pay a claim on a promissory note given for $40,-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexe

000 and interest at 6 per cent. per annum, which Bell, at the time of his death, owed the said trust company, and which was presented and allowed in its favor against his estate, and filed on May 25, 1893. The balance claimed to be due (payment having been made by the estate from time to time) was $10,093.40, with interest at 7 per cent. per annum from May 25, 1898. The trust company or bank had been adjudged insolvent on January 14, 1908, the respondent appointed receiver to liquidate and settle its affairs, and it was alleged that said claim against the estate was an asset of the said insolvent trust company. All claims against the estate of Bell, save that of the trust company, had been paid and the estate was solvent.

The administratrix answered the petition of the receiver. She did not contest the allegations of the petition further than they were qualified by a set-off which she pleaded, and except that she denied that the claim ever bore interest at 7 per cent. per annum, or a greater rate than 6 per cent. per annum. Her principal defense, however, was a set-off, in support of which she alleged that long prior to the insolvency of the trust company or bank, and under an order of court appointing it depositary of the funds of the estate and directing her to deposit them with it, she had done so, and that at the time of the insolvency of said bank there was on deposit with it an amount in excess of $20,200 assets of said estate; that the total amount due on the claim of the said bank against the estate when the bank became insolvent did not exceed $15,000, and that there was a balance due from it to the administratrix of the estate, as such, the sum of $5,200. Her prayer was that the petition for payment by the bank be denied, and it be adjudged that at the date of its insolvency there was owing from it to the administratrix of said estate a balance of $5,200. In effect the position of the administratrix under her answer was that she had a right to have set off against the allowed claim of the bank its debt to her as administratrix and respecting the funds of the estate on deposit with it, in as far as they compensated each other at the time of the insolvency of the bank, and for a judgment over in her favor for any excess.

The receiver demurred to the answer of the administratrix on the grounds that it did not state facts sufficient to constitute a set-off, and that the court had no jurisdiction of the alleged set-off. The court sustained the demurrer on the ground "that the court sitting in a probate matter had no jurisdiction to entertain the counterclaim or set-off pleaded by the said administratrix in her amended answer," and thereafter made an order in which it found that there was due the said bank from the estate the sum of $20,809.22, being unpaid principal in the sum of $10,093.40, and interest thereon from February 25, 1898, at the rate of 7 per cent. per annum; that the estate had ample funds out of which to make payment, and ordered the administratrix forthwith to pay the amount to the receiver. This appeal is from that order. In as far as this appeal may involve the question (conceding for the present that the court in a probate proceeding had jurisdiction to entertain such a defense) that the facts alleged in the answer of the administratrix did not constitute a defense of counterclaim or set-off, that question is disposed of in our opinion filed this day in the other appeal by the administratrix hereinabove referred to (S. F. No. 6487), where we held that they did.

[1] Now as to the question of jurisdiction. We are satisfied that the superior court, sitting in probate, had jurisdiction to entertain the defense of set-off interposed by the administratrix. It had jurisdiction of the estate of Bell and over all proceedings therein which included a determination of whether the bank was entitled to the order for payment of its allowed claim. It had jurisdiction of the parties in that particular proceeding and over the subject-matter. It is true that the superior court, sitting in probate, is limited in its jurisdiction to the extent that it must follow the mode of procedure provided by statute in the administration of the estate of a decedent and can only determine those questions or matters arising in the estate which it is authorized to do. Here the question whether a creditor is or is not entitled to an order for payment of his allowed claim arose in the proceeding in the administration of the estate. It was a controversy arising in the estate itself, and involved the right of the creditor to share in its assets, and was a question which the court, sitting in probate, was authorized to determine. The fact that, acting in probate, it may be called upon to apply legal or equitable rules or principles in considering a question it is called upon to determine does not affect its jurisdiction to do so. The superior court, sitting in probate, is a court of general jurisdiction, and, in determining any question arising in the administration of an estate which it is expressly authorized to decide, it may bring to its aid the full equitable and legal powers with which, as the superior court, it is invested. As said by this court in Burris v. Kennedy, 108 Cal. 336, 41 Pac. 459:

> "The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment."

[2] Respondent does not point out why the court in the probate proceeding did not have jurisdiction to entertain this defense of set-off, except it asserts that by the provisions of the Code of Civil Procedure (sections 438, 440) the right of set-off is limited to actions

between parties, and that this proceeding for an order directing the payment of an allowed claim is not an action; further that, even where a set-off is asserted in actions, it can only be asserted in those actions where a several judgment might be had between the parties, and this cannot be done here, because the court, if it found that the amount due to the administratrix exceeded the amount due to the bank, could not render a judgment against the receiver for such excess. And respondent asserts that the only way the administratrix could establish or enforce her claim of set-off would be in an action against the receiver of the insolvent bank. We think, however, that a proceeding in the estate of a decedent to obtain the order sought here may be regarded as an action within the terms of the sections of the Code referred to, respecting counterclaims or set-offs.

[3] Nor does it affect the question of jurisdiction that the court in such proceeding may not award the judgment for any excess. It can, as section 440 declares may be done, adjudge that the two demands are compensated in as far as they equal each other, leaving to the administratrix the right of asserting a claim for any excess in the insolvency proceeding where the affairs of the trust company are being settled.

[4] Nor is there any merit in the claim that the administratrix should have resorted to an action against the receiver to establish her set-off. She might, it is true, have intervened in the insolvency proceeding against the bank, if she so desired. The superior court, sitting in probate and in this proceeding which the bank inaugurated to enforce payment of its claim, had jurisdiction to determine the validity of her set-off.

[5] But so had the superior court in the insolvency proceeding against the bank, had she intervened there; the court in either proceeding had jurisdiction of the subject-matter, and the administratrix had the right to present it for determination in either proceeding or in both.

[6] Aside from these questions of jurisdiction, the further question is presented of the validity of the order made by the court directing the payment of the claim as regards the rate of interest computed on it. The court allowed interest at the rate of 7 per cent. per annum from May 25, 1898, up to the date of the order and until payment of the claim. The allowance of interest at the rate of 7 per cent. up to the date of the order of payment, instead of 6 per cent., was erroneous. In allowing the higher rate, the court doubtless proceeded on the theory that, when the claim was allowed and approved, it ranked as a judgment and drew interest at 7 per cent. per annum, as provided by section 1920 of the Civil Code, respecting judgments recovered in the courts of this state. But it is settled by our decisions that the allowance of a claim against a solvent estate is not equivalent to an ordinary judgment. It is a judgment only in a qualified sense, and does not attain the force and dignity of an absolute judgment until an order of court is made directing the executor or administrator to pay it. Until then it is simply an acknowledged debt of the estate, bearing interest at the contract rate. It is only after such an order is made that it bears interest at the statutory rate. Richardson v. Diss, 127 Cal. 58, 59 Pac. 197; Haub v. Leggett, 160 Cal. 491, 117 Pac. 556. The note by its terms bore interest at 6 per cent. per annum, and it was error, therefore, for the court to allow interest at more than that rate from May 25, 1898, to the date of the order for payment.

The order appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.; SHAW, J.; SLOSS, J.

168 Cal. 241

PEOPLE, by WEBB, Atty. Gen., v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (BELL, Intervener). (S. F. 6487.)

(Supreme Court of California. July 7, 1914. Rehearing Denied Aug. 6, 1914.)

1. Banks and Banking (§ 317*)—Insolvency—Set-Off.

Where an administratrix had a claim against a receiver of an insolvent trust company on an unpaid deposit account, and the receiver had a claim against the intestate, the superior court, in the insolvency proceedings, had jurisdiction to determine the validity of the claims and enforce the set-off.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

2. Banks and Banking (§ 317*)—Insolvency—Deposit Claims—Set-Off.

Since the rule that a receiver acquires no greater interest in the estate than the one from whom he acquires title, and that choses in action pass to him subject to the rights of set-off existing at his appointment, is applicable to insolvent banks, where a trust company became insolvent having a claim against an intestate, and owing a claim on an unpaid deposit account in favor of the administratrix, she was entitled to set off the one against the other, and was not required to pay her indebtedness in full and accept a pro rata distribution with other creditors on her deposit claim.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1222; Dec. Dig. § 317.*]

3. Set-Off and Counterclaim (§ 41*)—Right to Set-Off—Mutuality.

Where an administratrix deposited funds in her hands as administratrix in a trust company which held an allowed claim against her intestate, want of mutuality was no defense against the administratrix's right to set off her deposit claim against the claim of the trust company's receiver for payment of the claim against the intestate.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 76–79, 81; Dec. Dig. § 41.*]

4. Banks and Banking (§ 315*)—Deposit of Funds by Administratrix—Special Deposit.

Funds belonging to an administratrix, and deposited with a trust company under an order of the court of probate directing such deposit to be withdrawn only on the order of the court, as authorized by St. 1891, p. 490, did not constitute a special deposit but was a mere general deposit creating the relationship of debtor and creditor between the administratrix and the trust company.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1219–1221; Dec. Dig. § 315.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Suit by the People, by U. S. Webb, Attorney General, against the California Safe Deposit & Trust Company and others, in which Teresa Bell, as administratrix of the estate of Thomas Bell, deceased, intervened. From an order sustaining a demurrer and dismissing intervener's petition, she appeals. Reversed.

T. Z. Blakeman, of San Francisco, for appellant. Drown, Leicester & Drown, of San Francisco, for respondents.

LORIGAN, J. The appeal in this case and another (Estate of Bell, Teresa Bell, as administratrix, Appellant, Frank J. Symmes as receiver of the California Safe Deposit & Trust Co., Claimant and Respondent [No. 6698] 141 Pac. 1179) were on application of the appellant ordered heard together on the ground that the parties in interest were the same and the controlling question in each case was the same. We shall consider and dispose of these appeals separately addressing our attention now to the one above entitled (No. 6487), which is an appeal from an order dismissing a petition in intervention filed by the appellant, administratrix of the estate of Thomas Bell, deceased.

It may be preliminarily stated, because unquestioned, that at the time of the filing of this petition in intervention there was pending in the superior court of the city and county of San Francisco a case entitled People of the State of California ex rel. v. California Safe Deposit & Trust Co., in which, on January 14, 1908, a judgment had been entered adjudging the said California Safe Deposit & Trust Company (hereafter to be designated as the trust company or the bank) insolvent and appointing a receiver to wind up and settle its affairs, and that such insolvent estate was in process of settlement.

In that action, and on October 12, 1912, appellant, as administratrix of the estate of Thomas Bell, deceased, filed a petition in intervention containing the following allegations: That Thomas Bell, deceased, died testate in October, 1892; that his will was duly admitted to probate by the superior court of the city and county of San Francisco; that petitioner was appointed and qualified as administratrix with the will annexed, and that the estate of decedent is still pending unsettled in the said superior court; that said Thomas Bell, at the date of his death, was indebted to said California Safe Deposit & Trust Company on a promissory note payable to said trust company in the sum of $40,000 principal, and bearing, by the terms of said note, interest at the rate of 6 per cent. per annum; that the claim of said trust company thereon was presented to the then acting executors of the will of said deceased, was approved by them and allowed by the court in the sum of $40,000, and filed May 25, 1893; that afterwards, from time to time during a period of years, payments were made by the estate of Bell on said claim to said trust company, so that on December 19, 1907, there was due on said claim a balance of $10,093.40 principal, and interest thereon at 6 per cent. per annum from April 23, 1898. It is then alleged that on February 13, 1902, on application to the court by petitioner as administratrix of said estate for a reduction of her bond as such, the same was reduced from $300,000 to $20,000, and an order of court then made appointing and designating said trust company as the depositary of the funds of said estate and ordering and directing the administratrix to deposit with it all the moneys of the said estate; that said trust company accepted said appointment, and thereafter acted as such depositary until it became insolvent and ceased to do business; that petitioner, after the making of said order, from time to time deposited the funds of said estate with said trust company, and that there was on deposit with it on December 19, 1907, when it became insolvent and ceased to do business, a sum of money, funds of said estate, exceeding $20,200, no part of which has been paid to said administratrix; that the claim of said trust company against the estate of said Bell and the demand of said estate against said trust company became compensated as far as they equaled each other at the date of the insolvency and cessation of business of said trust company, and that thereby there still remained due to said estate from such trust company the sum of $5,200; that on July 6, 1909, an order of court was made directing the payment of all claims against the estate of Bell except the claim of said trust company, which was deferred for further consideration; that on July 14, 1911, said trust company applied in the matter of the estate of Bell for an order requiring the administratrix forthwith to pay to the receiver of said insolvent trust company said claim due to it from said estate; that petitioner in said proceeding resisted said application and asserted a claim that said money of said estate deposited with said trust company should be set off against the claim of said trust company so far as they equaled each other, but the superior court, in which the matter of said estate was pending, refused to entertain the claim of said estate for asserted want of jurisdiction; that, unless restrained, the receiver will proceed to enforce payment of the whole of the claim of said trust company, notwithstanding the fact that at the date of its insolvency it was indebted to said estate in a sum greater than the amount of its claim against said estate.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The prayer was that the court take cognizance of said respective claims and adjudge and determine the amount due on each; that they be adjudged to be compensated in as far as they equal each other, and for an adjudication determining the excess, if any, due from said trust company to the estate of Bell; that an injunction be issued restraining the receiver from further proceeding on the claim of said trust company in the matter of the estate of Bell, until the hearing of the petition in intervention.

The court, on the filing of the petition, granted the preliminary restraining order prayed for. Thereafter the receiver of the trust company demurred to the petition in intervention on the grounds that it did not state facts sufficient to entitle the petitioner to the relief prayed for, and that the court had no jurisdiction to entertain or grant it. The demurrer was sustained generally, and, petitioner declining to amend, an order was entered dismissing her petition. It is from this order that the present appeal is taken.

[1] Respondent insists that the court had no jurisdiction to entertain this petition in intervention. As we understand its petition, it is that the petitioner, as administratrix, should have brought an independent action against the receiver of the insolvent trust company. But no separate action was necessary. In the action of Bell ex rel. v. California Safe Deposit & Trust Co., in which the petition in intervention was filed, the court had control of the insolvent estate of the trust company for the purposes of liquidation and settlement, involving the settlement of the demands of all persons against said insolvent estate. It had jurisdiction of all claims, was a proper forum to adjust them, entertain and determine matters of proper set-off, adjudicate the right of a claimant to any balance against the funds of the trust company, and intervention in the insolvency proceeding was a proper course for the administratrix to have taken.

[2] Before approaching a discussion of the main question on this appeal, another point urged by respondent may be preliminarily disposed of. This is that in no event could the claim of the administratrix be allowed as a set-off against the trust company or bank after the latter had become insolvent; that on the insolvency of the bank its claim against the estate was an asset to be collected by the receiver and applied ratably to the payment of claims of creditors of the insolvent bank, including a pro rata payment only of the claim of the administratrix as a depositor; that to allow the claim of the administratrix as such depositor to be set off against the claim of the insolvent bank would be to defeat this right of pro rata distribution; that it would be an appropriation of this latter asset of the insolvent bank to the payment in full of the claim of the administratrix as a depositor and give her claim a preference to which it was not entitled over that of other depositors.

But the authorities do not sustain this contention. It is generally held that a receiver occupies no better position than that which was occupied by the party for whom he acts. He takes the property and rights of the one for whom he was appointed precisely in the same condition and subject to the same equities as existed before his appointment, and any defense, good against the original party, is good against the receiver.

> "The general rule is that a receiver acquires no greater interest in an estate than the one from whom he takes, and it follows that choses in action pass to him subject to any right of set-off existing at the time of his appointment." Pom. Eq. Remedies, vol. 1, §§ 186, 187.

This rule applies in the case of insolvent banks, so that the right of set-off is to be determined by the condition of things as they existed at the moment the bank became insolvent. Magee, Banks & Banking, p. 525; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Lamb, Receiver, v. Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; State v. Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

Pomeroy, in his work just referred to (section 188), declares that:

> "The principles involved in a set-off against a receiver have received particular application in the case of receivers of insolvent banks, when suing parties who had money on deposit at the bank when it became insolvent. It is said to be well settled that, in a suit by a receiver of an insolvent bank upon a note or obligation due the bank, the defendant will be allowed to set off his deposit or certificate of deposit held by him at the time of the suspension of the bank."

Within these principles the right of set-off in the matter at bar is to be determined as of the time when the bank was adjudged insolvent, and, if that right was available to the respective claimants at that time, the insolvency of the bank did not defeat it.

[3] Now as to the main question presented in this case, which is whether the administratrix of the estate of Bell could, as such, set off the claim of that estate for money thereof on deposit with the trust company or bank when it became insolvent, against the allowed claim of said bank against said estate, based upon a liability of the decedent Bell; all other claims and debts of the estate being paid at the time the set-off was pleaded.

Counsel for respondent contend: That this may not be done. That the right to assert a counterclaim or set-off and the conditions under which it may be availed of are prescribed by sections 438 and 440 of our Code of Civil Procedure. That thereunder, as declared by this court in McKean v. German Savings Bank, 118 Cal. 334, 50 Pac. 656:

> "Cross-demands of contending parties * * * can be deemed compensated, as far as they equal each other, only under such circumstances as that if one party had brought an action against the other a counterclaim could have been set up."

That mutuality is essential to the right of set-off. And they insist that this mutuality does not exist in the present case; that the claim of the bank is based on a debt created by Thomas Bell prior to his death, and arose out of a transaction between him and the bank, while the indebtedness relied on by the administratrix arose long after the death of Bell and out of a transaction between her and the bank; that the bank at no time had the right or power to apply the money deposited with it by the administratrix against the amount due it from the estate, nor would it have had a right to have this done if an action had been brought by the administratrix against it, while it was a going concern, to recover the moneys of the estate deposited with it; that hence at no time did there exist a mutual right of set-off between the parties; and that such right must be mutual or it does not exist at all.

Aside from the points made by respondent and which we have already considered, the only other attack which it makes upon the petition in intervention under its demurrer, or which it urges here in support of the ruling of the court sustaining it, is that it is apparent from the facts alleged in the petition that there is a want of mutality as to the respective demands of the parties. It is not claimed that, if this ground is not well taken, the petition does not make out a case entitling the petitioner to the relief asked for.

We are cited by respondent to a number of cases in support of their position that mutuality must exist between the demands in order to warrant a set-off between them, and particularly to cases where, in actions by administrators or executors to recover money belonging to the estate on a liability created after the death of the testator or intestate, it is held that claims against the estate, accruing prior to the death of the decedent, could not be asserted therein as set-offs. There can be no question but that the general rule as to the necessity of mutuality is as asserted by respondent, and it may be conceded that in a strict sense there is no mutuality between the claims here under consideration; they are not due to and from the same parties and in the same capacity. The general rule, too, is well settled, as claimed, that, in actions by executors or administrators upon a cause of action arising to them after the death of the testator or intestate, a defendant cannot set off a demand against the decedent existing at the time of his death. But this general rule is subject to exceptions which are applied in suits brought by executors or administrators such as above referred to, as well as in other actions, though we are now only concerned with ascertaining whether as to the claims here sought to be set off against each other an exception should apply.

It will be found, when cases of the character cited are examined, that where, in such actions by executors or administrators, the right of set-off has been denied to the defendants, such denial is not so much based on a want of mutuality (and that ground in many of them is not assigned as the reason), but is put upon the ground that the allowance of such a set-off might disturb the just and equal distribution of the assets of the estate among its creditors in any case where it was uncertain, from the unsettled condition of the estate, whether the assets were sufficient to pay all the debts of the decedent, or, in the case of an estate which was actually insolvent, the allowance of such set-off would not only prevent a pro rata distribution among its creditors, but, on the contrary, would give the creditor claiming the benefit of a set-off an undue preference over other creditors of the estate to the extent of full payment of his claim. Ency. of Law & Pro. vol. 18, p. 895, and cases cited there.

When, however, by reason of the special character of an asserted set-off, it appears that in no particular can the rights of any party interested in the assets of the estate be affected by its allowance, or when the estate is solvent and able to pay all claims against it, including the allowed claim of a defendant asserting it as a set-off, the courts in the first instance do not, and in the latter should not, apply the strict rule of mutuality to prevent the allowance of the set-off. It has been held that persons paying funeral expenses of a decedent may set off the amount thereof in an action by the executor or administrator upon a claim owed by them to the decedent in his lifetime. Adams v. Butts, 16 Pick. (Mass.) 343; Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Barbee v. Green, 86 N. C. 158. It is also held that, upon proof that all debts of the testator had been paid, an executor who was sole legatee could avail himself of a chose in action belonging to the estate as a counterclaim in an action against him. Blood v. Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490. Want of mutuality was not permitted in these cases cited to defeat the right of set-off; it being allowed in the first for the reason that other creditors of the estate could not be prejudiced, as the set-offs were preferred claims against the estate, and such set-off was allowed in the last for like reason.

We refer to these cases as showing that the rule of mutuality is not always controlling in actions by or against personal representatives of an estate which involves its assets, but that it will be departed from in cases where it appears that permitting the set-off to be interposed cannot in any respect embarrass the administration of the estate or prejudice the rights or interests of any other party interested in its assets.

We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, notwithstanding the respective demands are not mutual, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off against the claim of the other; that the right of the parties in that respect were reciprocal, and, as we have said, the insolvency of the bank did not affect the right of either to have this subsequently done.

That this should be so we are satisfied is apparent on consideration. In discussing the application of the principle, we will take the case of an individual creditor of the estate, with an allowed claim, against whom the administrator has some money demand representing assets of the estate arising from a transaction between them subsequent to the death of decedent. This will give a better opportunity for illustrating the principle, while not disturbing the relation of the actual parties here. Take the case of the creditor proceeding against the estate. Without having paid his indebtedness due to the administrator, he files his petition in the estate proceedings for payment of his allowed claim. The estate is solvent. In fact, the claimant may be its sole creditor. No other creditor of the estate would be prejudiced if the payment is made, and no other person interested in the assets will be affected. But the administrator resists the application for the order of payment and insists that the debt due him from the claimant representing assets of the estate should be set off against the allowed claim. What sound reason can be given why the strict rule of mutuality should be applied to deny the right of set-off? Nothing can be accomplished by it of just or fair advantage to the claimant creditor, nor any benefit arise to the estate. In fact, if the rule were applied, it might be of material disadvantage to the estate while unfairly advantageous to the creditor. The creditor may be insolvent, and it is well settled that the insolvency of a party against whom a set-off is claimed constitutes a sufficient ground for the allowance of a set-off not otherwise available. It may be that the demand due the administrator from the creditor constitutes the principal asset of the estate out of which to pay his claim, which of course would require a denial of the creditor's application until the administrator could collect the assets. The only effect of denying the right of set-off to the administrator in this situation would be to compel him to sue and enforce payment from the creditor if, he was solvent, and this for the sole purpose of thereupon paying it back to him in satisfaction of his claim. This would be an idle and senseless thing to require a court to do. These are special circumstances, but exist here; the bank is insolvent, and the debt owed by it to the administratrix represents all the money assets of the estate. Aside from this, however, in this matter at bar the circumstances present a situation where the rule of strict mutuality should, in consonance with obvious justice, be departed from and the set-off allowed. Here there is a solvent estate and a sole creditor of it, who is also in substantial effect its debtor. The bank is entitled to have its claim against the estate paid, but the administratrix is also entitled to have it pay its debt to her which represents assets of the estate. No injury can be worked to the creditor of the bank by permitting it, and it is entitled to no advantage over the estate through denying it. While the respective demands may not be strictly mutual, they are very intimately connected; the claimant in effect owes the estate and the estate owes him; both demands have relation to funds of the estate. This presents a situation where, in the interest of clear right and justice, an exception to the general rule of mutuality should be applied and the set-off allowed.

We are not in this opinion discussing any question of the jurisdiction of the superior court, sitting in probate in a proceeding by a creditor therein, to entertain and determine a claim of set-off, though we are satisfied it can, and so hold in an opinion this day filed, disposing of the other appeal taken by the administratrix, referred to in the beginning of this opinion (case No. 6698). We are here simply considering the question whether want of mutuality between the claims may be availed of to defeat the right of set-off in such a proceeding, and decide that it does not.

Being satisfied that the administratrix would have had the right to set off the indebtedness due her from the bank against the allowed claim of the bank, in a proceeding in the estate to enforce its payment, we are likewise satisfied that the bank would have had a reciprocal right, if the estate was solvent, to set off its allowed claim against the estate in a suit brought against it to recover the debt due the administratrix, as a depositor of the bank, and such debt representing assets of the estate. The same principle applies in both cases. Take a situation. The estate is solvent, with ample assets to pay all claims, and the claimant is the sole creditor. There is no dispute of the validity of his allowed claim. No possible prejudice can be suffered by the estate, its creditors, or any one interested in it, by allowing the set-off. On the contrary, the creditor may suffer great inconvenience, or a serious loss may result to him by denying him the right to do so, without any benefit whatever to any one. He may admit the indebtedness, but he is in such a position financially that he is not able to obtain the money to pay it. He could pay the estate if it would pay him. Possibly his debt to the estate is the largest asset, and his claim could not be paid except after he pays the estate. In this situation, or in any other where the estate is solvent, what sound reason can be presented for a refusal to allow the set-off? If want of mutuality may be invoked to do so, then the creditor is placed in a peculiarly hard situation without, as we have said, any benefit to the estate. If the administrator may proceed to judgment against him, it may result in a sacrifice of his property on execution to realize the amount due, and to what end? Solely to have the very money collected from him forthwith paid back to him in satisfaction of his claim. To deny the right of set-off under these circumstances simply for want of mutuality would be not only unjust and oppressive towards the creditor but also an idle and absurd act.

Applying these views to the respective demands of the parties here, we are satisfied that the facts stated in the petition in intervention shows that a right of set-off between these demands could have been asserted by either of them if any proceeding or action had been brought by the one against the other at the time of the insolvency of the bank; that this right was reciprocal; and that a sufficient cause for the relief asked by the administratrix was shown in her petition for intervention.

[4] It is further especially urged by respondent that the deposit with the bank was a special deposit, and hence its allowed claim could not be asserted in an action brought by the administratrix to recover it. It is not now necessary to discuss how far this would affect the present situation between the parties, even if the deposit was a special deposit, because the petition does not show this to be the fact. It may be assumed, from a general reference in the petition, that the order of court directing the administratrix to deposit the funds of the estate with the bank, to be withdrawn only on an order of the court, was made pursuant to an act of the Legislature (Statutes 1891, p. 490), permitting the court to do this. But the act does not provide that the funds so deposited shall constitute a special deposit. Nor does the circumstance that they might not be withdrawn unless by order of the court make them such. That had relation simply to the manner in which they might be withdrawn. It had nothing to do with the character of the deposit itself, which, as far as the petition for intervention shows, appears to have been a deposit generally, creating the relationship between the bank and the administratrix of debtor and creditor.

The order dismissing the petition in intervention is reversed.

We concur: MELVIN, J.; HENSHAW, J.; SHAW, J.; SLOSS, J.

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168 Cal. 183

THOMAS v. GERMAN GENERAL BENEV. SOCIETY. (S. F. 6354.)

(Supreme Court of California. July 6, 1914. Rehearing Denied Aug. 5, 1914.)

1. Master and Servant (§ 201*)—Injuries to Servant—Safety Appliance—Failure to Provide—Intervening Cause—Negligence of Fellow Servant.

Where plaintiff, a chef in a hospital, having used a freight elevator to go to the basement for supplies, on his return walked through the doorway in the darkness and fell into the elevator shaft, the elevator having been moved in the meantime and the doors left open by another servant under plaintiff's supervision, without his knowledge, the negligence of such underservant, who was plaintiff's fellow servant, was an intervening proximate cause, which precluded a recovery for plaintiff's injuries by reason of the defendant's negligence in omitting to perform a statutory duty to equip the elevator with automatic gates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515–534; Dec. Dig. § 201.*]

2. Charities (§ 45*)—Charitable Hospital—Injuries—Negligence—Liability.

The rule that a charitable institution is not liable for the negligence of its servants, provided it has used due care in selecting them, applies only to one who accepts the benefits of the charity.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 80, 81, 102–104; Dec. Dig. § 45.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Armin Thomas against the German General Benevolent Society. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Ralph Wilson, of San Francisco, for appellant. Arthur Brand, of San Francisco, for respondent.

HENSHAW, J. This action is an action for damages growing out of personal injuries suffered by plaintiff while he was in defendant's employ. The verdict of the jury was for plaintiff, and from the judgment which followed defendant appeals.

Plaintiff was the chef or head cook of the large hospital maintained by defendant. He had charge of the kitchen service. Under him were subordinate cooks and other assistants—a butcher, a vegetable man, a confectioner, a storekeeper, porters, and dishwashers. The kitchen was located upon the fifth floor of the hospital building, and from this floor an elevator ran to the basement, in which the storeroom was located. It was an electric elevator, and was operated by pulling a rope which ran perpendicularly through the elevator cage. It was so constructed that it would stop automatically upon the fifth floor and at the basement. It did not so stop automatically at the intermediate floors. This elevator was designed for the carrying of freight, consisting of kitchen supplies, which were thus transported from the storeroom in the basement to the kitchen upon the fifth floor. In the elevator was posted a conspicuous sign bearing the words, "For freight only. No passengers allowed." Nevertheless it was the known practice of the kitchen staff and other employés themselves to use this elevator. Plaintiff had himself frequently used it in transporting himself from the kitchen to the basement to take an inventory of the storeroom supplies, and to order the transportation of meats, vegetables and the like to his kitchen.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon the day of the accident the directors of the defendant society were dining at the hospital. A waiter reported to the chef that cheese was desired for their dinner. There was no cheese in the kitchen; and the chef himself entered the elevator and lowered himself to the basement floor, there to procure the desired article. This elevator was not equipped with automatic closing gates in front of the shaft, but was equipped with well-constructed doors closed by hand. It was the practice and duty of the employés when they moved this elevator to ring the bell connected therewith, and to close the gate. Plaintiff, on leaving this elevator in the basement, so closed the gate. He found the basement dark, and called to the storekeeper, telling him what he wanted. The storekeeper turned on a light in the compartment of his storeroom containing the cheeses, and plaintiff took upon his right arm such of the cheeses as he desired and started to return to the elevator. During the time of his absence the confectioner, a fellow employé and under the control of the plaintiff, opened the gate, entered the elevator and ascended to an upper floor without either ringing the bell or closing the gate behind him. Plaintiff moved along the darkened passageway with the cheeses on his right arm, and his left arm extended, believing that the elevator gate was closed as he had left it, and that his extended hand would encounter it. The gate being open, he stepped into the elevator shaft, and received the injuries complained of.

The complaint charged upon the facts above stated, and in addition upon the violation of an ordinance of the city and county of San Francisco, to the effect that:

> "All freight elevator shafts must be provided at each floor through which they pass with the latest and best appliance, style and design of automatic closing safety gates."

[1] Appellant's first propositions are that the evidence clearly establishes a thorough knowledge upon the part of the plaintiff of the appliance which he voluntarily used, that this appliance was not in itself mechanically imperfect, and that his assumption of risk in the use of it is clearly established, and bars his recovery. In the same connection and as related to this, the contributory negligence of plaintiff is urged herein; it being insisted that it was no part of plaintiff's duty to go to the basement for this supply; that he was the chef, and his duties were limited to the preparation of menus, the cooking of the food, and the general supervision of his kitchen staff; that he was a mere volunteer in going to the basement, and that if the basement was dark, as he declares, it was manifestly a part of his duty to call upon his subordinate, the storekeeper, to turn on the electric lights. To this, respondent makes answer that the doctrine of assumption of risk is based upon the maxim "Volenti non fit injuria," and that where an express mandatory statute requires an employer to do a specific act—as to furnish a particular appliance, or to supply protective guards—the rule of assumption of risk ceases to be applicable; in short, that the omission of a duty imposed by statute or ordinance precludes the defense of assumption of risk. We need not be at pains to discuss these contentions, nor the limitations upon them declared by appellant to exist. It may here be conceded that defendant had violated the duty imposed upon it by the ordinance above quoted in its failure to provide this freight elevator with automatic closing gates. It may be conceded that the assumption of risk is not open as a defense. It may be conceded that the contention touching the contributory negligence of plaintiff was resolved by the jury in his favor; but one proposition stands out clearly and indisputably—that is, that the proximate cause of the accident was the negligence of a fellow servant in the same general employment with plaintiff, and that such negligence bars plaintiff's right of recovery. The complaint itself, it will be remembered, pleads that while the plaintiff was obtaining these supplies another servant of the defendant caused the elevator to be moved from the basement floor; the evidence of plaintiff himself fixes that servant as the confectioner, who was beyond question not only a fellow servant, but under the general control of plaintiff. Mann v. O'Sullivan, 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149. It was his negligence in failing to perform what the plaintiff describes as the "duty" of all employés in using the elevator, viz., to ring the bell and close the gate, that was the proximate cause of the accident; and but for this servant's act of negligence the injury could not have occurred. The case, then, is one where, under the provisions of section 1970 of the Civil Code, a recovery is barred.

We need not be at pains to discuss at length the nature of such proximate and intervening cause. It has been repeatedly done. Vizelich v. Southern Pac. Co., 126 Cal.

589, 59 Pac. 129; Fogarty v. Southern Pac. Co., 151 Cal. 787, 91 Pac. 650; Schwartz v. Cal. G. Co., 163 Cal. 402, 125 Pac. 1044. These and all other authorities hold that, even where an appliance furnished by an employer is defective, the injured employé will not be entitled to recover if the injury was not the result of the defect, but was the result of the negligence of a coemployé. And where the negligence is predicated upon the failure to perform a duty commanded by statute or ordinance, the same rule applies. Says Thompson:

> "In all these cases it must appear that the violation of the ordinance was the proximate cause of the injuries received." 6 Thompson on Negligence, § 7868.

And says Cyc. (29 Cyc. 489):

> "The same rules are to be applied in determining the question whether an act is the proximate cause, whether such act is in violation of a statute or of some duty under general principles of law. In determining whether particular acts of negligence can be considered the proximate cause of injury, no distinction can properly be made between acts which constitute negligence because they are in conflict with statutory laws, and acts which are condemned as negligence under the general principles of law governing the conduct of men in relation to each other."

For the contrary doctrine respondent relies upon Groves v. Wimborne, 2 Q. B. 402 (1898). In that case the Factory Workshop Act imposed the mandatory duty upon the employer, for the protection of his employés, to fence and guard dangerous machinery. The arm of an employé was caught in unprotected cogwheels, and he was injured. There was evidence to show that originally this machinery had been protected. How and when the guards had been removed was not disclosed; but it was shown that they had not been there during the six months of plaintiff's employment. There was no question of intervening cause, or the negligence of a fellow servant, proximately contributing to the injury. The declaration of the Queen's Bench was the well-established one that where a duty is cast upon an employer he cannot escape responsibility for nonperformance by declaring that he had delegated it. Such a duty is either nondelegable, or, what is in legal effect the same thing, if delegated, the servant, to whom the duty is delegated, becomes a vice principal, and for his negligent act the master is responsible. The broad and obvious distinction between that case and the case at bar is that there was no immediate, intervening, proximate cause without which the injury would not have resulted.

[2] A final contention of appellant is that it is in no way responsible, by reason of the fact that it is a charitable institution, and that an action against it such as this will not lie. Such was the doctrine of some of the earlier cases. We need not enter into an elaborate discussion of the question. All of the authorities pro and con have been elaborately collated and learnedly reviewed in Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants.

The judgment appealed from is reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

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168 Cal. 161

BOND v. AICKLEY et al. (No. 6066.)

(Supreme Court of California. July 3, 1914.)

1. Quieting Title (§ 10*)—Title of Plaintiff—Sufficiency.

Where, in a suit to quiet title, neither party connects himself with the legal title, the one who proves prior possession in himself or those through whom he claims shows ownership sufficient to support a judgment within Civ. Code, § 1006, declaring that occupancy confers a title sufficient against all except the state and those having title by prescription, transfer, will, or succession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. § 10.*]

2. Quieting Title (§ 10*)—Title of Plaintiff—Sufficiency.

Possession is prima facie evidence of ownership, and, in the absence of any showing to the contrary, a person taking possession of and improving a vacant and unimproved lot, acquires ownership thereof, and under Civ. Code, § 1083, a remote grantee under quitclaim deeds has a title as against a subsequent grantee of the grantor where the subsequent grantee had notice by the recording of the prior deeds and of a lis pendens.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. § 10.*]

3. Deeds (§ 38*)—Description—Sufficiency.

Where a deed of a lot describes every distance in the description therein except one as so many feet, and the addition of the word "feet" to the remaining distance, given only as a number, will make a description covering the lot occupied by the grantor before execution of the deed, the word "feet" will be added to make the description complete.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65–79; Dec. Dig. § 38.*]

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Mary Bond against W. C. Aickley, prosecuted after his death against Ruth Aickley, his administratrix, and others. From a judgment for defendants, plaintiff appeals. Reversed.

F. A. Berlin, of Oakland, for appellant. Edward A. Holman and L. D. Manning, both of Oakland, for respondents.

SLOSS, J. The plaintiff brought this action against W. C. Aickley and others to quiet her title to a parcel of land in the city of Oakland. Pending the action, W. C. Aickley executed a deed of the premises to Irving E. Smith. Thereafter Aickley died, and Ruth Aickley, as administratrix of his estate, was substituted in his stead as a party defendant. Smith also appeared as a defendant, and answered, denying plaintiff's claim of ownership of the premises. Of the remaining defendants, some disclaimed, and the action was dismissed as to the others. The court found that plaintiff was not the owner or in the possession, or entitled to the possession of the premises; that at the commencement of the action W. C. Aickley was in the actual and peaceable possession thereof, and so continued until he conveyed such right of possession to Smith. The judgment decreed that the plaintiff should take nothing by this action, and that Smith have judgment against her for his costs. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

The principal contention is that the evidence does not support the finding that plaintiff was not the owner or entitled to the possession of the premises. The property in controversy is a strip about 37½ feet wide and 150 feet in length. None of the parties undertook to deraign title from a paramount source, the record containing nothing to indicate the condition or ownership of the property prior to 1892. In that year W. C. Aickley, named as a party defendant in this action, took possession of the lot, which was then vacant and unimproved, constructed a fence around it, and erected on it a cottage, in which, for a time, he resided. On April 16, 1894, he executed a quitclaim deed of the property to Annie Bond. On February 5, 1895, Annie Bond executed a like deed to the plaintiff, Mary Bond. In August, 1909, after the commencement of this action, Aickley conveyed the premises to Irving E. Smith, the respondent. A lis pendens had then been recorded, and Smith could therefore occupy no stronger position, as against plaintiff, than his grantor had had.

[1] The foregoing facts appear without substantial contradiction. They compel the conclusion that plaintiff was, as between the parties to this action, the owner of the premises, and was entitled to a decree quieting her title. At the trial both parties seem to have proceeded upon the theory that the plaintiff, being unable to show a clear paper title, was bound to prove the acquisition of a title by prescription. But this was not necessary, under the circumstances of the case. As between parties, neither of whom can connect himself with the legal title, the one who proves prior possession in himself, or those through whom he claims, makes out a sufficient showing of ownership. 15 Cyc. 30.

> "Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accesssion, transfer, will, or succession." Civ. Code, § 1006.

[2] It has always been the law in this state, as well as elsewhere, that possession is prima facie evidence of ownership. Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599; Nagle v. Macy, 9 Cal. 426; Ayres v. Bensley, 32 Cal. 620; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Morris v. Clarkin, 156 Cal. 16, 103 Pac. 180; Davis v. Crump, 162 Cal. 513, 123 Pac. 294. Accordingly, in the absence of anything to show a better or prior title, Aickley's possession, taken in 1892, established his ownership of the premises at that time. His quitclaim deed to Annie Bond transferred to her whatever title he then had (Civ. Code, § 1083; Graff v. Middleton, 43 Cal. 341; Lawrence v. Ballou, 37 Cal. 518; Rego v. Van Pelt, 65 Cal. 254, 3 Pac. 867), and Annie's subsequent deed vested the title in plaintiff. When this point was reached the plaintiff had established a perfect prima facie case, which could be overcome only by establishing a superior title in the defendant. There was no attempt to do this. Neither Ruth Aickley, as administratrix of W. C. Aickley, nor Smith, his grantee, stood in any better position than Aickley himself. To defeat plaintiff's claim, either of them would have had to show a title derived from a superior source, or acquired against plaintiff by adverse possession. As has been stated, no such showing was made. While there was some testimony tending to prove that Aickley had been in possession of the property at different times after the date of his deed to Annie Bond, and that he was in possession when the action was commenced, it is not pretended that the defendants proved the existence of the various elements necessary under our Code (Code Civ. Proc., § 325) to constitute adverse possession of real estate.

One of the findings declares that Smith was "the purchaser of said premises from W. C. Aickley in good faith." If this is intended as a finding that Smith bought without notice of Aickley's prior conveyance, the finding is against the evidence, because, first, Aickley's deed to Annie Bond had been recorded 10 years before, and, second, a lis pendens was, as we have already stated, of record when Smith took his deed.

[3] We may notice, briefly, the contention suggested by respondents, without argument or citation of authority, that the deed from Aickley to Annie Bond contained a description so indefinite as to make impossible the identification of the land sought to be conveyed. The defect consisted in the omission of the word "feet" in the call locating the starting point. This was described as a point on the northerly line of East Fifteenth street, "distant thereon 225 from the easterly line of 22d avenue." In view of the facts that every other distance in the deed is given in terms of "feet"; that the addition of this

word will make the description cover the lot in controversy as described in the complaint; that the lot so described is the one occupied by Aickley before the execution of the deed, and is, as may fairly be inferred, the only property in which he asserted any interest—we think the court below was justified in treating the description as sufficient, and admitting the deed in evidence. See Burton v. Mullenary, 147 Cal. 259, 81 Pac. 544; County of Los Angeles v. Hannon, 159 Cal. 37, 112 Pac. 878; Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

168 Cal. 261

STONE v. WOLFE. (L. A. 3362.)

(Supreme Court of California. July 9, 1914.)

1. MALICIOUS PROSECUTION (§ 21*)—PROBABLE CAUSE—ADVICE OF COUNSEL.

In a malicious prosecution, defendant cannot maintain the defense of probable cause by proving that he acted on the advice of counsel, unless he shows that he made to counsel, before receiving the advice, a full, fair, and honest statement of the facts then known to him, bearing on accused's guilt.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40–44; Dec. Dig. § 21.*]

2. MALICIOUS PROSECUTION (§ 21*)—PROBABLE CAUSE — ADVICE OF COUNSEL — EVIDENCE.

Plaintiff having agreed to employ workmen and buy material for the construction of a house for defendant, who was to pay the bills as the work progressed, plaintiff informed defendant that he needed $250 to pay wages for the week, which sum defendant gave to him. The time book for the week kept by the foreman showed that only $207.25 was due. On discovering this fact, defendant began a prosecution against plaintiff for receiving money under false pretenses. In fact, plaintiff, to defendant's knowledge, had other men working in a shop on window frames for the house, to whom $42.75 was owing, which plaintiff paid to them. In defendant's statement to the district attorney he exhibited the time book but said nothing about the men working on the frames. *Held*, that defendant did not make a full and true statement to the district attorney, and hence advice of counsel was no defense to an action for malicious prosecution.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 40–44; Dec. Dig. § 21.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by W. H. Stone against Isaac Wolfe. Judgment for plaintiff, and defendant appeals. Affirmed.

Baird & Gerecht, of Los Angeles, for appellant. Charles S. McKelvey, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment upon the judgment roll and a bill of exceptions setting forth the evidence.

The plaintiff sued for damages for malicious prosecution alleged to have been instituted against him by the defendant, maliciously and without probable cause. In his defense, the defendant claimed that the prosecution was begun and maintained in good faith, without malice, upon the advice of counsel that there was probable cause, after he had made to the counsel a full statement of the facts.

The evidence shows that the charge against the plaintiff was that of obtaining money under false pretenses. Stone had agreed to build a house for Wolfe, upon an arrangement that Stone was to employ the workmen and buy the material for Wolfe and that Wolfe was to furnish Stone with money to pay for the material and labor as the work progressed and the bills became due. On May 13, 1911, Stone stated to Wolfe that he needed $250 to pay wages for that week, whereupon Wolfe paid him that sum. The time book for the week, kept by the foreman at the house, showed that only $207.25 was due to the men working on the house for that period. Upon discovering this fact, Wolfe began the prosecution, claiming that Stone had procured the excess of $42.75 by means of a false statement as to the amount needed. There was evidence to the effect that some men were working in Stone's shop making window frames for that house, and that the $42.75 was owing to them and was paid to them by Stone. This, if true, showed that Stone's statement was not false and that there was, in fact, no cause for the prosecution. There was also evidence to show that Wolfe knew that these men were working at the shop on the frames and that in his statement to the district attorney he exhibited the time book for the men at the house, but said nothing at all about the men working at the shop upon the frames.

[1] The defendant, in malicious prosecution, cannot maintain the existence of probable cause in law by proving that he acted upon the advice of counsel, unless he also shows that he made to such counsel, before receiving the advice, a full, fair, and honest statement of the facts then known to him bearing upon the guilt of the accused person. Dawson v. Schloss, 93 Cal. 202, 29 Pac. 31; Dunlap v. New Zealand, etc., Co., 109 Cal. 371, 42 Pac. 29; Bliss v. Wyman, 7 Cal. 257; Wild v. Odell, 56 Cal. 136.

[2] From the evidence the trial court was justified in concluding that Wolfe knew of the men working at the shop and making frames for the house, to whom the remainder of the money might have been paid, but that he did not disclose this fact to his counsel or to the district attorney, in making his statement to them. This being the case, the defense of advice of counsel would not be available to defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

No other point is made in support of the appeal, and we find no error in the record.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

24 Cal. App. 573

REDGATE v. SOUTHERN PAC. CO.

(Civ. 1224.)

(District Court of Appeal, Third District, California. May 23, 1914.)

1. FALSE IMPRISONMENT (§ 15*)—LIABILITY.

A railroad company is not responsible for the acts of a police officer in arresting an employé on his own initiative.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5–67; Dec. Dig. § 15.*]

2. FALSE IMPRISONMENT (§ 15*)—LIABILITY.

Under St. 1901, p. 666, authorizing the Governor to appoint, on the application of any railroad company, a special policeman to act on the premises of the company, and making the company responsible civilly for any abuse of his authority, a railroad company is liable only for any abuse of the authority of an officer appointed on its application, though he serves at the expense of the company.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5–67; Dec. Dig. § 15.*]

3. FALSE IMPRISONMENT (§ 13*)—LIABILITY.

A special police officer, appointed by the Governor on the application of a railroad company to serve on the premises of the company, as authorized by St. 1901, p. 666, arrested without warrant an employé of the company on a charge of grand larceny. The officer had been informed by one participating in the larceny that the employé was his confederate, and assisted in consummating the theft. *Held*, that the officer empowered to make arrests without warrant for a felony was justified in arresting the employé, who could not maintain an action against the company for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 6, 7, 31, 59; Dec. Dig. § 13.*]

4. MALICIOUS PROSECUTION (§§ 15, 26*)—ACTIONS—MALICE—WANT OF PROBABLE CAUSE.

Plaintiff, suing for malicious prosecution, must, to recover, establish malice and want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 18, 59; Dec. Dig. §§ 15, 26.*]

5. MALICIOUS PROSECUTION (§ 20*)—"PROBABLE CAUSE"—WHAT IS.

"Probable cause" is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the criminal charge is true.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26–28; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 6, pp. 5618–5627; vol. 8, p. 7765.]

6. MALICIOUS PROSECUTION (§§ 23, 32*)—MALICE—WANT OF PROBABLE CAUSE.

Malice essential to constitute malicious prosecution may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 39, 67, 68; Dec. Dig. §§ 23, 32.*]

7. MALICIOUS PROSECUTION (§ 24*)—PROBABLE CAUSE—QUESTION OF LAW AND FACT.

Probable cause is a mixed question of law and fact, and where the circumstances clearly appear by uncontradicted evidence, the court must determine the question, and where prosecutor has reasonable grounds for his belief and acts thereon in good faith in causing the arrest of another, he cannot be subjected to damages for malicious prosecution, merely because accused is acquitted.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49–55; Dec. Dig. § 24.*]

8. MALICIOUS PROSECUTION (§ 56*)—MALICE—PRESUMPTION.

There is no presumption of malice essential to constitute malicious prosecution, and though malice may be inferred from want of probable cause, or other circumstances, yet malice must be proved as a fact.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112–116; Dec. Dig. § 56.*]

9. MALICIOUS PROSECUTION (§ 27*)—"MALICE"—WHAT IS.

To constitute "malice" essential to malicious prosecution, there must be malus animus, denoting that the party instituting the criminal proceedings is actuated by wrong motives, and he must have had in his mind some evil or sinister purpose.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 60; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, vol. 5, pp. 4298–4304; vol. 8, pp. 7712, 7713.]

10. MALICIOUS PROSECUTION (§ 64*)—MALICE—EVIDENCE.

On a trial for malicious prosecution, evidence, *held* not to justify an inference of malice.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151–153; Dec. Dig. § 64.*]

11. MALICIOUS PROSECUTION (§ 64*)—PROBABLE CAUSE—EVIDENCE.

In an action for malicious prosecution, evidence *held* not to support an inference of want of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151–153; Dec. Dig. § 64.*]

12. MALICIOUS PROSECUTION (§ 18*)—PROBABLE CAUSE—GUILT OF ACCUSED.

It is not necessary to justify an arrest that complainant be possessed of proofs of guilt of accused beyond a reasonable doubt, but all the law requires is that complainant has reasonable cause to believe that the crime has been committed, and that he is not actuated by malice, and one may rely on the uncorroborated testimony of a confederate, though a conviction cannot be had thereon.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 23, 24, 29–38; Dec. Dig. § 18.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Arthur Redgate against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellant. Austin Lewis and R. M. Royce, both of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CHIPMAN, P. J. The complaint charges that defendant "maliciously and without probable cause or any reason therefor, and against the will of the plaintiff and without warrant therefor, caused the plaintiff to be arrested and falsely imprisoned on or about the 4th day of March, 1907, in the city and county of San Francisco." In a second count it is charged that "defendant procured on the 8th day of March, 1907, from the police court" in said city and county, in an action entitled "The People of the State of California v. A. Redgate and Lloyd Newman, a warrant for the arrest of said plaintiff, which said warrant was founded upon a complaint sworn to at the instance of said defendant," charging "plaintiff with having feloniously stolen a certain case of shoes of the value of $75." The cause was tried by a jury and plaintiff had the verdict assessing his damages at $500, and judgment was accordingly entered for that amount. Defendant appeals from the judgment and from the order denying its motion for a new trial.

It appeared that a case of shoes had been stolen from the defendant's freight sheds where plaintiff was employed by defendant as a "checker," and Lloyd Newman was employed as a "trucker." Plaintiff, when called as a witness, thus explained their duties:

"The teamster puts freight on the truck right at the door, and he loads from my checking. The trucker brings it to the door. I tell the trucker what to bring to the door. I point out the things he shall put on the truck and bring down—I pick them out myself—they are dumped on a platform on the edge of the door. I check them to see that the numbers are all right and the goods."

It further appeared that James Regan, a detective sergeant of the city police department, of 17 years' service, found the case of shoes at a secondhand store kept by one Heintz, who informed Regan that one Murphy brought the case of shoes to Heintz's store "for a man named Classen to sell it." Classen was a teamster "driving a team and truck for the Clute Draying Company," and "was hauling a good deal of freight from the railroad shed of the Southern Pacific Company." Thomas Madden was a "special agent or special officer or railroad policeman for the S. P. Company" and had been, for about 15 years, stationed at Fourth and King streets. He testified:

"The loss of the shoes was reported first by the railroad, after that Mr. Regan spoke to me about it. It was soon after. He told me that he had located this particular case of shoes and they belonged to George H. Young. Then we worked together on the case. * * * Mr. Regan went and arrested Classen at the headquarters of Clute, Clute's barn; I went with him. He asked him what he knew about the shoes, and this man Classen said that he was not the only one that was in it, there were others; he said the men in the shed were in on that kind of work, so Mr. Regan asked him if he knew the men. He said he could not call them by name, but he knew them by delivering freight, and he could point them out and he came with Officer Regan and myself down to the shed, and he pointed out Redgate and Newman as the two men. Redgate was the one who was delivering the goods to him and Newman was the trucker, and that the two men made an agreement with him to take the shoes and sell them and divide up the proceeds between them. He said that in the presence of both men and me and Regan, and in their hearing. They denied it; they said they did not do it; they said but very little; they denied it; that was the nature of what they said. They were booked for larceny. A complaint was sworn to afterwards against them. I swore to that complaint. Mr. Regan and myself called upon Mr. Kelly before that complaint was drawn up. It was after these men were under arrest that I first took the matter up with Kelly."

Mr. Kelly was an attorney at law of 25 years' practice, and attended "to the criminal business of the Southern Pacific Company in this city and county." Witness Madden further testified:

"Q. When you took the matter up with Mr. Kelly, did you and Mr. Regan explain the evidence that was against these men? A. Everything just as I am telling it here, or as near as I can think it. I explained the matter to him as fully as I knew how.

"Mr. Moore: Q. Did you believe that Redgate and Newman had stood in on the proposition of putting that box of shoes on Classen's truck, with the idea that Classen would sell it, and they would cut up the proceeds? A. From what Classen said I did, from Classen's words. Q. Do you believe it still? A. From what the man told us, I believed it then, and I believe it still, the same as I did then. I do not remember when I first saw Mr. Kelly. The complaint was sworn to after the arrest."

Regan testified to much the same state of facts. He further testified:

"Q. Did you believe at the time they were arrested, at the time the complaint was filed, that there was probable cause to believe they had committed an act— A. I did. Q. Do you believe it yet? A. I do; the shoes were stolen, and they were all concerned in it, if Classen's word was to be believed. Classen drove a bonded warehouse truck, and he was not receiving any goods out of there that did not come from a certain place, as I understood from Classen any goods that he got on the truck outside of that he had no right to get it. Q. And you believe that he got it through this checker and this trucker? A. Well, that was his say-so; he accused them; he did not think over it a minute; when I asked him he said, 'I ain't the only one, Regan, there were others.' Newman and Redgate denied it. They said they did not know anything at all about it, they did not know he got this case out of there at all. They claimed that they had not given him this case. Q. Did they refuse to answer questions in regard to the matter, particular questions? A. They would not make any statement whatsoever. Q. Did you ask them to make a statement? A. I did."

Classen testified that he "got a box of shoes down there at the railroad sheds some time during the latter part of the month of February, 1907, from Mr. Redgate and William Newman." He explained what he did with the shoes and what took place after his arrest. Speaking of what he said to the arresting officers, he testified:

"I denied having taken them at first, and after a while I told them that I took them, they were given to me, and who the men were that gave them to me. I did not tell them the exact names of the parties, because I did not know what their names were, I only knew them working down there in the sheds. I told them that they told me to take the shoes. I told them they were two men working in the freight sheds, and they told me to take the shoes and dispose of them, and they told me who they were. I told them I did not know who they were; I would have to identify them. I did not know their names, who they were, I knew who they were. I stayed in jail until the following Monday, then I went down to the freight shed. I saw Mr. Redgate. I identified him as one of the men. I afterwards saw the other, Newman, in the city jail.

"Mr. Moore: Q. Was there also some conversation in jail when you saw Redgate and Newman and the officers afterwards? A. Yes, they spoke of these two men being the men, and what they did with it, and told them to tell everything out, and all like that; that was sort of really the conversation in substance, there was not much said.

"The Court: Q. Did you identify either of these two men whom you saw in the jail? A. Yes, sir. Q. Do you remember your saying anything as to whether these were the men, or what they said to you at the time? A. Well, I said they were the two men, that is what I told the officers at the time."

Attorney Frank P. Kelly testified:

"I attend to the criminal business of the Southern Pacific Company in this city and county. There was called to my attention in the first part of March, 1907, a matter in respect to Arthur Redgate and Lloyd Newman, employés of the company, at their freight shed here in this city. In the course of my business I was required to investigate all cases of theft from the sheds of the coast division. Mr. Regan came to me, and told me there was a theft of a box of shoes, and presented to me all the necessary testimony of witnesses to prove that the shoes had been stolen from there, and on their statement that they had these witnesses, I wrote out a complaint. It was read here in evidence—against Arthur Redgate and Lloyd Newman, who was checker and trucker at the same time. I wrote out the complaint against Arthur Redgate and Lloyd Newman, because from the officers' statement that Arthur Redgate as the receiving clerk there, or checker, had stated to Lloyd Newman that he should take the shoes and give them to somebody, and take them downtown and sell them, and bring back the proceeds, and divide them; that was the statement made to me. From the time the information was brought to me about 30 hours elapsed after they were arrested. This delay was for the reason that the officers did not have full information, so that I could make out the complaint. The names of the parties that came to me with this information were Officer Regan and Special Officer Madden of the Southern Pacific. * * * Q. Was anything stated by the officers to you with reference to a teamster of the name of Classen? A. Yes, sir; they told me that this man Classen, who, I think, they originally arrested, or did arrest, had hauled these shoes away to some place on Sixth street, that they had found them, and that Classen told them that Redgate and Newman had ordered him to haul them away."

The attention of the witness was called to the fact that the arrest was made on the 4th day of the month (March) and complaint was filed on the 8th. The witness stated that sometimes it occurs that complaints are made out a day or so before they are filed; that Redgate and Newman were already under arrest; that he, witness, had no feeling of malice towards these men, and that he had never seen Redgate before that time:

"Q. Did you feel at that time that there was proper cause to believe that Redgate had committed this offense? A. Yes, sir."

It appeared that Redgate and Newman were subsequently brought before the police court upon the complaint charging felony, to wit, grand larceny, at which time witnesses Classen, Regan, Heintz, and Young, the owner of the stolen shoes, testified, and, on April 6, 1907:

"The court, after having said matter under advisement, orders said action to be dismissed and the defendants discharged."

Plaintiff Redgate testified:

"I was arrested on the 4th day of March, 1907, at freight shed Fourth and Townsend streets, by Detectives Regan and Madden. I do not know whether either of them were railroad policemen or not. I did not know what they were arresting me for; they said, 'Come along with me.' I went to the office at the shed, turned in my bills, and explained to the clerk, and I said, 'These men are arresting me for something I don't know anything about.' They took me up in the Flood building. They took me into an office there, I suppose it was some railroad detective office. He asked me my name, where I was born, and that was all, and then they took me down to the jail on Eddy and Mason, and they charged me right there with grand larceny. They booked me on the book, my name, and charged me, and then they locked me up. I was in jail about three days. I got out on bonds after that. I had to have an attorney to get out. I paid him $50. I appeared for trial in the police court. I don't know the exact date, they did not bring my case up. Then it came up again. I was brought up before the court three times, the first time nothing was said or done, and I was taken back to jail—after I was released on bail, which was on the third day, I was twice brought before the court, and on the third occasion the charge was dismissed, and the only evidence on that occasion was some man who had the shoes stated he did not know us. Judge Conlin dismissed the case. At the present time I am a butcher. Notice of my arrest appeared in the Bulletin, Chronicle and Daily News."

The record of the trial shows that the witnesses above named testified at the preliminary hearing. Plaintiff testified, on cross-examination, that at the time he was arrested the officers brought Classen there, but witness testified that he did not hear any conversation, nor did he see Classen point him out; that when the detective asked him whether he had given Classen the shoes he said, "No, I had given him no shoes." He also testified that the records of the company showed that, on February 21st, the day it is claimed the goods disappeared, Classen signed a receipt to defendant for some goods belonging to the United States government, and that Newman was the trucker on that occasion, and that was the first time he had ever seen Classen. He further testified:

"I did not know what I was arrested for until I was booked—I did not know what they had Classen there for, I am sure, I suppose I thought they had him there, and arrested him and had him under watch. Classen was brought into a room with Newman and myself in the jail; I was asked if I knew him, so was Newman; we said, 'Yes.' I was asked if I wished to have a talk with him and said, 'No'—so did Newman."

Newman testified as follows:

"I had not been at sheds for five days prior to my arrest. I was arrested at 11:30 p. m., March 4, 1907, on China avenue, on my way home, 203 Paris street; by detectives brought to the city jail. Redgate was brought out, and asked if he knew me; he said, yes, I was his trucker. I was never asked about Redgate prior to my arrest. Redgate only had goods put on the trucks that appeared in the waybills. I was kept locked up at the jail three days before being taken to court—I was not taken to court because there was no charge; Redgate and I were jointly charged—as soon as I got before the court I gave bail."

The foregoing is substantially all the evidence in the case.

1. It is contended by appellant that the evidence is insufficient to sustain the first count of the complaint for false imprisonment.

[1, 2] The defendant had no connection with Regan who was a member of the police force of the city, and cannot be held responsible for his acts, for, as far as appears, he acted on his own initiative. Its responsibility, whatever it was, is for the acts of Madden alone. His powers were those of a peace officer, as will appear from the following act of the Legislature under which he was appointed:

"Section 1. The Governor of the state of California is hereby authorized and empowered, upon the application of any railroad or steamboat company, to appoint and commission during his pleasure one or more persons designated by such company and to serve at the expense of such company, as policeman or policemen, with the powers of police officers, and who, after being duly sworn, may act as such policeman or policemen upon the premises, cars or boats of such company. The company designating such person or persons shall be responsible civilly for any abuse of his or their authority.

"Sec. 2. Every such policeman shall, when on duty, wear in plain view a shield bearing the words 'railroad police,' or 'steamboat police,' as the case may be, and the name of the company for which he is commissioned." Stats. 1901, p. 666.

Defendant's liability, whatever it may be, for the acts of Madden, does not spring from the relation of employé or servant, for he bore no such relation to defendant. It has been frequently held, under statutes similar to the above quoted, that special officers appointed thereunder derive all their powers from the appointment made by the civil authorities, here by the Governor of the state. The authority to make arrests, with which plaintiff was clothed, was in terms given by the statute and in no sense can be said to arise from the relation of master and servant, or principal and agent, existing between the special officer and the company at whose application he was commissioned; and the fact that he is "to serve at the expense of such company" does not affect his status as that of a police officer. The rule of respondeat superior has no application where there is no evidence tending to show that the company was instrumental in causing the arrest or subsequent prosecution. The foregoing views are fully supported by the following cases, cited by appellant: Adler v. White City Construction Co., 147 Ill. App. 20; Samuel v. Wanamaker, 107 App. Div. 433, 95 N. Y. Supp. 270; Hershey v. O'Neil (C. C.) 36 Fed. 168, under the New York statute; Wells v. Washington Market Co., 19 D. C. 385; Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 46. Other cases are cited in the opinions to like effect. Where, however, the officer acts in a dual capacity, and the special policeman "reported for duty to the foreman of the defendant and acted in pursuance of instructions received from them," the defendant was held liable. Illinois Steel Co. v. Novak, 84 Ill. App. 641. See, also, where the head janitor and doorkeeper of a theater was also a special police officer and had not been relieved from his duties in the theater, in the discharge of which the question arose, Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 41 Am. St. Rep. 440. See, also, Brill v. Eddy, 115 Mo. 596, 22 S. W. 488.

It is very clear that defendant incurred no liability for the arrest and detention of plaintiff up to the time complaint was filed and warrant of arrest issued, unless it be for an "abuse of authority" by Madden, for no agent of the defendant had anything to do with the case to that time. We think, however, that Mr. Kelly's testimony shows that in preparing the complaint upon which alone a warrant of arrest could issue, and in subsequently conducting the examination, he was acting as the agent of defendant. We do not mean to hold that the defendant could not, without incurring a possible liability, employ an attorney to assist in the trial of the case after a complaint had been filed and the warrant of arrest was served, through some agency other than defendant's. What we hold is that, in assuming, as the attorney and agent of defendant, to advise the officers that there was sufficient evidence to hold the accused and in preparing the complaint and causing warrant to issue and in subsequently taking charge of the examination, as we may infer he did, Kelly placed the defendant in the attitude of an accuser, but it remained with plaintiff to show that it acted through malice and without probable cause. Furthermore, the statute, under which the special officer was appointed, expressly provides that the defendant "shall be responsible civilly for any abuse of his authority," which we take it means, in making the arrest, he must have had reasonable cause for believing that the accused had committed the crime for which he was arrested.

It results from the foregoing views that for the original arrest and detention under it, which was made without a warrant, the defendant is liable only for an abuse of the authority of the special officer who jointly with Detective Regan made the arrest; and defendant is liable for the subsequent proceedings initiated and conducted under the advice and direction of its attorney, Kelly, if his conduct was without probable cause and with malice. Inasmuch as both Kelly and Madden proceeded upon the same facts, we need only inquire whether Madden abused his authority in causing the arrest of plaintiff, and whether Kelly was legally justified in preparing the complaint against plaintiff and causing his alleged crime to be examined into.

[3] The evidence shows that plaintiff was arrested without a warrant and detained under that arrest until, upon the advice and direction of Kelly, a complaint was filed and a warrant was served, whereupon plaintiff gave bond and was released from custody. It seems to us that, under the circumstances, the special officer, Madden, did not abuse his authority, but was entirely justified in making the arrest.

Classen was a teamster and received freight only as delivered to him by plaintiff, the checker, and Newman, the trucker, both of whom were defendant's employés in charge of the freight shed. They were the persons through whom the theft, with the aid of Classen, could easily have been effected. Having traced the case of shoes from Heintz to Classen, he at first denied taking it, but finally admitted his participation, but claimed, what might very probably have been the fact, that others were implicated, and, when called upon to name them, he identified and pointed out plaintiff and Newman as his confederates, both of whom were, as we have seen, in a position to assist in consummating the theft. It seems to us that not only was Madden justified in arresting plaintiff, but would have been derelict in his duty not to have done so. He had the powers of a police officer (Act 1901, p. 666); and as such could make an arrest without a warrant, where a felony has been committed and "he has reasonable cause for believing the person arrested to have committed it." Pen. Code, § 836.

2. The second count in the complaint alleges that plaintiff was charged with the crime of felony and prosecuted by trial upon such charge "maliciously and without probable cause."

[4, 5] It was said in Smith v. Liverpool, etc., Ins. Co., 107 Cal. 432, 436, 40 Pac. 540, 542:

> "No principle is better established than that in actions for malicious prosecution the plaintiff must, in order to recover, establish not only malice, but want of probable cause. Those two elements are essential, and they must concur or the action will not lie. Potter v. Seale, 8 Cal. 217, 220; Anderson v. Coleman, 53 Cal. 188. 'The primary question to be considered in this class of cases,' as was said in Grant v. Moore, 29 Cal. 644, 'is the want of probable cause for the prosecution complained of, and this must be established before plaintiff can recover; and the burden of proof is upon the plaintiff.' Jones v. Jones, 71 Cal. 91 [11 Pac. 817]. Reasonable or probable cause has been defined to be: 'A suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' Potter v. Seale, supra, and cases there cited."

[6, 7] Malice may be inferred from want of probable cause, but the latter cannot be inferred from malice. Potter v. Seale, supra, 8 Cal. 220. Probable cause is a mixed question of law and fact, and where the circumstances clearly appear by uncontradicted testimony, it is the province of the court to determine the question of probable cause. Id. "Public policy and public security alike require that prosecutors should be protected by the law from civil liabilities; except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both concur" (Id.), and "if the prosecutor have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted." Carpenter v. Ashley, 15 Cal. App. 461, 467, 115 Pac. 268.

[8] There is no legal presumption of malice, and although malice may be inferred from want of probable cause or other circumstances, as an inference of fact, still, whether by inference or otherwise, it must be proven as a fact. Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672.

[9] "To constitute malice there must be malus animus, denoting that the party who instituted the proceedings was actuated by wrong motives" (26 Cyc. 48); i. e., he must have had in his mind some evil or sinister purpose.

[10] There is no evidence in the record directly indicating malice, nor are there any circumstances which would justify the inference of malice unless it may be inferred from proof of want of probable cause and from the discharge of plaintiff at the hearing of the complaint, and this latter circumstance in itself furnishes no basis for an inference of malice.

[11] We do not think there was evidence sufficient to support an inference of want of probable cause. The facts were fully stated to Mr. Kelly, who prepared the complaint. He did not know plaintiff, and he testified that he had no ill feeling towards him. He knew him to be a trusted employé of defendant, and had no reason or motive to prosecute him other than an honest belief from the facts given him that plaintiff was guilty and should be punished. He delayed a short time from taking immediate action to that end until he could investigate the case and satisfy himself that there was probable cause for filing a complaint, and we do not think the delay was so unreasonable as to warrant an inference that he, in his final action, was governed by motives of ill will or malice towards plaintiff, or proceeded otherwise than from what he believed and was justified in believing was his duty. Upon the subject

of probable cause the following California cases may be consulted: Dwain v. Descalso, 66 Cal. 415, 5 Pac. 903; Smith v. L. L. & G. Ins. Co., 107 Cal. 432, 40 Pac. 540; Davis v. Pac. Telegraph & Telephone Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Booraem v. Potter Hotel Co., 154 Cal. 99, 97 Pac. 65.

[12] It is claimed that, as plaintiff was the confederate of Classen and could not be convicted on the latter's uncorroborated testimony, it showed want of probable cause to arrest plaintiff on Classen's statement. It is not necessary to justify an arrest that the complainant be possessed of proofs of guilt beyond a reasonable doubt. All that the law requires is that the complainant have reasonable cause to believe that the crime has been committed, and that he is not actuated by malice. Classen occupied a position of some trust and confidence with his employer. There was nothing in his past life to awaken doubt as to the truthfulness of his story, and there was no reason why he should have falsely implicated plaintiff.

Atchison, T. & Santa Fé Ry. Co. v. Smith, 60 Kan. 4, 55 Pac. 272, was a case where the complaint was based mainly upon the confession of a confederate. There were some slight corroborating circumstances, as there were in the present case, but the charge rested chiefly on the confession. The person charged was acquitted, but in his subsequent action for malicious prosecution it was held that the company did not act without probable cause.

In our opinion Kelly was justified in taking the steps he did upon the information given him, and that plaintiff failed to establish either want of probable cause or malice.

Error is predicated of certain instructions given and certain others refused. We do not find it necessary to pass upon these assignments of error. It is not likely, should another trial take place, that the evidence would be materially different, in which case a verdict for plaintiff would not be permitted to stand.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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BRADY et al. v. DAVIS et al. (L. A. 3340.)

(Supreme Court of California. July 8, 1914.)

TAXATION (§ 553*)—ASSESSMENT—VALIDITY—AFFIDAVIT.

Pol. Code, § 3732, provides that the auditor shall deliver the corrected assessment books to the tax collector, with an affidavit attached thereto, declaring that he had received the assessment book from the supervisors, with the clerk's affidavit thereto affixed, and that he had corrected it to conform to the requirements of the State Board of Equalization; that he had reckoned the respective sums due as taxes, and had added up the columns of valuation, taxes, and acreage as required by law. *Held* that, where the assessment books were delivered to the collector without such affidavit, the auditor did the things required to be shown by the affidavit was immaterial, and the assessment was insufficient to support a sale of land attempted to be assessed for nonpayment of taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1057; Dec. Dig. § 553.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by M. F. Brady and another against M. M. Davis and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Walton J. Wood, Charles Lantz, and Davis, Lantz & Wood, all of Los Angeles, for appellants. Carter, Kirby & Henderson, of Los Angeles, for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ANGELLOTTI, J. Action to quiet title to a lot in the county of Los Angeles. The court found that plaintiffs were the owners of said lot and that defendants have no title or interest therein. Judgment was given accordingly. Defendants appeal from the judgment and from an order denying their motion for a new trial.

It is conceded that the plaintiffs were the owners of the property unless the title of their predecessor in interest had been divested by delinquent tax proceedings culminating in a deed from the state to the defendant M. M. Davis. The sale to the state and the subsequent sale to the defendant M. M. Davis were founded upon an assessment of the property for state and county taxes for the year 1894. It was shown without conflict that the auditor of Los Angeles county had not, at any time prior to the commencement of this action, made or attached to the assessment book for 1894, the year in which the taxes claimed to have been delinquent had been assessed, the affidavit required by section 3732 of the Political Code. In fact, it was made to appear that such affidavit has never been attached to said assessment book.

Regardless of other points made in support of affirmance, the judgment and order denying a new trial must be affirmed upon the authority of Moyer v. Wilson, 166 Cal. 261, 135 Pac. 1125. The fact that it was shown on the trial that the auditor did the things required to be shown by such affidavit is entirely immaterial. The actual annexing of the affidavit is essential to the validity of the proceedings, and such annexing must be made at least prior to the making of the sale to the state. Moyer v. Wilson, supra.

It is to be noted that judgment was ordered in favor of plaintiffs in this action only upon condition that the plaintiffs pay to the clerk of the court, for the use and benefit of the defendants, the amount, specifying it, of the purported taxes, penalties, interest, and costs against the property on the day of the sale of said property by the state, and the judgment recites that such payment was made.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

168 Cal. 140

LOS ANGELES GAS & ELECTRIC CORPORATION v. AMALGAMATED OIL CO. (L. A. 3240.)

(Supreme Court of California. July 3, 1914.)

1. Contracts (§ 278*)—Breach—Rights of Action—Performance by Plaintiff.

A party cannot recover damages for the breach of an entire contract, where he himself has failed, without lawful cause, to perform the covenants upon compliance with which the obligations of the defendant were dependent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207–1213; Dec. Dig. § 278.*]

2. Sales (§ 71*)—Construction—Quantity.

Where plaintiff agreed to purchase from defendant for a period of several years a sufficient quantity of crude oil to operate its plants over and above the amount agreed to be delivered to plaintiff by another company under yearly contracts providing for the delivery of not less than 12,500 nor more than 15,000 barrels per month, the act of plaintiff in purchasing from the second company more than the maximum quantity in some months and in others less than the minimum constituted a breach of contract authorizing defendant to refuse to perform, though the amount purchased by plaintiff from the second oil company during the year did not exceed the total of the maximum amounts, for the contract contemplated that whenever plaintiff needed more oil during a month than the maximum amount it should be purchased from defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189–196; Dec. Dig. § 71.*]

3. Sales (§ 176*)—Breach—Waiver.

A letter written the last month in the year informing defendant that plaintiff was receiving the balance of oil to make deliveries the maximum as contracted for with the second oil company was not notice that defendant had at other times received more than the maximum and at others less than the minimum, and so there was no waiver by defendant of plaintiff's breach of contract; for waiver presupposes knowledge of the facts which give the right.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436–444; Dec. Dig. § 176.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Los Angeles Gas & Electric Corporation against the Amalgamated Oil Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. A. Cheney, Herbert J. Goudge, and Le Roy M. Edwards, all of Los Angeles, for appellant. Ward Chapman, Warren E. Lloyd, Hunsaker & Britt, and O'Melveny, Stevens & Millikin, all of Los Angeles, for respondent.

SLOSS, J. This action was brought to recover damages for the alleged breach of a contract for the sale by the Associated Oil Company to the Los Angeles Gas & Electric Company of a sufficient quantity of oil (over and above the amounts already contracted for with other parties) to operate its gas and electric plants from February 1, 1905, to December 31, 1910. The plaintiff is the successor of the Los Angeles Gas & Electric Company. The contract was assigned by the Associated Oil Company to the defendant, Amalgamated Oil Company. We shall in this opinion refer to the plaintiff or its predecessor as the Gas Company, and to the defendant, Amalgamated Oil Company, or its assignor, as the Oil Company.

The contract has already received consideration at the hands of this court in Los Angeles Gas & Electric Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55, and its main features are set forth in the opinion there filed. In that action the plaintiff had sought to recover damages for the failure of the defendant to deliver certain oil demanded during the months of January and February, 1907. The plaintiff's allegation of performance on its part of all the obligations of the contract was put in issue by the answer. No evidence in support of the allegation was introduced by the plaintiff, and the defendant's motion for nonsuit was granted by the court. On the appeal the plaintiff's contention was that the contract was severable "into as many distinct agreements of sale as there were months in the term during which deliveries were to be made." The holding of this court was, however, that the contract was entire with respect to the covenants on the one part to take, and on the other to furnish, the oil required for the operation of plaintiff's plants during the specified term. This being so, it was incumbent on plaintiff to prove, as a prerequisite to its right to recover damages for the failure to deliver oil in January and February, 1907, that it had up to that point complied with its obligation to receive from the defendant all oil which it had contracted to take. Proof on this point lacking, the nonsuit was held to have been properly granted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Thereupon the present action was commenced to recover damages for the entire period remaining after the refusal of the defendant in December, 1906, or January, 1907, to deliver any more oil. In this action, as in the former one, the complaint alleged performance by the Gas Company of all the obligations imposed upon it under the contract. It alleged that on December 31, 1906, the defendant gave written notice to the Gas Company that said defendant no longer considered itself bound by the contract; that subsequent to said date the Gas Company demanded of the defendant that it furnish a quantity of crude oil; and that defendant refused to deliver said or any crude oil under the contract. It further alleged that, prior to the 31st day of December, 1906, the defendant had violated the contract by delivering to the Gas Company at various times in place of crude oil, as required and ordered under the terms of said contract, oil which had been "topped, skimmed, and from which had been removed by defendant the more volatile and lighter parts." Such topped oil, it was alleged was inferior to crude oil in gas making qualities. The Gas Company was not aware that the oil thus delivered had been topped until after the abandonment of the contract by the Oil Company. Damages were prayed for in the sum of $441,857.25.

The answer denies the performance by the Gas Company of all the obligations imposed upon it by the contract. It alleges that the notice of December 31, 1906, and the Oil Company's refusal thereafter to make any deliveries of oil under the contract, were caused by the breaches and violations of the contract theretofore committed by the Gas Company. It is admitted that the Oil Company delivered some 67,000 barrels of topped oil to the Gas Company, but denied that such topped oil was inferior in gas-making qualities to crude oil. The answer also pleads that the action is barred by the provisions of section 339 of the Code of Civil Procedure. By amendments to the pleadings issues were raised with respect to the receipt by plaintiff from the Union Oil Company, E. A. Summers, and R. F. Joyce of certain quantities of oil, in violation, as the defendant contended, of plaintiff's obligation to take from the defendant all oil required in the operation of the plants over and above the exceptions specified in the contract. The plaintiff's contentions, on the other hand, were and are that these purchases from the Union Oil Company and others were not in violation of defendant's rights under the contract, and that in any event the defendant had waived all objections to such purchases. The statement of further particulars with respect to these purchases may be deferred until we come to a discussion of the points of law made in connection therewith.

The court found that the defendant had violated the contract by delivering topped oil as alleged in the complaint, but that no such oil was delivered at any time prior to March 20, 1906. It found, in effect, that the plaintiff had committed a breach of the contract by purchasing 5,800 barrels of oil from one Joyce during the year 1905, and that defendant had no knowledge of such purchase at any time prior to December 31, 1906, and never consented to the delivery of such oil by Joyce. It further found that the plaintiff had violated the contract by making purchases of oil from the Union Oil Company during the years 1905 and 1906, and that defendant did not consent to such purchases. It found also that the cause of action stated in the complaint was barred by section 339 of the Code of Civil Procedure. As conclusions of law it determined that plaintiff was not entitled to take anything by its action, and that defendant was entitled to judgment for its costs. Judgment in accordance with these conclusions followed. The plaintiff appeals from the judgment.

The appellant founds its demand for a reversal upon the claim that several of the findings above outlined are contrary to the evidence.

[1] Without regard to the finding that the action was barred by limitation, it is, in effect, conceded, as it necessarily must be, that judgment in favor of the defendant necessarily followed from the findings that the plaintiff had violated the contract in material respects before any breach had been committed by the defendant, and that such violations by the plaintiff had not been waived by the defendant. A party cannot recover damages for the breach of an entire contract if he himself has failed, without lawful cause,

to perform the covenants, upon compliance with which the obligations of the defendant were dependent. Thus, in this case, a failure by the Gas Company to take from the Oil Company all of the oil agreed to be taken (or, which is the same thing, the taking of such oil from others) would deprive the plaintiff of the right to complain of the subsequent refusal of the defendant to furnish oil agreed to be delivered. This is the statement of an elementary rule, which requires, for present purposes, no citation of authority beyond the decision, already referred to, in the former litigation between the same parties. L. A. G. & E. Co. v. Amal. Oil Co., 156 Cal. 776, 106 Pac. 55. If, then, the findings that defendant committed no breach prior to March 20, 1906, that plaintiff had theretofore repeatedly broken the contract by purchasing oil from the Union Oil Company, and that such breaches had not been waived, are supported by sufficient evidence, we need look no further.

[2] We are satisfied that these findings are amply sustained by the record, and shall, therefore, have no occasion to discuss other interesting questions presented by counsel, such as the correctness of the lower court's determination that the action was barred, or the legal consequences resulting from the findings that some of the breaches committed by plaintiff were subsequent to breaches committed by the defendant.

The oil which the Gas Company bound itself, by this contract, to take from the Oil Company was "a sufficient quantity of crude oil to operate" its plants, "over and above the amounts heretofore contracted for to be delivered to said second party (Gas Company) during the term of this contract by others than said first party (Oil Company)." A list of said contracts and the amounts of oil covered thereby was referred to in the main contract and attached to it as an exhibit. The exhibit listed four contracts, all between the Gas Company and the Union Oil Company. Two of them are described as follows:

"1905. Union Oil Co. of Cal. not less than 12,500 nor more than 15,000 bbls. per month.

"1906. Union Oil Co. of Cal. Not less than 12,500 nor more than 15,000 bbls. per month."

The other two are for later periods, and are not important in the matter now under discussion.

These contracts between the Gas Company and the Union Oil Company were introduced in evidence. By a contract dated January 11, 1904 (described in the record as Exhibit BE), the Union Oil Company agreed to sell, and the Gas Company agreed to buy during the term of two years, 60,000 barrels of oil, at the rate of not more than 30,000 barrels per annum, nor more than 2,500 barrels per month. On February 17, 1904, a second contract (Exhibit BF) between the same parties was made, whereby the Union Oil Company agreed to sell and deliver, and the Gas Company to buy and receive, "fuel oil to the amount of, not to exceed, 12,500 barrels per month nor less than 10,000 barrels per month from the date hereof to and including December 31st, 1905, and not to exceed 15,000 barrels per month, nor less than 12,500 barrels per month during the calendar year 1906." These provisions were followed by stipulations covering grade and deliveries. It will be observed that the contract of January 11, 1904 (Exhibit BE), and that of February 17, 1904 (Exhibit BF), overlapped for the year 1905. Adding to the latter contract the 2,500 barrels per month provided for by the earlier one, it may properly be said that the parties had contracted for a delivery of not less than 12,500 barrels, and not more than 15,000 barrels, per month during the two years 1905 and 1906. And thus the contracts are described in the exhibit attached to the agreement between the parties to this action.

The court finds that during these years the gas company did order and receive from the Union Oil Company "for and during certain of the calendar months of said period less than 12,500 barrels per month, and for and during certain other calendar months of said period more than 15,000 barrels of oil per month." This finding is, as appellant concedes, supported by the evidence. Thus, taking a few months as examples, we find that in March, 1905, the Gas Company received from the Union Oil Company 17,259 barrels, in April, 1905, 20,384 barrels, in December, 1905, 32,866 barrels, in January, 1906, 28,835 barrels, while in May, June and July, 1905, the receipts were, respectively, 5,157, 9,981, and 8,912 barrels. These months were all prior to March, 1906, when, as the court finds, the defendant made its first breach of the contract by commencing the delivery of topped oil. It may be remarked, however, that the receipt of oil from the Union Oil Company in quantities of more than 15,000 or less than 12,500 barrels continued during the rest of 1906, the plaintiff thus receiving, in the months of November and December, 1906, in excess of 60,000 barrels. With the exception of this item of 60,000 barrels, the aggregate of the oil received from the Union Oil Company, as the court finds, "did not exceed the amount of oil which said Union Oil Company of California by the contracts referred to in the schedule attached to said contract" (i. e., the one here sued upon) "undertook to deliver during the years 1905 and 1906." It may be remarked in passing that this is not, as appellant contends, a finding that the Gas Company did not, in the aggregate, purchase of the Union Oil Company more oil than it was entitled to take from that company. The 60,000 odd barrels taken in November and December, 1906, are expressly excepted from the calculation. But, without regard to this point, we are brought to consider the question lying at the base of the branch of the case now under discussion, viz., whether the Gas Company violated the provisions of its contract with the Oil Company by taking oil from the Union Oil Company in quantities greater than the monthly maximum or less than the minimum called for by the terms of its contract with the said Union Oil Company. We entertain no doubt that this question must be answered here, as it was in the court below, in the affirmative. The construction of the contract between the parties herein, as affected by the contracts with the Union Oil Company, therein referred to, was discussed by the learned trial judge in an opinion, from which we quote as follows:

> "The contract which is the basis of this action —i. e., the contract between the Gas Company and the Associated Oil Company—requires the latter, during the term of the contract, to furnish the Gas Company with all the crude oil necessary to operate its plant, excepting only such oil as had theretofore been 'contracted for to be delivered' to the Gas Company by the Union Oil Company. The oil which the Gas Company had contracted for to be delivered by the Union Oil Company was not a fixed monthly quantity. For the years 1905 and 1906 it was a monthly amount not less than 12,500 barrels nor more than 15,000 barrels. The contract with the Union Oil Company required the latter to deliver to the Gas Company during each month of said two years an indefinite quantity of oil—a quantity ranging somewhere between said minimum and maximum amounts. None of these indefinite monthly quantities, ranging somewhere between said maximum and minimum quantities, became definite, fixed, or certain until in a particular month the Gas Company had ordered and received from the Union Oil Company the quantity for that particular month—a quantity not less than 12,500 nor more than 15,000 barrels. When, however, the Gas Company had actually received from the Union Oil Company, in any particular month, a quantity of oil ranging somewhere between 12,500 barrels and 15,000 barrels, the quantity so received for that month became the quantity 'contracted for to be delivered' to the Gas Company for that month.
>
> "The contract between the Gas Company and the Oil Company—the contract for the alleged breach of which plaintiff is seeking damages—was a contract for oil to be used in the Gas Company's plants. The contract contemplates that it shall be so used, and not otherwise.
>
> "The contract between the Amalgamated Oil Company and the Gas Company did not call for monthly deliveries, nor even weekly or daily deliveries; nor did it fix any prescribed period or periods of time during which deliveries should be made. By it the Oil Company agreed to furnish, and the Gas Company agreed to receive, all the oil necessary to meet the latter's 'requirements' in the manufacture of gas and electricity, except such as had theretofore been 'contracted for to be delivered to' the Gas Company by the Union Oil Company. The Gas Company's plants were in operation day and night—in practically continuous operation. It was necessary that it should always have on hand quantities of oil sufficient to operate its plants. The maximum monthly amounts which it had contracted for to be delivered by the Union Oil Company were not sufficient for its requirements in all the months of the year. Its business required it to have on hand at all times, or practically at all times, oil furnished by the defendant. This amount necessarily fluctuated. It was not the same at all the seasons of the year. But the defendant or its assignor was required to be prepared to make 'runs' into plaintiff's tanks on receiving from plaintiff 'three days' notice of its requirements.' So that, while the contract did not require the Oil Company to make monthly or even weekly or daily deliveries, it did contemplate a continuous series of deliveries—deliveries running over the whole term of the contract—and made whenever and as often as the Gas Company's requirements might necessitate, conditioned only by the Oil Company's right, before making any delivery, to receive three days' notice of the amount required by the Gas Company.
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> "So far I have treated the clause in the contract between the Amalgamated Oil Company and the Gas Company in which reference is made to the prior contracts as a clause providing that the Amalgamated Oil Company shall deliver all oil sufficient to operate the Gas Company's plant over and above the 'oil' theretofore 'contracted for to be delivered' by the Union Oil Company. But the provision is that the Amalgamated Oil Company shall furnish all the oil sufficient to operate the Gas Company's plants over and above the '*amounts*' theretofore contracted for to be delivered by the Union Oil Company. And it may be argued that, inasmuch as the Oil Company was to sell and deliver the oil sufficient to operate the Gas Company's plants, except the *amount* of oil contracted for to be delivered by the Union Oil Company, the Gas Company could add together all the maximum deliveries which it had the right to purchase and receive from the Union Oil Company, thus laying the foundation for the assertion of a right to cumulate the difference between the monthly amounts actually received from the Union Oil Company, in the months when it received less than the prescribed maximum, and the maximum amounts provided in the contracts with the Union Oil Company. But I am of the opinion that the result is the same, whether we read the clause in question as a provision excepting from the Gas Company's total requirements the '*oil* contracted for to be delivered' by the Union Oil Company or the *amounts* 'contracted for to be delivered' by the Union Oil Company. The reference is not to an aggregate amount, but to amounts. The amounts are monthly amounts. They are not, as has been shown, fixed or definite amounts. The monthly amount to be purchased and received from the Union Oil Company remained indefinite and uncertain until it was actually purchased for the month in which it was to be used by the Gas Company. When purchased, and not before, it became, the amount 'contracted for to be delivered' in or for the particular month for which it was purchased.
>
> "The Gas Company, of course, was not obligated to purchase and receive from defendant, or its assignor, *in* any particular month the oil necessary to meet its requirements during that month, over and above the amount purchased and received by it in that month from the Union Oil Company. So much of the oil furnished by the defendant as the Gas Company was obligated to purchase or receive from the defendant *for* any particular month it could purchase and receive from the defendant in some prior month or months. But if for any month the Gas Company purchased and received from the Union Oil Company a quantity of oil exceeding the maximum fixed in its said contracts with the Union Oil Company (thus decreasing the amount of oil which the defendant would otherwise have furnished for that month), or if for any month the Gas Company purchased and received from the Union Oil Company a quantity of oil less than the minimum fixed in its said contracts with the Union Oil Company (thus increasing the amount of oil which the defendant would otherwise have furnished for that month), the Gas Company would be guilty of a breach of its contract with the Oil Company.
>
> "From the foregoing it follows that the Gas Company, without violating its contract with the Associated Oil Company, could not cumu-

late the difference between the minima and maxima prescribed in its contracts with the Union Oil Company and receive and use such cumulations. Though the contract between the Gas Company and the Associated Oil Company was an entire contract and one which contemplated a continuous series of deliveries, covering the whole term of the contract, the contracts with the Union Oil Company contemplated monthly purchases and deliveries; i. e., the purchase of and receipt in each and every month of a quantity of oil not less than a prescribed minimum nor more than a prescribed maximum—an amount which, when ascertained at the end of the month, became the amount 'contracted for to be delivered' during that month by the Union Oil Company.

"For the same reason, the defendant, without violating its contract with the Associated Oil Company, could not anticipate in any month deliveries due from the Union Oil Company in future months. To the extent that by such anticipations the Gas Company purchased and received for any one month oil above the maximum prescribed for that month in its contracts with the Union Oil Company, it decreased the amount which the defendant would otherwise have furnished for that month. And, since the right to such anticipations is not given to the Gas Company in any of its contracts with the Union Oil Company, deliveries of such anticipations are not deliveries of oil 'contracted for to be delivered to' the Gas Company under any contract made by it with the Union Oil Company, and therefore such deliveries of anticipated oil, to the extent that they decreased the oil which the defendant would otherwise have furnished in or for any particular month, are breaches of the contract between the Gas Company and the Oil Company (Associated Oil Company).

"It is reasonable to infer that the Gas Company used in the operation of its plants all the oil which it ordered and received from the Union Oil Company; and therefore it is reasonable to infer that if, in any particular month, the Gas Company ordered and received from the Union Oil Company an amount of oil less than the minimum prescribed in its contract with the Union Oil Company, the defendant was called upon to supply for the Gas Company's needs, in operating its plants during that month, an amount of oil in excess of the amount which, under the contract between the Gas Company and the Associated Oil Company, the defendant could rightfully be called upon to supply for that month; and, in the same manner, it is reasonable to infer that if, in any particular month, the Gas Company ordered and received from the Union Oil Company an amount greater than the maximum prescribed in its contracts with the Union Oil Company, the defendant was called upon to supply for the Gas Company's needs in operating its plants an amount of oil less than the amount which, under the contract between the Gas Company and the Associated Oil Company, it was rightfully entitled to supply for that month."

We think the passages just quoted afford a sufficient and convincing refutation of the appellant's claim that the oil company was not concerned with the amounts of oil taken in the several months of 1905 and 1906 from the Union Oil Company, provided only that the aggregate so taken did not exceed the sum of the maximum amounts of 15,000 barrels per month, computed for the entire period. In the interpretation of contracts, so much depends upon the language used by the parties in the particular case that it is often impossible to find decisions which furnish any real assistance in solving the problem presented. In the present instance we content ourselves with citing Central Oil Co. v. Southern Refg. Co., 154 Cal. 165, 97 Pac. 177, as a case which lends substantial support to the construction here approved.

[3] The finding that the breaches which we have been discussing were not waived by the defendant is supported by sufficient evidence. The record is a very large one, and we must limit ourselves to a mere reference to the testimony which we regard as affording justification for the court's finding. While the defendant did, in December, 1905, receive a letter from plaintiff stating that said plaintiff was "at present receiving the balance of oil to make deliveries the maximum, as contracted for with the Union Oil Company," the testimony of defendant's officers and agents was that they had no knowledge, until shortly before the repudiation of the contract, that the plaintiff had disregarded the limitations of its contract with the Union Oil Company. Giving to this letter its full force, the only information it conveyed was that, in December, 1905, the gas company was receiving amounts which, if delivered in prior months, would have been within the maximum of 15,000 barrels per month. There was no suggestion that theretofore the deliveries had, in certain months, been short of the minimum, and, in others, in excess of the maximum contracted for. Waiver of a right presupposes knowledge of the facts which give the right, and the letter relied on falls far short of informing the defendant of the full extent of the breaches upon which it now relies. Furthermore, the contract was again broken by plaintiff in the months of January, February, and March, 1906, and these breaches were not brought to the attention of defendant by the letter of December 20, 1905.

For the same reasons, and others as well, the interview of January, 1906, in which an officer of defendant was advised of the taking of "the accumulated quantity for 1905 under the Union contract," followed by the continued delivery of oil by the defendant thereafter, did not require the court to find that the plaintiff's violations of the contract in the matter of purchases from the Union Oil Company had been waived. It may be added that there was testimony that defendant, at the time of the interview last mentioned, notified the plaintiff that the right to receive accumulated balances was not conceded.

Of the issue regarding defendant's violation of the contract, it is sufficient to say that the evidence fully supports the finding that the defendant was guilty of no such violation prior to March 20, 1906.

The conclusions stated dispose of the case. It being held that the particular findings considered in this opinion are supported by evidence, the judgment must stand, whether or not other contentions of the appellant be correct.

The judgment is affirmed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.; HENSHAW, J.

168 Cal. 204

MADSEN v. MARYLAND CASUALTY CO. OF BALTIMORE. (S. F. 6659.)

(Supreme Court of California. July 6, 1914.)

1. Insurance (§ 375*)—Accident Policy—Waiver of Condition—Power of Soliciting Agent.

A mere soliciting agent of an insurance company cannot waive conditions and warranties, and hence the fact that he, in writing an application, knew that a statement or warranty therein was false did not effect a waiver of the warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948–951, 956–965; Dec. Dig. § 375.*]

2. Insurance (§ 376*)—Policy—Limitation in Power of Agent—Validity.

A provision in a policy that no condition, warranty, etc., contained therein can be waived, altered, etc., by any soliciting agent is a valid limitation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952–955; Dec. Dig. § 376.*]

3. Insurance (§ 136*)—Acceptance of Policy—Effect.

An insured, by accepting a policy and retaining it without objection, is bound by its terms and cannot be heard to say that he did not read it or know its terms.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219–230; Dec. Dig. § 136.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Robert K. Madsen against the Maryland Casualty Company of Baltimore. Judgment for plaintiff, and defendant appeals. Reversed on rehearing.

Myrick & Deering, of San Francisco (James Walter Scott, of San Francisco, of counsel), for appellant. L. L. Cory, of Fresno, for respondent.

PER CURIAM. [1] A rehearing was granted in this case for further consideration of the principal question involved, namely, the power of a mere soliciting agent of an insurance company to effect the waiver of a warranty exacted from the insured by the insurer, either expressly or, as here, by himself writing the application for insurance and embodying a known false statement touching such warranty therein. Still further, a rehearing was granted because the identical question was before the court in another case, that of Sharman v. Continental Insurance Co., 138 Pac. 708. The decision in that case is controlling in this. It is to the effect, as there fully expressed, that such soliciting agent has not the power to waive conditions and warranties. The opinion of the District Court of Appeal hereto appended is therefore adopted, and the judgment appealed from is reversed.

"Appeal from judgment and order denying defendant's motion for a new trial. Plaintiff recovered judgment against defendant for the sum of $1,300 upon an accident insurance policy.

"One Graff, a soliciting agent for defendant, solicited the insurance from plaintiff, who was very deaf, as was well known to said Graff. The application for the policy was filled out by Graff, and without being signed, or read to or by plaintiff, was sent to the general agent of defendant. It contained a warranty to the effect that plaintiff was neither partially nor totally deaf. A policy was issued by the defendant and sent to plaintiff through the mail in August, 1904. It remained in his possession until and after the accident, which occurred in January, 1911.

"Among other things it in terms stated that it was issued 'in consideration of the warranties made in the application * * * (copy of which application is indorsed herein and made a part hereof).'

"A copy of the application was indorsed on the policy. The policy also contained the following condition: 'An agent has no authority to change this policy, nor to waive any of its provisions, nor shall notice to any agent or knowledge of his or any other person be held to effect a waiver or change in this contract, or any part of it. No change whatever in this policy and no waiver of its provisions shall be valid unless an indorsement is added thereto signed by the president or secretary of the company, expressing such change or waiver.

"Plaintiff placed this policy in his safe deposit box without reading it. It was for a term of one year, but for six successive years thereafter upon payment of the premium plaintiff procured from defendant renewal certificates as follows: 'In consideration of the premiums * * * Maryland Casualty Company of Baltimore hereby agrees to continue in force the above-numbered policy for twelve months, * * * provided the statements in the schedule of warranties in the original contract are true at this date, and that nothing exists at the date hereof to render the hazard greater than or different from that shown by said schedule.'

"Plaintiff was injured in a railroad accident. His deafness, which had existed from childhood and was permanent, in no way contributed to his injuries.

"No officer, agent, or other person connected with defendant, save Graff, had any knowledge of plaintiff's deafness. Graff, as we before stated, was but a soliciting agent.

"The points involved in this appeal are raised by specifications as to the insufficiency of the evidence to support the findings of fact, as well as to objections to certain evidence.

"Plaintiff's theory of the case is that the fact that Graff had knowledge of plaintiff's deafness charged the defendant with such knowledge, and effected a waiver of the warranty.

"But, aside from the fact that Graff was but a soliciting agent, the policy contains an express condition that no such waiver shall result from any such knowledge or notice.

[2] "That such a condition is a valid limitation upon the authority of a mere soliciting agent at least is now well established. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866; Fidelity & Casualty Co. of N. Y. v. Fresno Flume & Irrigation Co., 161 Cal. 466, 119 Pac. 646, 37 L. R. A. (N. S.) 322; Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293; Wilkens v. Mut. Ben. Reserve Fund Life Ins. Co., 54 Hun, 294, 7 N. Y. Supp. 589; Fitzmaurice v. Mutual Life Ins. Co., 84 Tex.

61, 19 S. W. 301. There is no pretense or claim that any fraud was practiced upon the plaintiff.

[3] "By accepting and retaining the contract without objection, plaintiff was bound by its terms and cannot now be heard to say that he did not read it or know its terms. Quinlan v. P. W. Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Cleaver v. Traders' Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908; Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Wierengo v. American Fire Ins. Co., 98 Mich. 621, 57 N. W. 833; McFarland v. St. Paul F. & M. Ins. Co., 46 Minn. 519, 49 N. W. 253; Reeve v. Phoenix Ins. Co., 23 La. Ann. 219; Overton v. Am. Cent. Ins. Co., 79 Mo. App. 1; Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Monitor Mut. Fire Ins. Co. v. Buffum, 115 Mass. 343; Conner v. Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127, 70 L. R. A. 106.

"The fact that the deafness did not contribute to the injury is of no consequence. This is conceded by respondent.

"From what has been said as to the law concerning the assured's acceptance of a policy, plaintiff must be assumed to have known of the terms and conditions of the contract. From this it follows that the findings made upon a contrary theory are not supported by the evidence, and the judgment and order must be reversed; and it is so ordered."

BEATTY, C. J., does not participate in the foregoing.

168 Cal. 112

LAW et al. v. SAN FRANCISCO GAS & ELECTRIC CO. (S. F. 6223.)

(Supreme Court of California. July 3, 1914. Rehearing Denied July 31, 1914)

1. Novation (§ 6*)—What Constitutes.

Where defendant agreed with plaintiffs, who owned three buildings, to supply all three buildings with steam, and plaintiffs sold two of the buildings, defendant consenting to an assignment of the contract and agreeing to supply the purchaser, there was a novation, under Civ. Code, § 1531, declaring that a novation is made by the substitution of a new obligation between the same parties with intent to extinguish the old one; defendant's agreement to supply the purchaser of the two buildings with steam in accordance with the contract with plaintiffs, and consent to the assignment, rendering the purchaser an independent customer.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 6; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 5, pp. 4848–4851; vol. 8, p. 7733.*]

2. Steam (§ 5*)—Contracts—Construction—Indivisible Contracts.

A contract to supply three separate buildings with steam is not an indivisible contract, and, upon a sale of two of the buildings, the contract may, with the consent of the power company, be assigned to purchaser

[Ed. Note.—For other cases, see Steam, Dec. Dig. § 5.*]

3. Steam (§ 5*)—Contracts—Construction—Liability of Contractor.

Where defendant agreed to supply three buildings owned by plaintiffs with steam, and, upon plaintiffs' sale of two of the buildings, consented to an assignment of the contract to the purchaser, defendant's obligation to furnish plaintiffs steam for the building retained was not dependent upon the continued existence of all three buildings; there being no provision in the contract for its abrogation in such event.

[Ed. Note.—For other cases, see Steam, Dec. Dig. § 5.*]

4. Steam (§ 5*)—Contract for Furnishing—Construction.

Where defendant, who agreed to furnish plaintiffs' three buildings with steam, consented to a partial assignment of the contract upon plaintiffs' sale of two of the buildings, the partial assignment relieved plaintiffs from the obligation to pay for steam for all three buildings, plaintiffs not occupying a position analogous to a lessee, who has assigned his lease, and hence plaintiffs may demand steam for the building retained, though the purchaser, after the destruction of the other buildings, did not require steam.

[Ed. Note.—For other cases, see Steam, Dec. Dig. § 5.*]

5. Steam (§ 5*)—Contracts—Construction.

Where defendant agreed to furnish plaintiff steam for three buildings, the contract providing that defendant should not be responsible for interruptions of service due to municipal interference, strikes, fires, actions of the elements, etc., it is no defense, to an action for damages for failure to furnish steam, that, after the destruction of defendant's plant, it was not rebuilt.

[Ed. Note.—For other cases, see Steam, Dec. Dig. § 5.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Hartland Law and another against the San Francisco Gas & Electric Company, a corporation. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. B. Bosley, of San Francisco, for appellant. Edgar C. Chapman, of San Francisco, for respondents.

MELVIN, J. Defendant appeals from a judgment entered in accordance with the award of arbitrators and from an order of the superior court refusing to vacate said award.

On or about the 20th day of July, 1905, the plaintiffs entered into a contract with the defendant corporation by which the latter agreed to furnish steam for heating the Monadnock, Rialto, and Crossley buildings situated in the city and county of San Francisco. At that time plaintiffs owned all three of these buildings. The steam was generated at the manufactory of defendant known as "Station C," and under the terms of the contract was to be delivered at a designated point to the pipes of plaintiffs running to said buildings. The corporation agreed to furnish steam for 24 hours a day at an approximate pressure of 100 pounds, and payment was to be made at the rate of one cent per cubic foot of distilled water returned through meters from the heating systems. The life of the agreement was to be ten years. Under this contract steam was delivered and paid for. On the 16th of March, 1906, plaintiffs conveyed the Rialto and Crossley buildings to Mrs. Theresa A. Oelrichs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On that date the president of the San Francisco Gas & Electric Company, Mr. John A. Britton, wrote to Messrs. Tobin & Tobin, attorneys for Mrs. Oelrichs, consenting that the contract for the supply of steam might be assigned to her in so far as it related to the two buildings which she had purchased. The letter also contained the following paragraph:

"Should it be your client's desire to have a separate contract made upon the same terms, ending at the same period of time as the contract with Mr. Law, I shall be pleased, on behalf of the San Francisco Gas & Electric Company, to enter into such a contract at your pleasure."

On the 17th of March, 1906, plaintiffs assigned the contract of July 20, 1905, in so far as it affected and applied to the Crossley and Rialto buildings, to Mrs. Oelrichs, and the assignment was delivered to her. Said assignment has never been canceled or rescinded. Mrs. Oelrichs never accepted defendant's offer to enter into a separate contract regarding the two buildings which she had purchased from the Law brothers.

On the 18th day of April, 1906, in the great conflagration in San Francisco the Crossley and Rialto buildings were practically destroyed, and the Monadnock building, together with defendant's Station C, were partly demolished. At the time of the arbitration the two buildings belonging to Mrs. Oelrichs had not been rebuilt, but the plaintiffs had reconstructed the Monadnock building, had demanded steam from defendant, and had been refused. Station C, the only plant which defendant had owned prior to April 18, 1906, from which it could supply steam under its contract, had not been rebuilt with a view to continuing steam service. These and other facts were submitted to a board of arbitrators, and the three following questions were, by said submission, propounded to them:

"(a) Was said contract of July 20, 1905, extinguished by reason of all or any of the facts herein recited and agreed upon? And (b) Was the further performance by the defendant of the said contract of July 20, 1905, excused by reason of all or any of the facts hereinbefore recited and agreed upon? And (c) If it shall be determined by said arbitrators that the said contract of July 20, 1905, was not extinguished, and that the further performance thereof by the defendant after the 18th day of April, 1906, was not excused by reason of all or any of the facts hereinbefore recited and agreed upon, then, and in that event only, what is the amount of the loss and damage which the plaintiffs have suffered by reason of the defendant's failure and refusal to further perform said contract of July 20, 1905, and to furnish steam under and pursuant to the provisions thereof for the heating of said Monadnock building subsequent to the 18th day of April, 1906?"

The arbitrators took testimony, considered the matters involved, and made a report in which the first two interrogatories were answered in the negative, and the damages were fixed in the sum of $14,595.

Passing, without deciding, the contention that defendant's attack on the award and judgment entered thereon is not in accord with the provisions of section 1287 of the Code of Civil Procedure, we will consider the arguments of counsel for appellant upon the mistakes of law by which he insists the arbitrators failed properly to analyze the contract and to give the award which a proper analysis would have made inevitable. He relies upon the following propositions:

(1) The contract of July 20, 1905, was in its nature entire and indivisible.

(2) The obligations arising under said contract were contingent upon the continued existence of the three buildings; further performance being excused by the destruction of two of them.

(3) The contract was rescinded by defendant's action in that regard because of partial failure of consideration resulting from destruction of two of the buildings.

(4) The assignment to Mrs. Oelrichs did not modify the obligation of plaintiffs to take and pay for all of the steam necessary for the heating of the three buildings.

(5) The obligations of the parties to continue performance of the contract were contingent upon the existence of defendant's steam plant, and defendant was excused by the destruction thereof from further performance.

[1, 2] It is doubtless true, as appellant's counsel contends, that ordinarily when a contract is made with reference to several parcels of property belonging to one person, the obligations of the agreement will not be met by performance with reference to one of them. Thus in Sterling v. Gregory, 149 Cal. 118, 85 Pac. 305, where the defendant had agreed to purchase all of the oranges from three groves, all belonging to plaintiff, the sale by the latter of the fruit from two of the orchards was held to be a breach of the agreement sufficient to support a rescission. In McConnell v. Corona City Water Co., 149 Cal. 61, 85 Pac. 929, 8 L. R. A. (N. S.) 1171, this court held that the contract for driving a tunnel a certain distance was indivisible, but held, nevertheless, that where part of the tunnel caved in, by reason of the failure of defendant to furnish proper timbers, plaintiff might sue for the value of the work done and might obtain damages for loss of estimated profits. So in Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402, it was held that a contract for the sale of "all phosphate rock which should be needed for the ordinary requirements of plaintiff's factory" was a single contract and not a number of agreements for the sale of definite quantities of rock as ordered from time to time.

Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, involved a contract for the delivery of 5,000 tons of rails, 1,000 tons during each of five specified months. It was held that partial default in delivery affected the entire contract. But in none of these cited cases was there involved a partial assignment of the contract with the assent of both parties. Respondents insist that the partial assignment to Mrs. Oelrichs with the consent of the defendant amounted to a novation. Appellant's position is that it assented only to the assignment of the benefits of the contract without consenting to the relief of plaintiffs from the obligations thereof. But, as respondents insist, they had the right to make such an assignment without the consent of the other party to the agreement. There can be little doubt that the intention of the defendant was to release the Laws and to substitute their vendee as to that part of the contract relating to the buildings purchased by her. The offer made by the president of the corporation to enter into a separate contract with her for the supply of steam to her two buildings indicates unerringly such intention. It is argued that Mrs. Oelrichs' failure to accept the offer of a separate contract prevented novation; but the plaintiffs would not have been parties to that new agreement, and, if the position of appellant is correct, their original contract was held in suspense until the action of Mrs. Oelrichs and defendant in entering into a new agreement of which they (the plaintiffs) might have no knowledge. The letter of the president of the defendant corporation to Mrs. Oelrichs was accepted in all particulars by the plaintiffs because the assignment of a part of the contract to their vendee was indorsed upon it. In effect that letter said to them and to her:

> "This corporation will allow the Law brothers to substitute their vendee for themselves in that part of the agreement relating to the Rialto and Crossley buildings, and if she wants a more formal substitution we will make a new contract with her."

The transaction was a novation under section 1531 of the Civil Code. By the terms of the original agreement the defendant corporation was empowered to use the pipe system of plaintiffs, if necessary in delivering steam to other customers. If such deliveries had been made, could the company have refused to furnish steam to the three buildings originally owned by the plaintiffs because the other customers had declined to accept delivery after the fire? Assuredly not. The assignment with defendant's consent of the contract for steam to heat the Crossley and the Rialto and the offer by defendant to execute a separate contract with Mrs. Oelrichs had the effect of making her a customer of the San Francisco Gas & Electric Company just as if she had caused that corporation under that contract to make connections of its steam pipes between the system of plaintiffs and some building not included in the original scheme. In other words, the Crossley and Rialto buildings were placed in the same category with newly connected buildings. There was nothing in the original contract limiting the activities of the corporation to the supply of steam to the three buildings of the Law brothers. On the contrary, there was provision for extension, if need be, of the defendant's business of steam supply. In the conduct of such business there would be no essential indivisibility of the subject-matter of the various agreements preventing their assignment, with the consent of the company furnishing the steam, whenever a building connected with the system should be sold. We cannot say that the contract was one, the subject-matter of which might not be divided by consent of the parties.

[3, 4] It is argued that the obligation of the parties to perform the contract of July 20, 1905, depended upon the continued existence of the three buildings, and that performance was excused by the destruction of two of them. In this behalf appellant cities such authorities as Taylor v. Caldwell, 3 B. & S. 833, where the rule is thus announced:

> "There seems no doubt that, where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. * * * But this rule is only applicable when the contract is positive and absolute and not subject to any condition, either express or implied, and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

The facts in that case were quite different from those involved here. One party to the contract agreed to give to the other the use of a certain music hall on specified days. By the accidental burning of the hall both parties were discharged from the contract. There is nothing in the contract before us, either express or implied, which brings it under the rule in Taylor v. Caldwell and similar authorities cited by appellant. Dexter v. Norton, 47 N. Y. 63, 7 Am. Rep. 415, cited in this behalf, is easily distinguishable from the case at bar. In the opinion in that case it was held that an obligation to deliver specific articles of personal property, namely, certain designated bales of cotton, was excused by the destruction of the property by fire without fault on the part of the vendor. The general rule, however, was there declared to be that, where a person actually contracts to do a certain lawful and not impossible thing, neither inevitable accident nor those events denominated acts of God will excuse him; the reason for the rule being that he might have provided for such contingencies by contract. In Lorillard v. Clyde, 142 N. Y. 458, 37 N. E. 489, 24 L. R. A. 113, the court was considering a contract by which certain dividends of a corporation were guaranteed. Dissolution of the corporation without fault of either party was held a sufficient reason for failure to perform. The agreement between the parties in the case now under discussion was drawn in anticipation of the possibility of interruption in the service by reason of fire or other destructive force, yet no provision was made for abrogation of the contract as the result of such event. The paragraph on this subject is as follows:

> "This company will not be responsible for interruptions of said service due to municipal interference, strikes, fires, actions of the elements, or causes beyond its control, but will endeavor to furnish an uninterrupted supply."

It is contended that the partial assignment of the contract did not operate to relieve the assignors from the obligation to pay for steam for the three buildings, and in this behalf an attempt is made to draw an analogy between this agreement and a lease. It is true that authorities are not wanting for the proposition that the assignment of a lease, even with the lessor's consent, does not necessarily relieve the lessee from the liability for any breach of covenant or condition contained therein. Clarke v. Cummings, 5 Barb. (N. Y.) 339; Jackson v. Clark, 7 Johns. (N. Y.) 227. But in a lease there is ordinarily a privity of estate and a privity of contract between lessor and lessee; therefore the assignment of the lease, considered as an estate in land, does not necessarily carry with it the assignment of an express covenant to pay rent. In this contract there was no stipulation for payment by plaintiffs for all of the steam furnished at all events. They were to pay for all the steam delivered at the three buildings, but the general assignment of the contract, so far as it affected and applied to two of the buildings, carried with it the obligations and benefits relating to the entire subject-matter of the agreement, so far as those two buildings were involved. There was no privity of contract as distinguished from privity of estate, and consequently no analogy between this assignment and the transfer of the ordinary lease.

[5] Appellant's counsel insists that continued existence of the steam plant, as well as continued existence of all the buildings, were conditions and essential parts of the existence of the contract of July 20, 1905. This argument is met by the clause quoted above, in which interruption of the service by fire or other destructive agency is excused but not made the basis for the termination of the status of the parties.

We conclude, therefore, that the contract was severed by the act of the parties on March 17, 1906, culminating in the assignment to Mrs. Oelrichs of the part relating to the two buildings which she had purchased; and that this severance resulted in a novation. The contract was then not one depending solely upon the continued existence either of all of the buildings or of the steam producing machinery at defendant's Station C. It follows that plaintiffs were entitled to an award of damages for the refusal of the San Francisco Gas & Electric Company to continue to furnish steam to the Monadnock building, on account of which they were obliged to make expensive changes in their heating system. It is not asserted that, if the defendant was bound to continue furnishing steam to plaintiffs as requested, the amount of damages fixed by the arbitrators was excessive.

The judgment and order are therefore affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

168 Cal. 227

POSTLETHWAITE v. MINOR et al.

(S. F. 6075.)

(Supreme Court of California. July 6, 1914. Rehearing Denied Aug. 5, 1914.)

1. APPEAL AND ERROR (§ 959*) — REVIEW — DISCRETION OF LOWER COURT—PLEADING—AMENDMENT.

The discretion of the court in allowing amendments is so broad that the Supreme Court will disturb it only upon a distinct showing of an abuse of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. § 959.*]

2. GUARANTY (§ 6*)—AGREEMENTS TO GUARANTEE—REMEDY FOR BREACH.

A provision of an agreement for the formation of a corporation that certain of the parties should indorse and guarantee the payment of bonds of the corporation to be issued to another party was entirely executory and contemplated a future guaranty of the bonds by indorsement and was not a present guaranty, and hence the remedy for the failure of such parties to indorse the bonds was not by an action against them as guarantors but by a suit for specific performance or other appropriate action on the agreement to guarantee or on the breach thereof, in view of Civ. Code, § 3109, providing that one who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 8; Dec. Dig. § 6.*]

3. GUARANTY (§ 27*) — CONSTRUCTION OF GUARANTY.

Contracts of guaranty create no liability beyond what is expressed in the terms used, as interpreted by the proper rules of construction, and the words are not to be interpreted, save in their ordinary popular sense.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. § 27.*]

4. GUARANTY (§ 30*)—AGREEMENTS TO GUARANTEE—RIGHT OF ACTION.

The holder of bonds of a corporation, who was not a party to the agreement to form such corporation nor interested in it by transfer, assignment, or otherwise, could not sue certain parties to such agreement for their breach of their agreement therein to indorse such bonds.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 30–32; Dec. Dig. § 30.*]

5. GUARANTY (§ 76*)—AGREEMENTS TO GUARANTEE—ASSIGNMENT.

The guaranty of a note or bill, made in a separate instrument, will not pass by the transfer of the note or bill.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 86; Dec. Dig. § 76.*]

6. GUARANTY (§ 75*)—ACTIONS AGAINST GUARANTOR—FORM OF REMEDY.

As a general rule an action against a guarantor must be brought specially upon the contract of guaranty itself.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 85; Dec. Dig. § 75.*]

Shaw and Henshaw, JJ., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Hugh W. Postlethwaite against Isaac Minor, Sr., and others. From a judgment for defendants and orders discharging a writ of attachment and denying a new trial, plaintiff appeals. Affirmed.

John A. Wright, of San Francisco (Geo. F. Hatton and H. F. Peart, both of San Francisco, of counsel), for appellant. Knight & Heggerty, Frank McGowan, Gillett & Cutler, and McGowan & Westlake, all of San Francisco, and Otto C. Gregor, of Eureka, for respondents.

MELVIN, J. Plaintiff appeals from a judgment against him, from an order discharging a writ of attachment, and from an order denying his motion for a new trial.

The action was one whereby plaintiff sought to enforce an alleged guaranty by defendants of certain bonds of the Central Casket & Supply Company (a corporation). The court found that 87 of the 90 bonds issued by the Central Casket & Supply Company together with interest thereon from February 15, 1906, remained unpaid; that there was due to the plaintiff, as owner and holder of said bonds, something more than $55,000, but that the defendants did not, nor did either or any of them, in any manner guarantee the payment of any of said bonds either on the 21st of June, 1905, the day alleged in the complaint, or at any other time. Therefore, as learned counsel for appellant aptly phrases it:

> "The existence or nonexistence of the guaranty is therefore the question which forms the core of the case."

Plaintiff does not assert that the bonds were actually and physically indorsed by the defendant, but his position is that by a certain contract, called in the briefs the "fundamental agreement," in which the defendants promised that they would, under the conditions mentioned therein, jointly and severally indorse and guarantee the payment of the bonds, they had become indorsers by virtue of the completion of the contract in all other particulars. The agreement in question was one looking to the formation of the Central Casket & Supply Company. The parties were the California Mercantile Investment Company (party of the first part), Isaac Minor, Sr., Joseph Ancell, and D. K. Minor (parties, repectively, of the second, third, and fourth parts). To the new enterprise the party of the first part was to contribute all of the assets and good will of the Central Hardware & Supply Company of San Francisco, of which it owned all of the capital stock, and it was to subscribe for 60,000 shares of the capital stock of 300,000 shares of the par value of $1 per share. The other parties were to contribute all of the assets and good will of the D. K. Minor Company (a corporation) and to subscribe for and take in payment therefor 140,000 shares of the capital stock of the Central Casket & Supply Company. It was also agreed that immediately upon the formation of the new corporation, in addition to delivering 60,000 shares of its stock to the party of the first part, it would issue and deliver its promissory note for $25,000, payable one year after date, with interest at the rate of 6 per cent. per annum, and 90 bonds for $500 each, bearing interest at 5 per cent. per annum. There were other features of the agreement relating to a cash payment by the Minors and Ancell and certain credits to the various parties to be given upon the books of the new corporation, but they need not be detailed here. The fourth paragraph of the fundamental agreement is as follows:

> "The parties of the second, third and fourth parts will jointly and severally indorse and guarantee the payment of the said promissory note and bonds of the proposed corporation so to be given to the party of the first part and will waive any and all right and claim upon the party of the first part or its assigns for contribution or liability of any kind to pay any part of the said promissory note or bonds otherwise than out of the assets of the said proposed corporation; and as security for the indorsement and guaranty by the parties of the second, third and fourth parts of the said promissory note and bonds and for the waiver of all claims on the party of the first part or its assigns to pay any part of the said promissory note or bonds otherwise than out of the assets of the proposed corporation the parties of the second, third and fourth parts shall deposit in escrow in the Central Trust Company of California all of the stock of the proposed corporation hereinafter subscribed for by them until the said promissory note and bonds are fully paid without right on the part of the parties of the second, third and fourth parts before then to sell, assign, transfer or hypothecate their said stock unless with the consent in writing of the said party of the first part or its assigns."

Under this agreement the new corporation was formed, and to it the assets and good will of D. K. Minor Company and the Central Hardware & Supply Company of San

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Francisco were assigned. The other provisions of the contract were, generally speaking, carried out, but the bonds (which were made payable, not to the "party of the first part," but to the Central Trust Company of California or bearer) were not indorsed by the defendants when the said bonds were delivered to the California Mercantile Investment Company, and they never have been so indorsed, although demand has been made by plaintiff that such indorsement be made.

The complaint contains the averment:

> "That on the 21st day of June, in the year 1905, the defendants in writing signed by them jointly and severally guaranteed the payment of all of the said bonds."

This is denied by the amended answer, and there are a number of separate defenses, some of which were evidently abandoned at the trial. One of these, however, is based upon an alleged want of consideration for the contract of June 21, 1905, for the indorsement of the bonds; another upon alleged waiver of performance by the California Mercantile Investment Company of that part of the fundamental agreement providing for the indorsement of the bonds; and it is also averred that about September 15, 1905, 140,000 shares of the capital stock of the Central Casket & Supply Company, which had been deposited with the Central Trust Company, together with an indorsed promissory note for $25,000, payable by the casket company to the California Mercantile Investment Company, were taken in full satisfaction by the last-named corporation of the contract of June 21, 1905, and that, relying upon such acceptance, the casket company paid the note, with interest. There is a further defense based upon an alleged sale by the Central Casket & Supply Company with the consent of the California Mercantile Investment Company of the former's good will and personal property to the Western Casket Company, whereby it is alleged the otherwise adequate security of the 140,000 shares of stock was rendered valuless. The last special defense is based upon an alleged conveyance in trust of certain real property by the Central Casket & Supply Company to the Central Trust Company of California, to secure the payment of the bonds here in suit. It is alleged that neither the plaintiff nor the investment company has ever resorted to this security.

[1] Appellant insists that the court erred in permitting the filing of this amended answer at the opening of the trial without permitting him to show that it was sham and false. We perceive no error in this. The discretion of the court to allow amendments is so broad that we would only disturb it upon a distinct showing of abuse of that discretion, and none appears here. Nor need we examine minutely all of the separate defenses, although some of them were sustained by the court, because in our opinion the court correctly interpreted the fundamental agreement as not constituting a guaranty of the bonds by the defendants and as not being in any manner available to the plaintiff, who was not a party thereto nor one having capacity to sue thereunder by reason of any assignment or transfer of any interest therein or otherwise.

[2, 3] An examination of the fourth paragraph of the fundamental agreement quoted above will disclose the fact that it is entirely executory and that it contemplates a future guaranty of the bonds in a certain manner; that is, by indorsement. Section 3109 of the Civil Code provides:

> "One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose."

It was unquestionably the intention of all of the parties to the fundamental agreement that the note and the bonds mentioned therein should be actually indorsed. The former was indorsed. The bonds, which were prepared by the secretary of the California Mercantile Investment Company, had a form of indorsement printed upon each of them. There was some evidence that, when the bonds were tendered for indorsement, Mr. Isaac Minor, Sr., in the presence of plaintiff, of Mr. Barnett, secretary of the investment company, and of others, including Mr. Ancell and Mr. D. K. Minor, flatly refused to indorse the bonds. The other defendants did not indorse them, and as late as November 4, 1907, plaintiff wrote to Mr. Isaac Minor, Sr., demanding that he do so. In that letter it is also suggested that there may be a cause of action for damages against defendants by the investment company. Obviously there could be no tenable action for damages if the existing contract was as good as a physical indorsement. All of these things indicate that the parties to the contract contemplated some future act to be done in a particular manner. It is plain that the contract is not a present guaranty, and therefore not corresponding to the one upon which plaintiff declares. Johnson v. Moss, 45 Cal. 517; McIver v. Richardson, 1 M. & S. 557; note to Lanusse v. Barker, 16 U. S. (3 Wheat.) 148, 4 L. Ed. 343; Stafford v. Low, 16 Johns. (N. Y.) 68; Stockbridge v. Schoonmaker, 45 Barb. (N. Y.) 105. Contracts of guaranty create no liability beyond what is expressed in the terms used as interpreted by the proper rules of construction. Baylies on Sureties, 146. Words in a contract of suretyship are not to be interpreted save in their ordinary popular sense. Hewlett v. Beede, 2 Cal. App. 565, 83 Pac. 1086; Barrett-Hicks Co. v. Glas, 9 Cal. App. 497, 99 Pac. 856. If defendants failed in any of their promises under the fundamental agreement, the remedy of the party of the first part to that contract was by a suit for specific performance or other appropriate action based upon the agreement itself or the breach thereof. If they had failed, for example, to pay the money mentioned in the fundamental agreement or to assign their interest in the D. K. Minor Company, such would have been the remedy. We do not see how a different rule applies to their failure, if any, to meet the requirement for the indorsement and guaranty of the bonds.

[4, 5] Not being a party to said contract nor interested in it by transfer, assignment, or otherwise, the plaintiff cannot maintain this action. The rule on this subject is expressed as follows in 7 Cyc. 542:

> "That the guaranty of a note or bill made in a separate instrument will pass by the transfer of the note or bill has been held in England, but American authorities have held to the contrary."

See Gamwell v. Pomeroy, 121 Mass. 215; Watson's Executors v. McLaren, 19 Wend. (N. Y.) 561; McLaren v. Watson's Executors, 26 Wend. (N. Y.) 430, 37 Am. Dec. 260.

In McLaren v. Watson's Ex'rs, supra, Chancellor Walworth said:

> "The testator in this case, by a separate and distinct instrument, which contained no words of negotiability, and was not indorsed or written upon the note, guaranteed the payment of a note at 60 days. * * * But, to make a guaranty negotiable as a part of the note to which it relates, it must be on the note itself, or at least it must be annexed to it: in the nature of an allonge or ekeing out of the paper upon which the note is written."

[6] The general rule is that an action against a guarantor must be brought specially upon the contract of guaranty itself. 20 Cyc. 1482.

It follows that the judgment of the lower court must be sustained upon the broad general grounds above discussed, and this makes it unnecessary to review the other defenses which were also recognized as sufficient by that tribunal. Nor need we consider matters of alleged error having reference to aspects of the case which we have not discussed. Bancroft v. Haslett, 106 Cal. 153, 39 Pac. 602; Dyer v. Brogan, 70 Cal. 139, 11 Pac. 589; Malone v. County of Del Norte, 77 Cal. 218, 19 Pac. 422; McCourtney v. Fortune, 57 Cal. 619.

The judgment and orders from which plaintiff has appealed are affirmed.

We concur: LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

SHAW, J. I dissent. The agreement to "indorse and guarantee the payment of the said promissory note and bonds" became a present guaranty of payment as soon as the transaction was closed by the formation of the new corporation, the turning over by the mercantile company of all its business and property to said new corporation, and the issuance of the bonds of the new corporation to the mercantile company. The making of the agreement in this form was an offer to guarantee the bonds. The turning over of the property and the issuance of the bonds, as agreed, was an acceptance of the offer, and it put the guaranty in force at once as a binding contract. I do not think there is any disagreement in the authorities on this point, with respect to the agreement to guarantee. See Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437; Petty v. Gacking, 97 Ark. 217, 133 S. W. 832, 33 L. R. A. (N. S.) 175; James v. E. G. Lyons Co., 134 Cal. 191, 66 Pac. 210.

The last-cited case was so held because of the section of the Civil Code (3197) covering a promise to accept a bill of exchange, and it may not be authority directly to the point above stated. But it cites the common-law rule as the foundation of the section. It does not derive its force from the Code entirely, and the other cases cited refer to the other classes of cases similar to the case at bar.

It is not necessary to hold that the same effect follows with regard to the agreement to "indorse" the bonds. An indorsement, in the strict sense, is a technical transaction, doable only by writing the indorser's name on the back of the instrument, or on an allonge attached to it. There is some conflict of authority, even where the consideration has passed, over the question whether one can be sued in equity as an indorser if he has merely signed an agreement to indorse. But it is universally agreed that in such a case he is liable for the damages for the breach of contract, if he fails or refuses to make the indorsement.

I concur: HENSHAW, J.

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168 Cal. 207

PEOPLE v. MAMMILATO. (Cr. 1794.)

(Supreme Court of California. July 6, 1914.)

1. Homicide (§ 253*)—Sufficiency of Evidence—Premeditation.

On a trial for homicide, evidence *held* to warrant a jury finding that the killing was premeditated, and hence to support a conviction for murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523–532; Dec. Dig. § 253.*]

2. Homicide (§ 22*)—Degrees—Murder in the First Degree.

If accused, incensed and angered by vile epithets addressed to him by deceased, and smarting under repeated accusations against his honesty, left a saloon where deceased was, went to his room, and procured a dagger with the premeditated intent and purpose of assailing deceased, and returned to the vicinity of the saloon, waited until deceased came out, and without warning stabbed him to death, the killing was murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35–38; Dec. Dig. § 22.*]

3. Criminal Law (§ 1170½*)—Appeal—Harmless Error—Use of Interpreter.

Where an Italian on trial for homicide, as appeared from the record, had a very good command of English, readily understood the questions asked him, and had no difficulty in narrating all that occurred between himself and deceased, and his counsel apparently did not consider that he failed to understand questions or to give a direct and intelligent answer except in a couple of instances when he did not understand the meaning of a few words, and an interpreter was used, no prejudice from the court's ruling in refusing to permit him to give his testimony through an interpreter was apparent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

4. Homicide (§ 159*)—Evidence—Previous Quarrels between Parties.

On a trial for homicide, evidence that shortly before the killing, when deceased and accused were in a saloon and deceased was applying vile epithets to accused and charging him with theft, accused opened a pocketknife and rushed towards deceased was properly admitted as tending to show his state of mind towards deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 297–300; Dec. Dig. § 159.*]

5. Witnesses (§ 277*)—Cross-Examination of Accused in Criminal Prosecutions.

Where, on a trial for homicide, accused undertook to testify to all that occurred in a saloon shortly before the homicide, and testified that, after an altercation between the parties in the barroom was quieted by third parties, he retired to the card room, and immediately left the saloon by the back door, the prosecution was properly permitted to cross-examine him as to whether he did not open a knife and make an effort to return to the barroom, though he had not mentioned this matter, since, while the cross-examination of accused must be confined to matters testified to in chief, he may be cross-examined as to details not brought out by his direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979–983; Dec. Dig. § 277.*]

6. Homicide (§ 203*) — Evidence — Dying Declarations — Sense of Impending Death.

Where, though, when deceased first made an alleged dying declaration, he stated that he thought he would pull through, he subsequently reaffirmed it as true at a time when he knew he was going to die, it was admissible in evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430–437; Dec. Dig. § 203.*]

In Bank. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Fernando Mammilato was convicted of murder in the first degree, and he appeals. Affirmed.

George F. Cosby, Lawrence Sledge, and Geo. Ingraham, all of Oakland, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LORIGAN, J. Defendant was convicted of murder of the first degree, sentenced to death, and, from the judgment and order denying him a new trial, appeals.

[1] Defendant was a laborer employed in and about Sunol, Alameda county, when this tragedy took place, and lived at a rooming and boarding house occupied by a Mrs. Andrews. The deceased, John Smith, was a storekeeper at Sunol. Some days prior to November 9, 1912, the day when the stabbing occurred which caused the death of deceased, the defendant came into the store of deceased while the latter was engaged in counting into piles a large amount of money, and, unobserved by deceased, took from one of the piles a $20 piece which he placed in his pocket and went out of the store. Shortly thereafter deceased missed the money, and about the same time that he did so defendant returned to the store. Deceased charged him with stealing the money and threatened him with arrest and prosecution if it was not immediately returned. Defendant repeatedly denied taking it, while deceased persisted in his accusations and threats. Defendant went out of the store but returned immediately and laid the $20 piece on the counter, saying that he had only taken it for fun or as a joke, and departed. Deceased and defendant next met on the evening of November 9, 1912, in the Hazel Glen saloon in Sunol. The deceased came in about 7:30 and was at the bar when defendant and a party with whom he had been playing cards in a back room came out to the bar for drinks. Defendant accosted the deceased, asking him to play a game of cards with him, which deceased emphatically declined to do, accompanying his declination with vile epithets directed to defendant, in the course of which he accused him of stealing $20 from him; charged him with being a thief; that he belonged in San Quentin, and that he intended to put him there. Defendant made no response in kind to the low epithets of deceased, though naturally becoming angered by them, but protested that the taking of the money by him was all in jest, and warned the deceased to look out about making such accusations against him. This altercation was quieted by other parties at the bar, and defendant immediately retired to the card room, where another game had started. He did not participate in it but seated himself near the players. He was angry and muttering to himself in Italian. He was seated but a few minutes when deceased, who had remained at the bar talking to the barkeeper, again referred to defendant and in a loud tone of voice and with a vile epithet declared that he would fix him. Defendant, immediately that this last remark of deceased was made, took out a pocketknife and, opening its large blade, made a rush for the barroom, but one of the players in the room, who had been watching him, caught him as he passed, took the knife from him, brought him back into the card room, and gave the knife to the barkeeper. Defendant remained in the card room but a few minutes and then left the saloon by the back way. The theory of the prosecution is that the defendant left the saloon at this time to secure a dagger, which he had in his room at the boarding house, for the purpose of killing the deceased. After leaving the saloon he was seen going rapidly in the direction of his rooming place at Mrs. Andrews. The evidence shows that in a washstand drawer in his room there the defendant had a dagger with a blade four or five inches long. This was seen in the drawer Friday

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

night; the deceased was stabbed on Saturday night. Search was made for this dagger in the room of the defendant the Monday following, but it could not be found, and, in fact, has never been seen since. After the departure of the defendant from the saloon, of which it does not appear deceased had any knowledge, the latter remained about 20 minutes and left. Within a very short interval afterwards he was brought into a barber shop adjoining the saloon, having been stabbed with a weapon in the hand of defendant.

There were no witnesses as to what took place between the defendant and deceased when they met outside the saloon and the latter received his death wound. The meeting occurred on the street in the vicinity of the Southern Pacific Railroad depot. A witness, approaching in the direction where defendant and deceased met, testified that he could see indistinctly through the darkness—the night was dark and drizzly—two men together as though they were fighting, and immediately one turned and ran away, passing by the witness, who then recognized him as the defendant. He could not recognize who they were when they met each other. In fact, as to what then actually occurred there is but the testimony of the defendant and the dying declaration of the deceased. In his dying declaration the deceased stated that the defendant stabbed him near the Southern Pacific depot about 20 minutes to 8 o'clock without a word, except "Hello, Smith"; that he then stabbed him and ran away. The testimony of the defendant is that, after leaving the Hazel Glen saloon, he had gone to the saloon of a countryman of his to see a friend, and, not finding him, was on his way back to the Hazel Glen saloon when he met deceased, who had just come out of it; that, when they met, deceased immediately commenced to again revile him with low epithets and struck him twice in the face; that defendant started to run away, but deceased pursued him along the street; that, at the time deceased struck him in the face, in putting up his hand to protect himself he felt a knife in the inside pocket of his coat, and as he ran he drew it out; that deceased overtook him and again struck him in the face; that he warned deceased that he had a knife, but nevertheless deceased rushed upon him and grabbed him by the neck with both hands; that, as deceased rushed in on him, the defendant held the knife in front of him to defend himself, and deceased rushed upon it and was wounded; that he did not force the knife into him but only held it out in defense; that deceased then released his hold on him, and defendant ran away, leaving deceased standing there; that he ran away because he believed that deceased intended to shoot him as he had placed his hand in his hind pocket, at the same time declaring that he would kill defendant. Defendant walked that night to Niles, a town some distance from Sunol, and was arrested the next morning. He testified that as he ran away he put the knife in his pocket again but had lost it while running. The morning of his arrest he told the officers practically the same story as he testified to on the trial. When arrested he complained that his face was sore and swollen from the blows inflicted by deceased upon it, but witnesses who examined his face at the time he made the statements observed no swelling or any abrasion or discoloration upon it.

The weapon with which deceased was wounded was the dagger that was usually kept in the room of the defendant. It belonged to Mrs. Andrews, although defendant kept it in his room. He testified that he had put it in his pocket—sheathed in its wooden case—the morning of the day of the stabbing to use it in gathering mushrooms, but was prevented from going out for that purpose and had forgotten to put it back in his room; that he had forgotten that he had it at all times thereafter, even while in the Hazel Glen saloon, until, when putting up his hands to protect himself from the blows of deceased, he had felt it in his inner coat pocket and drew it out. The deceased lived about four hours after being wounded. The autopsy showed that the dagger penetrated the body of deceased the full length of the blade; that the seventh rib was cut nearly three-fourths through, and the weapon penetrated into the heart of deceased some two inches. Neither the deceased nor the defendant were intoxicated that evening.

[2] Appellant makes the point that the evidence was insufficient to sustain the verdict against him. His counsel make this claim without any discussion of it at all, simply submitting "all the testimony taken on the trial" for the consideration of the court. Discussing this point as briefly as appellant presents it, it is only necessary to say that under the evidence, the salient portions of which we have stated, the jury was warranted in determining that, incensed and angered by the vile epithets addressed to him by the deceased, and smarting under the repeated accusations against his honesty, the defendant left the saloon, went to his room, and procured the dagger with which the killing was done with the premeditated intent and purpose of assailing the deceased; that, having procured it, he returned to the vicinity of the saloon, waited until deceased came out of it, and without warning stabbed him to death. A homicide committed under such circumstances and with such intent constitutes murder of the first degree, and, as the evidence here was sufficient to support such a verdict, we cannot disturb it.

[3] It is next insisted that the court erred in not permitting the defendant to give his testimony through an interpreter. The defendant is an Italian, and at the time of the trial was about 25 years of age. He had lived in Canada and the United States about

six years. The court was of the opinion that the defendant understood English sufficiently well to testify without an interpreter, although one was sworn and instructed to follow the defendant, and, if it appeared he did not fully understand the questions asked, to aid him. The testimony of the defendant appearing in the record covering a long direct and cross examination does not disclose that any error was committed by the court in denying him an interpreter. He had a very good command of English, and the record does not disclose that he did not readily understand the questions asked him or had any difficulty in narrating all that occurred between himself and deceased according to his account of it. From the beginning to the end of his narrative his counsel, according to the record before us, do not seem to have considered that at any point in it he so failed to understand questions asked or to give a direct and intelligent answer to them that the use of an interpreter was required, save in a couple of instances when he did not understand the meaning of a few words, and then the interpreter was used. From an examination of the record and of his testimony as given by question and answer, we do not perceive that any prejudice at all followed from refusing the defendant the aid of an interpreter.

[4, 5] It is next insisted that the court erred in allowing the prosecution to cross-examine the defendant on the subject of his opening his pocketknife in the card room and rushing towards the barroom where decedent was, which we have referred to in our statement of the evidence. This matter had been detailed by a witness for the prosecution without any objections on the part of the defendant, and properly so, as tending to show the state of mind of the defendant towards deceased growing out of his revilement of defendant. It is not now insisted that such evidence would not be relevant, but it is claimed that, as on his direct examination nothing was testified to by defendant as to his actions when he returned from the bar to the card room, it was improper to permit the prosecution on cross-examination to go into that matter. While the rule is that the cross-examination of a defendant must be confined to matters testified to in chief, this does not mean that such examination must be confined to a mere categorical review of matters testified to by him on direct examination. In his testimony in chief, defendant undertook to testify to all that occurred in the saloon from the time he and deceased met there until defendant left, the conduct and actions of the deceased and his own conduct and actions there, and testified that he left the barroom when the revilement of him by deceased had ceased and went into the card room and from there immediately left the saloon by the back door, when he heard the deceased in a loud voice declare to the barkeeper that he intended to fix him; that he then left because he was afraid of deceased. The defendant, having undertaken to testify to all that occurred in the saloon from his meeting with deceased there until his departure therefrom, could not preclude the prosecution on cross-examination from inquiring as to matters pertinent to the case which it claimed defendant had omitted to testify to while assuming to state all that occurred between these two intervals of time. It could cross-examine him for the purpose of bringing out in detail anything bearing on the case that occurred during that period as to the conduct and actions of defendant, respecting which he had testified about only in a general way, and to that end direct his attention to a precise matter and inquire whether it did not occur. People v. Russell, 46 Cal. 121. In this view it was proper for the prosecution to make inquiry of defendant whether, as part of what transpired in the card room, he had not then taken out a knife and made an effort to return to the barroom where deceased was.

[6] It is next insisted that the court erred in admitting in evidence the dying declaration of deceased. The claim is that it was not made by deceased under a sense of impending death. The deceased, after he was stabbed, was taken first to a barber shop in the vicinity and from thence to his residence. E. E. Ritter, a local attorney and notary public, was sent for and arrived at the residence of deceased about 10 o'clock, and being informed by the attending physician that the deceased wanted to make a statement Ritter asked him if he wished to do so. Deceased said he did. Ritter said to him:

> "Now, if you make a statement it is necessary for you to realize that you are going to die; it is important that you realize for certain that you are going to die to make this."

Then deceased answered as to his dying:

> "Well, I don't know; I think I will pull through; I want to state how this thing happened."

He then made a statement which Ritter reduced to writing, read over to him, and which the deceased signed. This statement was:

> "I realize that I am about to die, and wish to make a statement. Fred stabbed me near Southern Pacific depot about 20 minutes of 8 o'clock p. m., without a word, except 'Hello, Smith,' and then stabbed me, and then ran away from me. I had an argument with him over the stealing of $20 on election day. He gave the $20 back after I had a row with him, 15 or 20 minutes after, and said he was only fooling. Frank Mendonca seen me have the argument with him. [Signed] John Smith.
>
> "Subscribed and sworn to before me this 9th day of November, 1912. Edward M. Ritter, Notary Public in and for the County of Alameda, State of California."

Ritter then left the residence of deceased to go to his office to prepare a deed which deceased desired to execute. He retained the written statement made by deceased. He returned in about an hour—in fact was sent for and informed that the deceased was dying.

He testified that when he reached deceased he asked:

> "'Now, John, do you realize that you are going to die?' And he says, 'Yes,' he says, 'I know I haven't got a chance.' The Court: He says what? A. He says, 'I know I haven't got a chance.' Well, I says, 'Do you want to acknowledge this statement now as your dying statement that you made a while ago?' And I read it over to him, I read this statement that I had written out, and he had signed; I read it over to him, and he said, 'Yes, I acknowledge that as my dying statement.' I marked the time here as 11:10. I think he died at 12:05."

While the Christian name of defendant is Fernando, the evidence shows that he was known about Sunol as Fred. In fact, there is no question but that the person referred to in the statement of deceased as Fred was the defendant.

While it appears that the statement received by the court as his dying declaration, when originally made by deceased, was not made under a sense of impending dissolution, his subsequent ratification of it at a time when it appeared that hope of living was gone was sufficient to entitle it to admission by the court. It was not necessary, at the time when deceased was conscious that he could not live, that he should make another statement independent of the one already made. If, while in the possession of his reasoning faculties and under a sense of impending death, a declarant reaffirms as true a statement of facts previously made and produced and reread to him, as the evidence shows was the case here, that is sufficient to entitle it to be admitted in evidence as a dying declaration. People v. Crews, 102 Cal. 174, 36 Pac. 367.

We have considered and disposed of all points presented on this appeal for a reversal, and, as all of them are untenable, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

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168 Cal. 216

STRAIN et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. (L. A. 3514.)

(Supreme Court of California. July 6, 1914. Rehearing Denied Aug. 5, 1914.)

1. RECEIVERS (§ 73*)—APPOINTMENT—PROTECTION—DUTY OF COURT.

A court appointing a receiver is bound to protect him in the discharge of his duties and in the control of the property against any one interfering therewith, whether a party to the proceeding in which the receivership is created or not; the court's jurisdiction not being affected by the fact that the act of interference was committed outside the territorial jurisdiction of the court, if the alleged offenders are within such jurisdiction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 131; Dec. Dig. § 73.*]

2. CONTEMPT (§ 54*)—COURTS—JURISDICTION—AFFIDAVIT.

An affidavit, which is made the basis of a contempt proceeding, must show facts constituting a contempt, or the court acquires no jurisdiction to proceed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

3. RECEIVERS (§ 74*)—POSSESSION OF PROPERTY — INTERFERENCE — CONTEMPT — AFFIDAVIT—OWNERSHIP.

Where an affidavit for contempt alleged that affiant, as receiver in a certain corporation, was in possession of and used certain irrigation canals and the water therein, a portion of which were located in Mexico, by which property in I. county, Cal., was irrigated, and that petitioners had interfered with such canals by diverting water therefrom in Mexico, the affidavit was not fatally defective because it did not allege that the corporation was the owner of the canals or that the particular canal in Mexico, from which the water was diverted, was owned or under the control or possession of the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132–135; Dec. Dig. § 74.*]

4. RECEIVERS (§ 74*)—OWNERSHIP OF PROPERTY — INTERFERENCE — CONTEMPT — AFFIDAVIT.

Where an affidavit for contempt alleged unlawful interference by petitioners with water in a system of irrigation canals in affiant's possession, as receiver of a corporation, by withdrawing water from one of the canals in Mexico, and that all the water flowing through the various Mexican canals, including the one from which water was diverted, was water diverted under an appropriation from the Colorado river by the corporation and was conducted through its canals in California to the international boundary, there turned into connecting canals in Mexico, whence it flowed back into California, such allegation did not warrant an inference that the water was abandoned as soon as it passed into the Mexican canals, and hence the affidavit was not objectionable for failure to allege that the receiver was ever in possession or control of the "water" so diverted in Mexico.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132–135; Dec. Dig. § 74.*]

5. CONTEMPT (§ 67*)—EVIDENCE—REVIEW—CERTIORARI.

On a writ of certiorari to review a judgment punishing petitioners for contempt, the Supreme Court cannot review the evidence in so far as it affects or applies to the merits, but only to ascertain whether there was proof of jurisdictional facts, without which the court had no power to punish for contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 221, 222; Dec. Dig. § 67.*]

6. RECEIVERS (§ 74*)—POSSESSION OF PROPERTY—INTERFERENCE.

Where, in a proceeding for contempt for interfering with a California receiver's possession of a system of irrigation canals and the water contained therein, including a portion of the works located in Mexico, there was evidence that the receiver was in actual control and possession of the entire system, and particularly the canal in Mexico, from which petitioners diverted water, and that petitioners knew of such control and possession when they diverted the water, the evidence was sufficient to confer jurisdiction of the proceeding, though there was other evidence that so much of the works as were located in Mexico were under the control of another receiver appointed by the Mexican courts.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132–135; Dec. Dig. § 74.*]

7. RECEIVERS (§ 74*)—PROCEEDINGS—ISSUES—TITLE TO PROPERTY—CONTEMPT.

The rule that title or right to property cannot be tried in a contempt proceeding against one for interfering with the possession of a receiver only means that the court in such proceeding cannot take property from the possession of a stranger to the action in which the receiver has been appointed, who claims title to it or right to its possession, and does not prevent the court from passing on an issue as to whether the receiver is in actual possession of the property interfered with, so as to charge the parties proceeded against with contempt.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132–135; Dec. Dig. § 74.*]

In Bank. Petition by Frank Strain and others for a writ of certiorari to review an order of the superior court of Los Angeles county adjudging petitioners in contempt. The District Court of Appeal having sustained the writ and annulled the judgment, the petition was removed to the Supreme Court for further consideration. Writ dismissed.

Campbell & Moore, of Los Angeles, for petitioners. W. B. Mathews and S. B. Robinson, both of Los Angeles, for respondent. O'Melveny, Stevens & Millikin, and Walter K. Tuller, all of Los Angeles, amici curiæ.

LORIGAN, J. This proceeding in certiorari was inaugurated in the District Court of Appeal to review an order of the superior court of Los Angeles county adjudging the petitioners guilty of contempt. The proceeding in the superior court against the petitioners for contempt was initiated by the filing of an affidavit in said court by W. H. Holabrid, as receiver of the California Development Company, charging petitioners with interfering with him in the discharge of his duties with respect to the property of said company in his charge and possession as receiver.

The facts stated in the affidavit of said receiver are as follows:

The California Development Company is a corporation duly organized under the laws of New Jersey and authorized by its corporate charter to "acquire, hold, construct and maintain headings, dams, ditches, canals, reservoirs and other structures and appliances for carrying, conserving and conducting water and irrigating land, and supply and distribute water to and irrigate and cultivate the lands of the company and of others, and sell or let such water or the right to use the same."

On December 13, 1909, and long prior thereto, said company was the owner in charge and possession of a system of waterworks situated in Imperial county, this state, and consisting of headgates, canals, ditches, and structures and property used in diverting water from the Colorado river and distributing and supplying it to consumers and users of water in said Imperial county for the purposes of irrigation, domestic use, and generating electricity, and was using and operating said works, structures, and property for diverting and distributing water as aforesaid. On said December 13, 1909, in an action pending in the superior court of Imperial county (subsequently transferred to Los Angeles county), entitled Title Insurance Company, Plaintiff, v. California Development Company et al., Defendants, an order was duly made by said court whereby W. H. Holabird, the affiant, was appointed receiver of the said property of the California Development Company, and has ever since been and now is such receiver in charge and possession of the said property, using and operating the same for the purpose of diverting water from said Colorado river and delivering and distributing the same to consumers in said county of Imperial. The water so diverted by said company and its receiver from the Colorado river is conveyed through a canal from a point of diversion in Imperial county to a point on the international boundary line between the United States of America and the republic of Mexico; thence for a distance approximately of 60 miles through the said republic of Mexico by means of a channel or canal, part natural and part artificially constructed, known as the Alamo canal, and from said Alamo canal by means of a connecting canal to various points of use of water in said republic of Mexico, and still by another canal connecting with said Alamo canal to various points on said international boundary line, where, at different points thereon, it is delivered to customers in said Imperial county. The aforesaid canals, as far as the same lie within the county of Imperial, are part of the above-described property of the California Development Company. Among said canals connecting with the Alamo canal in Mexico and diverting water therefrom is one known as the East Side Main canal, extending northerly from the Alamo canal to said international boundary line and known as the Holt canal, which connects with the said East Side canal at a point known as Holt heading in the republic of Mexico, and through which water is diverted at said heading and conducted across said international boundary line to various points in said Imperial county and delivered and supplied by said receiver to customers. The affidavit then states: That certain persons named (the petitioners in this case) in the year 1912 caused a gate to be constructed in said Holt canal near said Holt heading within the republic of Mexico, connected a canal therewith, and by means thereof diverted large quantities of water from said Holt canal across said boundary line into Imperial county for use on lands therein owned by them. That said parties knew, prior to the diversion by them of said water from said Holt canal, that said receiver was in the control and possession of the said property of said California Development Company, and was then and there using and operating the same. That all of the water flowing in said Holt canal was diverted from said Colorado river by means of headgates and works of the said California Development Company and would, if it had not been so diverted as aforesaid, flow through said Holt canal to said international boundary line and into Imperial county and be distributed and sold by said receiver for use therein.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On the filing of this affidavit petitioners were cited to show cause why they should not be adjudged guilty of contempt, and on a hearing were adjudged guilty thereof in having interfered with said receiver in the use and operation of said property of said California Development Company in his charge and possession as receiver, and as a punishment were each fined $50. Thereafter petitioners inaugurated this proceeding in certiorari before the said District Court of Appeal, in which they attack the validity of the order or judgment of contempt on the ground that it is in excess of the jurisdiction of said superior court in the particulars following: First, that the affidavit upon which the proceeding in contempt is based is insufficient in that it fails to allege facts showing a contempt; and, second, that, conceding the sufficiency of the affidavit, the evidence nevertheless shows that the court had no jurisdiction in the contempt proceeding for two reasons: (1) Because it related to property beyond the territorial jurisdiction of the court and not under the control or in the possession of the receiver; and (2) that it involved the question of the title of property which the court had no jurisdiction to determine in a contempt proceeding. The District Court of Appeal sustained these claims of petitioners and annulled the judgment of contempt. Thereafter, on petition therefor, the matter was ordered before this court for further consideration.

It appears that the petitioners, though not parties to the action wherein Holabird had been appointed receiver, were nevertheless residents within the territorial jurisdiction of the court when the alleged interference with the Holt canal took place, and were such when this proceeding in contempt was commenced against them.

[1] It is the duty of a court appointing a receiver to protect him in the discharge of his duties and in the control and possession of the property in his custody, as such against any one interfering therewith, whether a party to the proceeding in which the receivership is created or not, and the jurisdiction of the court to do this is not affected by the fact that the act of interference was committed, as in this case, outside the territorial jurisdiction of the court, if the alleged offenders are within its territorial jurisdiction. High on Receivers (4th Ed.) § 164; Smith on Receivers, § 47; Chafee v. Quidnick Co., 13 R. I. 442; Richards v. People, 81 Ill. 551; Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147.

No question is made here but that the court had jurisdiction over the persons of petitioners in this proceeding, and, if the act charged to have been committed by them constituted an interference with the duties of the receiver respecting the property in his control and possession as such, then, under the authorities just cited, they were subject to punishment by the superior court, and its action in that respect was justified.

[2] As to the claim that the statement of facts in the affidavit was insufficient to confer jurisdiction: It is settled that an affidavit which is made the basis of a contempt proceeding must show facts constituting a contempt or the court acquires no jurisdiction to proceed in the matter. Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409.

[3] Against the sufficiency of the affidavit it is asserted that it is nowhere alleged therein that the California Development Company was the owner of any of the canals referred to in the affidavit as located in the republic of Mexico or of the waters flowing therein, nor, particularly as to the Holt canal from which water is alleged to have been diverted by petitioners where the same lies in said republic, it is alleged that the same or the waters therein were ever owned by said company, or were ever in the possession or under the control of the receiver thereof.

It is true that the affidavit does not show who owned the canals in Mexico, including the Holt canal. It is entirely silent on this subject. But it was not essential to the sufficiency of the affidavit that a statement of this fact should be made. It does appear, taking all the allegations of the affidavit into consideration, that the receiver was operating as such an established system of the California Development Company, whereby, through works owned by said company in Imperial county, water diverted from the Colorado river under an appropriation thereof was conveyed by a canal through said county to the international boundary line between the United States and Mexico and discharged into canals connecting therewith in the latter territory; that through these connecting Mexican canals it was thence brought 60 miles and discharged at the international boundary line into still further connecting canals and conduits of said California Development Company in said Imperial county controlled by the receiver and by means thereof distributed to customers and users. It shows one continuous diverting and distributing system, as an integral part of which said canals in Mexico were used for the purpose of delivering the water from the intake in the Colorado river to the points of delivery in Imperial county, and were being actually used by the receiver for that purpose when interfered with by petitioners. This actual use as part of such system was all that was required to be alleged respecting these canals. It was immaterial, as far as the sufficiency of the affidavit is concerned, whether they were or were not owned by the California Development Company or whether there was any allegation therein on that subject. It was sufficient to show, as the tenor of the affidavit does, that they were being used by it and its receiver for the purpose of conveying a continuous flow of water therein from the intake of the company on the Colorado river to the point for distribution in Imperial county, and that they and the water therein were in the control and possession of the receiver when the alleged act of interference by petitioners was committed.

[4] This brings us to a consideration of the next point made by petitioners, which is that it is not alleged in the affidavit that the specific water which petitioners are charged with having diverted from the Holt canal—nor in fact the water in any of the Mexican canals—was owned by the California Development Company, or was ever under the control or in the possession of its receiver. It appears from the affidavit that all the water which flows through these various Mexican canals, including the Holt canal, consisted of water diverted under an appropriation from the Colorado river in the state of California by the California Development Company, was conducted by it through its canals in that state to the international boundary line and there turned into the connecting canals in Mexico for beneficial use on irrigable lands. When so appropriated through actual diversion into its canal by the company for such intended beneficial use it became at once its property, and control and possession of it was in its receiver. When he started it flowing from the canal of the company into the Mexican canals located in this foreign country, he did not thereby relinquish control or abandon possession of it, as appears to be claimed by petitioners. This of itself did not constitute abandonment either in law or fact. Abandonment is a question of intent—a question of fact to be determined from the act and intention of the party claimed to have abandoned a thing. But it is apparent, from the allegations of the affidavit here, that there never was any intention on the part of the receiver to abandon the water so appropriated by the company when he turned it into the Mexican canals. As part of an entire system operated by that company, these canals in Mexico were being used by it in connection with canals in California for the purpose of conveying the water appropriated by the company from its intake on the Colorado river in a continuous flow to the points in Imperial county where its distribution would be made and controlled. This, from the recitals in the affidavit, was obviously what the canal system in its entirety was constructed for, devoted to, and being used for. As it is alleged in the affidavit that the company was using the canals in Mexico in connection with its own, it is to be assumed that it was rightly using them in conducting the water which it had appropriated and owned to its destined point of distribution, and the facts alleged in the affidavit sufficiently show that, at the time of the alleged interference of petitioners, the receiver of the company was in the control and possession of the water in the Mexican canals, which, as receiver, he had diverted from the river and started on its flow, and which was the only water flowing through all the canals as comprehending an entire system of water distribution.

[5] As to the next point made by petitioners which is based on the evidence adduced at the hearing had in this proceeding: This is, that, even if the affidavit was sufficient, nevertheless the evidence at such hearing shows that the court had no jurisdiction to adjudge petitioners guilty of contempt. Under this claim, of course, the evidence cannot be reviewed by us in this proceeding on certiorari, in as far as it affects or applies to the merits of the case. It can be considered only for the purpose of ascertaining whether there was proof of the jurisdictional facts alleged in the affidavit, and without proof of which the court would have no power to punish for contempt. Stumpf v. Board of Supervisors, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350; 4 Ency. of Plead. & Prac. p. 262.

[6] It appears from the evidence without question that petitioners, who were residents and property owners in Imperial county and whose lands were not being supplied with water under the system of the California Development Company, constructed a ditch through their said lands and extended it some 600 feet across the boundary line into the republic of Mexico so as to be able to connect it with the Holt canal in said republic, part of the continuous system used by the California Development Company heretofore referred to; that they applied to Holabird, the receiver of the California Development Company, to furnish water from the Holt canal to this canal constructed by them, offering payment therefor, but that the receiver refused to furnish the water. Petitioners insist that the evidence further shows beyond any question that one Andrade had, in an action brought by a creditor in the courts of Mexico against a Mexican corporation which owned the canals in Mexico, been appointed, by said Mexican court, receiver of the property of the Mexican corporation and was, at the time petitioners connected their canal with the Holt canal and diverted its waters, in exclusive control and possession of all the canals in Mexico, including said Holt canal, and that Holabird never had control or possession of any of said canals; that the appointment of said Andrade as such receiver of the property of the Mexican corporation had been made a month prior to the appointment of Holabird as receiver of the California Development Company's property; that petitioners, upon the refusal of Holabird to allow them to take water from the Holt canal, as requested, applied to the Mexican receiver Andrade, in possession thereof, for permission to do so; that he granted them

permission, and thereupon they connected their canal with said Holt canal. Of course, if the evidence showed, as petitioners claim, that these canals and water were, at the time of the alleged interference, not in the possession of the receiver Holabird but in the control and possession of the Mexican receiver, there could have been no interference with the possession of Holabird, and the superior court was without jurisdiction to punish the petitioners for contempt. But it is not a fact that the evidence shows this to have been the situation. There was, it is true, evidence of acts and conduct on the part of Andrade designed to annoy and hamper Holabird in the control which, after his appointment, he was constantly exercising over the Mexican canals and works as part of the water supply system of the California Development Company. But there was sufficient evidence to warrant the superior court in concluding, as it necessarily did, that, notwithstanding this conduct of Andrade, Holabird, as receiver, himself and through his agents and employés, was in the actual control and possession of the entire system of the California Development Company, including the Mexican canals, and particularly the Holt canal, and that petitioners had knowledge of that fact when they interfered with his control and possession as receiver of the latter canal. This is as far as we may look into the evidence on this proceeding. We have considered it, as alone we may do, solely for the purpose of ascertaining whether there was in fact evidence before the superior court tending to show possession of the property by its receiver for the purpose of determining whether that court had jurisdiction of the proceeding against petitioners for alleged contempt in interfering with it. As we say, there was such evidence. Whether the superior court was right in its conclusion from it cannot be considered in this proceeding, which, as we say, is limited solely to an inquiry whether the superior court had or had not jurisdiction of the contempt proceeding.

[7] There was further evidence in the case that the canals in Mexico were owned by a Mexican corporation over whose property Andrade had been appointed receiver, and that certain contracts between that corporation and the California Development Company were introduced in evidence by petitioners, from the terms of which it appeared that the two corporations had agreed that the use of water diverted by the California Development Company from the Colorado river and turned into the Mexican canals should be divided between the two corporations, a portion to be used in Mexico and a portion in Imperial county; that under these contracts the Mexican receiver claimed the right to control the property in Mexico, and under such asserted claim gave permission to petitioners to take waters from the Holt canal. Under this showing petitioners assert that the right to the control of the Mexican property as between the two receivers, Andrade and Holabird, under their respective appointments, and the right of petitioners claiming under the Mexican receiver, could only be determined by an interpretation of these contracts in a proper action brought for that purpose, where petitioners claiming under the Mexican receiver would be entitled to be heard, and that proceedings for contempt do not constitute such an appropriate action.

In this contention petitioners seek to invoke the well-settled rule that title or the right to property cannot be tried in a contempt proceeding. But what is thus meant is that a court in such a proceeding cannot by its order take property from the actual possession of a stranger to the action in which the receiver is appointed who claims title to it or right to its possession. Such an order would be void because one in possession of property cannot be dispossessed of it without due process of law which means an appropriate action brought against him where, upon issues framed and a regular trial before a court or jury, his title or right to retain possession may be determined, and a proceeding in contempt is not such an action. But this is not the situation here. There was no question of title or right to possession involved in the contempt proceeding, and petitioners could not force that question into the proceeding as a basis for attacking the jurisdiction of the court to entertain it. The sole question before the court in this proceeding was one of actual possession. Was the receiver in the actual possession of the canal and water in Mexico when petitioners interfered with it? If he was, then such interference, without leave of the court appointing him, was contempt. If there was a question between petitioners and the receiver Holabird as to the possession of said property, the courts were open to the petitioners, and therein they could have had any dispute between them on that subject settled. In a dispute like the present, it was the duty of petitioners, asserting that Holabird had no right under his order of appointment to take possession of the canals and water in Mexico, and that such possession belonged to the Mexican receiver under whom they claimed, to have petitioned the court, in the action in which Holabird was appointed, to pass upon the question of how far, if at all, Holabird was authorized to take possession of such canals and water under its appointment of him as receiver. This the court would undoubtedly have done if they had applied to it. They could not, however, invade or interfere with the actual possession of the receiver without subjecting themselves to a proceeding for contempt and punishment therefor, if it was proven that they did.

We are satisfied that there is no merit in any claim of petitioners under which they assert that the superior court exceeded its jurisdiction in entertaining the contempt proceeding against them and rendering the judgment now sought to be reviewed. It did not. It proceeded within its jurisdictional limits, and the petition for the writ of certiorari is therefore dismissed.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.

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168 Cal. 234

JOYCE v. TOMASINI. (Sac. 2079.)

(Supreme Court of California. July 6, 1914. Rehearing Denied Aug. 5, 1914.)

1. Specific Performance (§ 114*)—Actions—Complaint.

Under Civ. Code, § 3391, which declares that specific performance of an executory contract cannot be enforced against a party if he has not received an adequate consideration, or, if it is not, as to him, just and reasonable, a complaint seeking specific performance of a contract must set forth facts showing that the consideration is adequate and just and reasonable to the defendant, and the bare allegation that the contract is supported by good consideration and is just and reasonable is insufficient.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

2. Specific Performance (§ 29*)—Contracts—Sufficiency.

A contract for the lease of 105 acres of tule land, not stating the county or state, or otherwise bounding it so as to definitely locate it, may be specifically enforced where extrinsic evidence showed that the lessor owned a tract of tule land, consisting of 105 acres, in a certain county and that the tract was bounded by the lands of the persons named in the agreement, for it will not be inferred that the lessor owned a similar tract of land in that county or in other counties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69–82; Dec. Dig. § 29.*]

3. Specific Performance (§ 29*)—Contracts—Sufficiency.

Specific performance of a contract to lease land, which also contained an option allowing the lessee to purchase, will not be denied because the contract, instead of describing the land, recited that it was bounded by certain individuals; the recitals obviously meaning that it was bounded by the land of the named persons.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69–82; Dec. Dig. § 29.*]

4. Landlord and Tenant (§ 124*)—Lease—Property Covered—Appurtenances.

Where there was a way rightfully in use for ingress and egress to land contracted to be leased, such a way is appurtenant to the land and will pass without special description.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 437–440; Dec. Dig. § 124.*]

5. Specific Performance (§ 114*)—Actions—Pleading.

In a suit for specific performance of contract for the lease of land with an option to purchase, where the agreement did not definitely describe a way to the land, plaintiff, in order to have the way described in a lease executed by the court, must lay the foundation therefor by alleging and proving extrinsic facts showing the location and description of the way.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

6. Evidence (§ 460*)—Extrinsic Evidence—Admissibility.

In a suit for the specific performance of a contract for the sale of land, extrinsic evidence is admissible to identify and apply the description.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. § 460.*]

7. Specific Performance (§ 28*)—Agreements—Definiteness.

An agreement for the leasing of land, which recited that defendant agreed to lease to plaintiff certain land for a term of three years, commencing January, 1912, at a rental of $200 per year, to be paid in advance before taking possession, is sufficiently definite, as to the term and time of payment of rent, to be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61–68; Dec. Dig. § 28.*]

8. Specific Performance (§ 28*) — Agreement—Sufficiency.

Under Civ. Code, § 1731, declaring that an agreement to sell real property binds the seller to execute the conveyance, an option for the purchase of land agreed to be leased is sufficiently definite to be specifically enforced, though it does not expressly provide when the conveyance is to be made; the grantor being bound to execute the conveyance upon the payment of the purchase money, which payments were provided for in the agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61–68; Dec. Dig. § 28.*]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Thomas Joyce against G. Tomasini. From a judgment for plaintiff, defendant appeals. Reversed.

T. T. C. Gregory and C. J. Goodell, both of San Francisco, for appellant. Lewis A. Hilborn and Robert R. Moody, both of San Francisco, for respondent.

SHAW, J. The judgment was entered on June 6, 1912. The appeal therefrom was taken on June 21, 1912. The record includes a bill of exceptions setting forth the evidence and proceedings taken at the trial.

The complaint purports to state a cause of action to enforce specific performance of a contract to execute a lease. The findings are in favor of the plaintiff on all the issues. Judgment was rendered that the agreement be specifically enforced and that the defendant, on or before June 21, 1912, upon the payment to him by the plaintiff of $200 as rent, should, in compliance with the agreement, execute a formal lease of the premises, in form as set forth in the judgment, and substantially the same in terms as that provided for in the agreement sued on. It also declared that, upon the receipt of the $200, the defendant should deliver to the plaintiff the possession of the premises.

[1] The defendant demurred to the com-

plaint upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and this is assigned as error. We think the demurrer should have been sustained. The contract is sued on as an executory agreement to execute a lease, in substance an agreement to grant an estate for years in the parcel of land. The object of the action is to enforce specific performance of this executory agreement. The Civil Code, following the settled doctrine of equity jurisprudence, declares that specific performance of an executory contract cannot be enforced against a party, if he has not received an adequate consideration therefor, or if it is not, as to him, just and reasonable. Section 3391. It is well established as a rule of pleading in such cases that the plaintiff, in order to allege a good cause of action, must set forth facts which show that the consideration provided for in the contract sought to be enforced is adequate, and that the contract is just and reasonable to the defendant. A complaint which fails to state such facts does not state a cause of action to enforce such contract.

> "This does not mean that it must be alleged in haec verba that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient. but the fact that the contract is such as will satisfy the conscience of the chancellor in the respects mentioned must appear from a proper statement of facts." Stiles v. Cain, 134 Cal. 172, 66 Pac. 231.

See, also, Wait v. Kern etc., Co., 157 Cal. 25, 106 Pac. 98; Sunrise Land Co. v. Root, 160 Cal. 97, 116 Pac. 72; Herzog v. Atchison, etc., Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 806; White v. Sage, 149 Cal. 616, 87 Pac. 193; Flood v. Templeton, 148 Cal. 377, 83 Pac. 148; Prince v. Lamb, 128 Cal. 129, 60 Pac. 689; Arguello v. Bours, 67 Cal. 450, 8 Pac. 49; Bruck v. Tucker, 42 Cal. 354; Agard v. Valencia, 39 Cal. 302; Boyd v. Warden, 163 Cal. 157, 124 Pac. 841; Smiley v. Read, 163 Cal. 644, 126 Pac. 486.

The complaint does not purport to set forth any facts whatever on the subject. The only allegation concerning it is the bald statement "that said agreement, and the terms and conditions thereof, aforesaid, were and are, in all respects, just, fair, and reasonable between the parties thereto." This is in the precise form which was condemned as insufficient in the passage above quoted. Doubtless the appellate courts should give the language of a complaint on this subject liberal construction in favor of the action of the court below, where it shows an attempt by the pleader to comply with this requirement. But here we have no attempt to state any facts at all—nothing more than the general language of the statute—a mere conclusion of law without facts to support it. The objection was presented by demurrer and was not waived at the trial. There is no escape from the conclusion that the complaint was insufficient and that the judgment must be reversed for that reason.

[2, 3] In view of the possibility of further proceedings below, it is proper to notice certain other objections urged against the validity of the agreement. The agreement itself is as follows:

> "Suisun, Cal., Jan. 6, 1912.
>
> "This is to certify that I—G. Tomasina—agrees to lease to Thos. Joyce 105 acres of tule land bounded by F. Chadbourne on S., Mrs. Payton on East, Oakland Club N. & W., and a right of way to said tule land for a term of 3 years commencing Jan. 1912, at a rental of $200. per yr paid in advance before taking possession, Thomas Joyce to have privilege of buying said land for $50.00 per acre, during the 1st year terms ½ cash, and bal in 1 yr at 6 per cent per annum, after 1st year Joyce is to have first privilege of buying tule land, terms to be ½ cash & bal in 1 yr at 6 per cent. Thomasina is to reserve the hunting privileges thro lease. Rec'd paymt $1.00 on acct.
>
> "G. Tomasini."

In the absence of explanatory extrinsic facts, the description of the land to be leased would be so uncertain that performance of the agreement could not be enforced. The objects named as boundaries are the names of individuals, which is absurd. Furthermore the agreement does not show the state or county in which the land is situated. But it appears that Tomasini was and is the owner of 105 acres of tule land in Solano county, Cal., which is bounded south by the lands of F. A. Chadbourne, east by the lands of Mrs. L. S. Payton, and on the north and west by the lands of the Suisun Gun Club. The evidence shows that the Suisun Gun Club was also known as the "Oakland Club." These facts remove the difficulty in identifying the land. True, the names of the owners were used to designate the bounds instead of stating that the lands of the persons named constituted the boundaries, but this method of expression is not uncommon and is well understood. When used in the connection in which they appear in this agreement, the words could not reasonably be taken otherwise than as referring to the lands owned by the several persons named, respectively. Tibbetts v. Moore, 23 Cal. 213; Tredinnick v. Mining Co., 72 Cal. 81, 13 Pac. 152; Central I. D. v. De Lappe, 79 Cal. 355, 21 Pac. 825. So understood, the description is sufficient to identify the land. The county and state is not given. But it further appears that the land, bounded as above stated, is in Solano county, Cal. It will not be presumed, for the mere purpose of nullifying the agreement, that there is another tract of 105 acres of tule land, either in Solano county or elsewhere, and that is bounded by other lands belonging to the same persons as are named. If such an extraordinary coincidence does exist, it is incumbent on the defendant to plead and prove it. In the absence of such proof, it will be presumed, upon the other facts shown, that these boundaries do identify the tract of land in question.

[4, 5] The agreement is indefinite and un-

certain with regard to the exact location of the right of way. The complaint contains no allegation to remove this defect. It may be that this ambiguity can be cured by a showing of extrinsic facts, if the complaint be amended. If it is made to appear that there was at that time a way rightfully in use for access and egress to and from this land, running from the county road "No. 480" to a point on the tract of land to be leased, such way would be appurtenant to the land and would pass with a conveyance of the land without special description. The plaintiff would be entitled to have such way properly described, however, if he demands it, in a lease executed under an order of the court if he should finally prevail in the action. But, in order to entitle him to such relief, it is necessary that he should lay the foundation therefor by alleging and proving extrinsic facts showing the location and description of the right of way. The complaint should also have alleged that the Suisun Gun Club, the owner of one of the adjoining tracts of land, was also known as the "Oakland Club," the designation used in the agreement aforesaid.

[6] Upon these points the rule allowing testimony of extrinsic facts to identify and apply the description of land in a written contract is well stated by Justice Field in Stanley v. Green, 12 Cal. 162, as follows:

> "That the evidence of the circumstances under which the deed was executed is admissible does not admit of a question. These circumstances place the court in the position of the parties, and enable it to interpret intelligently the language used by them. It is not to contradict or vary the terms of the instrument that the evidence is received, but to apply them to the subject-matter. For this purpose, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty, until it has been examined with all the light which cotemporaneous facts may furnish. If these render the intention clear, and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed, and the instrument enforced."

This rule has been frequently applied in this state. Marriner v. Dennison, 78 Cal. 207, 20 Pac. 386; Jenny Lind Co. v. Bower, 11 Cal. 198; Kimball v. Semple, 25 Cal. 449; Hancock v. Watson, 18 Cal. 139; Colton v. Seavey, 22 Cal. 503; Reamer v. Nesmith, 34 Cal. 626; Piper v. True, 36 Cal. 615; Sprague v. Edwards, 48 Cal. 249; Truett v. Adams, 66 Cal. 222, 5 Pac. 96; Wheeler v. Bolton, 66 Cal. 86, 4 Pac. 981; Preble v. Abrahams, 88 Cal. 251, 26 Pac. 99, 22 Am. St. Rep. 301; Towle v. Carmelo, 99 Cal. 398, 33 Pac. 1126; McCullough v. Olds, 108 Cal. 532, 41 Pac. 420; Best v. Wohlford, 144 Cal. 738, 78 Pac. 293; Burton v. Mullenary, 147 Cal. 259, 81 Pac. 544.

[7] The agreement gives the duration of the term and the time of payment of the rent with sufficient certainty. Its effect in these particulars is that the term began January 1, 1912, and extended three years from that date, and that the first year's rent was to be paid when the lessee should take possession, and the subsequent rentals on the 1st of January of each subsequent year, and in advance.

[8] The agreement does not fix the time for the making of the deed in case the option should be exercised, nor does it expressly declare that the defendant will execute a deed. But the contract, in that event, would become an agreement to sell the land for the stated price, and, by section 1731 of the Civil Code, such an agreement binds the seller to convey the title. In the absence of anything appearing to the contrary, covenants to pay the price on the one hand and to transfer the property on the other are deemed to be dependent, and a conveyance would be due, in this instance, upon payment of the price. 1 Sugden on Vendors, bottom p. 239. We do not deem it necessary to notice any other points urged in the briefs.

The judgment is reversed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

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TURNER et al. v. EASTSIDE CANAL & IRRIGATION CO. (Sac. 1926.)

(Supreme Court of California. June 29, 1914. Rehearing Denied July 28, 1914.)

1. TRIAL (§ 404*)—FINDINGS—GENERAL FINDINGS—SPECIAL FACTS.

A general finding, independent of particular facts found, can be upheld, where there is evidence to sustain it, regardless of the legal effect of the particular facts found, but a general finding, in a suit involving water rights, that defendant has the right to use and divert a specified quantity of water from a stream is not a general finding, where the quantity referred to therein is made up of that mentioned in particular findings stating in detail the places where the water may be used and the quantities that may be used, and the particular findings control as to the quantity and use of the water.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. APPEAL AND ERROR (§ 878*)—PARTIES WHO MAY ALLEGE ERROR—RESPONDENT.

A finding of fact in favor of appellant is conclusive on respondent on the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. § 878.*]

3. WATERS AND WATER COURSES (§ 79*)—RIPARIAN OWNERS—RIGHT TO USE WATER.

An owner of riparian land may use the water of the stream, and to do so he may go to a point on the stream above his land with the consent of the abutting and intervening owners, and there take the water and conduct it to his land, so long as he takes only his reasonable share and uses it only on his riparian land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 70, 71; Dec. Dig. § 79.*]

4. WATERS AND WATER COURSES (§ 78*)—ACQUISITION OF WATER RIGHTS—PRESCRIPTIVE RIGHT.

A corporation organized to divert water from a river for sale, rental, and distribution for irrigation, and to carry water to its lands, took the water at a point above the riparian lands of plaintiffs and carried the same through a canal. It delivered water on the land of plaintiffs for use there without any charge therefor or without exercising any supervision over the taking by plaintiffs, who, when desiring water for their land, opened the gates into the canal and let the water out into their fields without asking leave of the corporation so to do. *Held*, that the taking of the water by the corporation was not hostile to plaintiffs to the extent of the water used by them, and though the corporation had the right to make its diversion at the place maintained by it, and to insist that the water used by plaintiffs should be taken through the canal, it did not acquire the right to take the water from plaintiffs and use it elsewhere.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 67–69; Dec. Dig. § 78.*]

5. WATERS AND WATER COURSES (§ 138*)—RIPARIAN RIGHTS—USE OF WATER FOR IRRIGATION.

The use of water for irrigation by a riparian owner is not adverse to the riparian owners above or below, but he may only use the water in equal right with them.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 150, 151; Dec. Dig. § 138.*]

6. WATERS AND WATER COURSES (§ 49*)—RIPARIAN RIGHTS—USE OF WATER FOR IRRIGATION.

Where the appropriation of water is for a riparian use, the question of the right to the use of the water must be confined to an inquiry whether the water claimed for the riparian land is its reasonable share of the water of the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.*]

7. WATERS AND WATER COURSES (§ 257*)—RIPARIAN RIGHTS—USE OF WATER FOR IRRIGATION.

Where an irrigation company acquired the right to use a specified quantity of water of a river through a canal over the land of a riparian owner, and the corporation furnished the riparian owner water from the canal for the irrigation of his land, the riparian owner was entitled, under Civ. Code, § 552, to have the supply of water continued on the established rates and terms.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. § 257.*]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Elizabeth Turner, administratrix of William C. Turner, deceased, and another against the Eastside Canal & Irrigation Company. From a part of the judgment establishing the rights of defendant to divert water, plaintiffs appeal. Reversed and remanded for new trial of issues involved in the part reversed.

Frank H. Short, of Fresno, J. W. Knox, of Merced, and Edward F. Treadwell, of San Francisco, for appellants. James F. Peck, of Oakland, for respondent.

SHAW, J. The plaintiffs appeal from the part of the judgment declaring that the defendant "is entitled to divert" from the San Joaquin river, at a point above plaintiffs' land, 281 cubic feet of water per second, "for sale, rental, and distribution, for the irrigation of land and for the watering of stock and domestic uses thereon," and quieting the title of the defendant to said water "against plaintiffs as the owners of the riparian lands above described."

The plaintiffs each own a large body of land on and near the San Joaquin river. Other large bodies of land belonging, respectively, to J. J. Stevinson, the Sharon estate, and J. W. Mitchell lie farther down the river and were, in part at least, riparian thereto. The defendant corporation was formed by Stevinson and Mitchell in 1887, mainly as an agency by means of which to divert water from the river and carry it to their lands. In order to do this, it was found necessary or convenient to take the water from the river at a point above the lands of the plaintiffs herein and carry it through a canal over the intervening lands of the plaintiffs and others to the Stevinson and Mitchell lands. The canal company obtained rights of way through said intervening lands, made tne canal thereon, and by a dam in the river took water therefrom into the canal and carried it therein to the lands below. This diversion began in the year 1888. The plaintiffs' lands, at that time, all belonged to William C. Turner. In March, 1906, some 3,000 acres of it were sold and conveyed to the Las Animas & San Joaquin Land Company, hereinafter designated the "land company."

On September 28, 1906, the plaintiffs began this action. The complaint alleges that for two years past the defendant, by means of said dam and canal, had been taking water from the river above plaintiffs' lands, carrying it through the canal to the lands below, not riparian to the river, and there discharging it; that it had no right to take from the river any greater flow than 75 cubic feet per second, at any stage, and no right at any time to take a quantity that would leave less than 25 cubic feet per second flowing down the river over its dam, but that it claimed the right to divert and carry below plaintiffs' lands a flow of 500 cubic feet per second, and threatened and intended to do so. They prayed for an injunction to prevent the excessive diversion.

In its answer the defendant alleged that it had acquired by prescription the right to take from the river at said dam a flow of 500 cubic feet of water per second when that quantity was then flowing, and to take the entire flow when there was less, and to carry the same through the canal to points below the plaintiffs' lands and there sell and distribute the same for use on other lands.

One of the important questions arising in the case is whether the use made by the defendant of the water it diverted, and which was adjudged to belong to it, was of a character adverse to plaintiffs and such as to give the defendant a prescriptive right to continue the diversion. The court found that, ever since the year 1888, the defendant had been continuously diverting into the canal at the said dam 281 cubic feet per second of the water of the river and causing the same to run down the canal and to be applied to beneficial use as follows: It delivered 70 cubic feet per second upon 5,600 acres of land for the irrigation thereof, 1,400 acres of which were lands described in the complaint as belonging to the plaintiff land company, and 4,200 acres thereof were lands owned by Miller & Lux, which said water was used for the irrigation of said lands; it delivered to other lands of Miller & Lux, 500 acres in extent, 10 cubic feet per second; it delivered to 750 acres of land belonging to the Sharon estate 15 cubic feet per second; it delivered to 2,500 acres of land belonging to the estate of Mitchell 50 cubic feet per second; it delivered to 4,000 acres belonging to Stevinson 80 cubic feet per second—all of which water was used upon the said lands, respectively, for the irrigation thereof, making the total amount of 225 cubic feet per second actually put to beneficial use, and that the remaining 56 cubic feet per second of the water so diverted was necessarily lost by unavoidable seepage and evaporation in transmission. It further found that the defendant made said diversion for said uses openly, uninterruptedly, and under a claim of right to do so, and adversely to the plaintiffs and all other persons; that the defendant "took and appropriated said quantity of 281" second feet of flowing water "for the purpose and with the intention of supplying the same, for beneficial purposes, to the inhabitants of the lands situated along the line of and below the water in said canal, for the irrigation of the land so situated, and for the sale, rental, and distribution by said defendant to all persons desiring to use the same"; that said lands constituted a "farming neighborhood"; that the plaintiffs and their predecessors in interest at all times knew that said quantity of water was being so diverted and used under a claim of right; that never, prior to June 12, 1906, did they deny or dispute said right; that many owners of other lands along the canal, relying on the neglect and failure of the plaintiffs to deny or dispute said right, obtained water from year to year from the defendant, improved their lands by planting trees, vines, and alfalfa, and irrigated the same with water from said canal; and that the trees, vines, and alfalfa would perish if deprived of said water.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The court also made a general finding that the "defendant is the owner of and has the right to use and divert the water naturally flowing in the San Joaquin river" 281 second feet when that quantity is flowing in the river, and the entire flow when there is less than 281 second feet. The respondent contends that this general finding is supported by evidence of uses upon other lands than those above set forth and particularly found, and that this is sufficient to sustain the general finding. It is true that, if the general finding was intended to be independent of the particular facts found, it could be upheld, if there was enough evidence to sustain it, regardless of the legal effect of the particular facts. But this finding is not of that character. The findings clearly show that the 281 second feet referred to in the general finding is made up of that mentioned in the particular findings, above recited, in which the court sets forth in detail the exact places where the water was used and the quantities used on each place and necessarily consumed in transmission, going to make up the 281 second feet, and that the right to that quantity was gained solely by virtue of the delivery upon these lands and the use thereon of the respective quantities mentioned. It is therefore unnecessary to further consider the claim that there was evidence of adverse diversion and use upon other lands than those specifically mentioned.

The court further found that all of the plaintiffs' lands are and always have been situated along and bordering on the San Joaquin river and its various channels; that the waters of said river naturally flow and always have naturally flowed "to, upon, through, and over said lands, and all of said lands are and at all times have been riparian to said river."

Upon an analysis of the facts we have stated, it will be observed that the prescriptive right of the defendant, if any, to 17½ second feet of the water included in the water right adjudged to it (that is, one-fourth of the 70 second feet) is based solely on the finding that, for the essential period of time, the defendant had taken 17½ second feet of water from the river into its canal, carried the same down the canal to lands of the said land company, and there delivered it upon 1,400 acres of said land for the irrigation thereof, and that the same has been there used for that purpose upon the lands of the company. It is contended by plaintiffs that the 4,200 acres of land belonging to Miller & Lux were also riparian to the river, and that the 52½ second feet delivered from the defendant's canal upon that land and used to irrigate it were of the water to which that land was entitled by virtue of its riparian character. There is no finding that this 4,200 acres is riparian to the river.

[2] The finding above mentioned, to the effect that all the lands of the plaintiffs were and always have been riparian to the San Joaquin river, is conclusive of the fact, so far as the respondent is concerned, upon this appeal. Consequently all that part of the respondent's argument directed to the proposition that said lands are not riparian, or based on that assumption, is unavailing and requires no further consideration.

We now come to the question whether or not the defendant has acquired title by prescription, as against the land company, to the 17½ second feet of water taken from the river into the canal of defendant and delivered upon the 1,400 acres of riparian land belonging to the land company.

[3] The owner of riparian land has the right to use the water of the stream. In order to obtain it, he has the right to go to a point on the stream above his land, with the consent of the abutting and intervening owners, and there take out the water and conduct it to his land. So long as he takes in this manner only his reasonable share of the water and uses it only on his riparian land, he is exercising his riparian rights and nothing more. Turner v. James, 155 Cal. 92, 99 Pac. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823; Rose v. Mesmer, 142 Cal. 329, 75 Pac. 905; Charnock v. Higuerra, 111 Cal. 480, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195. As is said in Charnock v. Higuerra, it is frequently the case that he cannot conveniently or profitably bring the water to his land for irrigation thereof otherwise than by taking it out on other land above him. It is not claimed that the water so used on the 1,400 acres was more than its appropriate share.

[4] The taking of water into the canal above, carrying it down to and delivering it upon the land of the land company for use by it thereon, was not an act in itself hostile, adverse, or injurious to the land company with respect to that water. The canal passed through the land of the land company, and it is conceded that no charge has ever been made by the defendant against the owners of the land for this water. It appears further that the defendant exercised no supervision whatever over the taking of this water by the land company. When the latter desired water from the canal for its land, it opened the gates into the canal, of which there were several, and let the water out into its fields, and it does not appear, nor is it claimed, that it ever asked leave of the defendant to do so. Apparently it was doing by means of this canal only that which by any available means it had a right to do, taking the water of the river for use on its riparian land. Our attention has not been called to any evidence indicating that the defendant ever denied its right to this water or disputed that it was a riparian right. It is therefore clearly established that the taking was neither hostile nor injurious to the land company, so far as the water right and the water itself is concerned, to the extent of the 17½ second feet used on the said 1,400 acres.

It may be that, by means of this continuous diversion of the water above the plaintiffs' land, the defendant has acquired a right to divert it at that place. Such right may be of advantage to the defendant, since it may enable it the better to carry to the other places below the excess over and above that delivered to or taken by the land company. This question it is not necessary to consider. It may be that the parties have to some extent confused this right to an established place of diversion with the right to the water itself. The two are not dependent. And this appears to be the true solution of the difficulty. The defendant has the right to make its diversion at the place it has maintained so long and to insist that the 17½ second feet used by the land company shall also be taken out at that place and through said canal; but it has not acquired the right to take that water from the land company and use it elsewhere, nor indeed any right whatever to the use of that water.

[5] With regard to the 52½ second feet used on the land of Miller & Lux, the facts are not precisely the same. There is no finding that the Miller & Lux land is riparian to the river. We have not examined the evidence to ascertain whether it is riparian or not. It appears that, before the defendant constructed its canal, Miller & Lux granted to it a right of way over the Miller & Lux land for the canal, in consideration of which the defendant agreed that Miller & Lux should at all times have the right to have 50 cubic feet of water, of the natural flow of the canal at its current flow on a grade of 6 inches per mile when there was 200 of such cubic feet flowing in the canal, turned out to them upon said land along the canal through gates to be constructed by the defendant. It was further agreed that the rights of Miller & Lux, whether as appropriators, riparian proprietors, or otherwise, to the waters of the river should be in no wise impaired or affected by the agreement, and that, if the defendant should take water from the river, its taking should be based upon such rights thereto as it had prior to the making of the agreement. If the Miller & Lux land is also riparian to the river, as claimed, it may be that the use by it of the water taken through the canal under this agreement would also be attributable to the riparian right. Such use would be like that of any other riparian owner, not adverse to those above or below, but only the use in equal right with them of its reasonable share. This we cannot determine, inasmuch as there is no finding that said land is riparian. If it should turn out upon another trial that it is riparian, the rules above stated with regard to the 1,400 acres of the land company would apply with equal force to the water used on the land of Miller & Lux under the said agreement. The defendant's canal would be a mere agency of Miller & Lux as riparian owner, and the effect on the land company's right to the water so used by Miller & Lux would be the same as if Miller & Lux had made and used the canal to carry said water to said land.

[6] The findings and evidence suggest that perhaps similar questions may arise with regard to the use of the water applied upon the Stevinson land. It also appears to be,

in part at least, riparian to the river. Having that character, there would attach to it the right to the reasonable use, as compared to other riparian lands, of the waters of the river. There is some evidence indicating that the defendant company was a mere agency of Stevinson to carry the water from the river to his land. If so, such taking may be, to that extent, an exercise of his riparian rights and not an appropriation by the defendant. The parties do not appear to have well understood the distinction, and in their testimony they generally use the word "appropriation," in speaking of their right. If it should be found to be a riparian use, the question to be determined as to the water used thereon would not be with respect to a right by prescription, but would be confined to the inquiry whether the water claimed for that land is its reasonable share of the water of the river. The answer alleges that several thousand acres of the land irrigated with the water taken by defendant is riparian to the river. It is uncertain in that it does not describe the land referred to; it may be that of Miller & Lux or the land company, and not that of Stevinson. The findings do not state the character of the Stevinson land. It should be added that the answer does not allege that the taking by the defendant was a taking for use on riparian land or in exercise of any riparian right pertaining to the land to which the water was to be applied. It alleges a taking for sale, rental, and distribution, or, in other words, an appropriation to public use, but it does not clearly appear in the evidence that it was offered for sale generally. All these matters can be ascertained upon a new trial, if proper pleadings are presented.

[7] We add that, even if the defendant had by adverse use, or in any other manner, acquired the title to the 281 second feet of water, the judgment is too broad. The land of the land company lies on the line and within the flow of the canal of the defendant. If the defendant has furnished water from said canal for the irrigation of said land, as the court found, it would be entitled, under section 552 of the Civil Code, to have the supply of water continued upon the established rates and terms.

The award of 281 second feet to the defendant was excessive by at least 17½ second feet, so far as the land company is concerned. It is possible that it was also excessive so far as it included the right to take from Miller & Lux the 52½ second feet and the 15 second feet from the Sharon land which was taken under an arrangement similar to that relating to the Miller & Lux land. The Turner estate is, or may be, interested in these questions. It is possible that the use of the water on the lands of the land company, Miller & Lux, and the Sharon estate, all of which are adjacent to the Turner land, or nearer to it than the Stevinson land, would be less detrimental to the Turner lands than its use on lands below it and more remote from it. We therefore deem it advisable to sustain the appeal as to both plaintiffs.

The part of the judgment appealed from is reversed, and the cause remanded for a new trial of the issues involved in the part of the judgment reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(168 Cal. 189)

MACDONALD v. DE FREMERY et al.

(S. F. 6361.)

(Supreme Court of California. July 6, 1914. Rehearing Denied Aug. 5, 1914.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

The findings of the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. § 1010.*]

2. FRAUD (§ 11*)—ACTION FOR DECEIT—OPINION.

An expression of an opinion, to avoid an action for deceit, must be an expression of an opinion honestly entertained by the person making it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

3. FRAUD (§ 24*)—ACTION FOR DECEIT—SOLE INDUCEMENT.

It is sufficient, in order to maintain an action for deceit in representations inducing the purchase of stock, that defendant's false statement was one inducement to the purchase, although not the sole inducement.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 24.*]

4. BANKS AND BANKING (§ 253*)—NATIONAL BANKS — REPORT BY DIRECTORS — FEDERAL STATUTE.

The federal statute requiring directors of a national bank to report its condition to the comptroller of the currency requires the report to contain a true statement of the condition of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 944–949; Dec. Dig. § 253.*]

5. BANKS AND BANKING (§ 253*)—ACTION FOR DECEIT—FALSE REPORT OF BANK DIRECTORS.

The act of directors of a national bank in signing a report of its condition to the comptroller of the currency, falsely reporting an item of loans and discounts containing paper worth much less than its face value, which would materially affect the value of its stock, would render them individually liable to a purchaser of the stock who in good faith relied upon such report as stating the bank's true financial condition, regardless of whether such report was made for the express purpose of inducing any particular individual to purchase.

[Ed. Note.—For other cases, see Banks and Banking, Cent.Dig. §§ 944–949; Dec.Dig. § 253.*]

6. FRAUD (§ 13*)—FALSE REPRESENTATIONS—BELIEF—NEGATIVE FRAUD.

Where statements by bank directors in a report of the bank's condition to the comptroller of the currency were, in fact, false, it was immaterial that they believed that the bank would eventually come through its difficulties or that they did not intend to cheat a purchaser of the bank's stock; and, as deceit may be negative, consisting in suppression of what it is one's duty to declare as well as in the declaration of that which is false, the directors, if they did not and could not have believed that the report contained a true statement of the bank's financial conditions, and failed to disclose such fact to plaintiff in handing him the report, were liable under the express provision of Civ. Code, § 1710, defining deceit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.*]

7. FRAUD (§ 20*)—FRAUDULENT REPRESENTATIONS—RELIANCE—DUTY TO INVESTIGATE.

A purchaser of the stock of a national bank was justified in relying upon the directors' representations either actual or as contained in their report of the bank's condition to the comptroller of the currency, without further independent investigation of his own.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

Department 2. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by A. S. Macdonald against James L. De Fremery and others. Judgment for the surviving defendants, and plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. Williamson & Dibblee, of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

HENSHAW, J. This action was brought to recover damages for deceit. The complaint charged that plaintiff was induced through the false representations of defendants to purchase stock of the Union National Bank of Oakland at a gross overvaluation, whereby plaintiff sustained damages in the sum of $37,400, alleged to be the difference between the price paid for the stock and its actual value at the times of purchase. The defendants were, respectively, president, first vice president, and second vice president of the Union National Bank. Defendant De Fremery died before the trial of the action, which as to him consequently abated, and was dismissed. Upon the trial had against the remaining defendants the court made findings and gave judgment in favor of them. The plaintiff prosecutes this appeal under sections 953a et seq., Code of Civil Procedure, contending that the findings and decision are not supported by the evidence.

The complaint charges upon three causes of action. In the first plaintiff seeks to recover damages in the sum of $10,400, the amount paid for 54 shares of stock bought from defendants, and 50 shares of a new issue of stock, for all of which stock plaintiff paid the par value of $100 per share. The second cause of action seeks damages in the same amount, growing out of the purchase of the same stock, but is founded on certain other allegations of fact and of fraudulent representation, which will hereinafter be set forth. In the third cause of action the allegations of the second are repeated, and it is charged that, in reliance upon the alleged facts and the asserted fraudulent representations, plaintiff purchased from a third person, one Perine, 270 shares of the stock, paying therefor the par value.

For the better understanding of the controversy a brief historical presentment of certain unquestioned facts becomes necessary. The Union National Bank of Oakland had been in existence for many years. In 1907 its stock had sold for $243 per share. Defendants had purchased small amounts of this stock at that price. It became too closely affiliated in its banking business with the California Safe Deposit & Trust Company of San Francisco, which latter institution closed its doors and went into insolvency. The Oakland bank then took advantage of the so-called "panic holidays" of the autumn of 1907 and suspended business, not as an insolvent institution, but under the protection of the holiday act. A committee of ways and means was appointed from the directorate of the bank to investigate its financial condition and formulate a plan for the resumption of business. The three defendants in this action, with three others, constituted this committee. It employed Mr. Knight, an expert accountant, to make a complete examination of the assets of the bank and to report the result of this examination to the committee. Mr. Knight made this examination, placing specific valuations upon the bank's notes, bonds, and other securities. In so doing he consulted with De Fremery, Roeth and other members of the board. The result of his examination, after such consultations, was embodied in a report in which these various securities were classified under the designations of "Good," "Not Valued," "Doubtful" and "Bad." By "good" it was meant that the securities so classified were worth their face; by "not valued," that they were worth one-half of their face; by "doubtful," that they were worth one-third of their face; and by "bad," that they were valueless. Mr. Knight's report was carefully examined and passed upon by this committee of ways and means and expressed the opinion of the committee as to the value of the assets. This report was completed and presented on November 26, 1907. The bank then effected an agreement with its depositors touching the amounts and times of the withdrawal of their deposits and opened its doors for business on January 2, 1908. The three defendants became actively interested in the management of the bank. Mr. De Fremery was elected president, with a salary of $500 per month, Mr. Gray first vice president, with a salary of $200 per month, and Mr. Roeth second vice president, with a salary of $300 per month, positions which they retained up to and including the time of their transactions with plaintiff. A plan was proposed and accepted by the stockholders of the bank to bring in new capital by increasing the capital stock from

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

$150,000 to $300,000, selling 1,500 shares of the new issue at par. On January 24th the three defendant officers and directors, together with three other directors, passed a resolution at the directors' meeting awarding these three defendants each $5,000 in consideration of their services in selling the new issue, and conditioned upon their success in so doing. The bank did not prosper. Depositors withdrew their money, necessitating the sale of the bank's securities and the calling in of its loans to meet their demands. Thus over $400,000 of loans were called in, and salable securities to the extent of $145,000 were disposed of. No new loans were made. Hence the bank was not engaged in that essential part of a lucrative business, but was, in fact, in liquidation, meeting its creditors' demands. In so doing its operating expenses exceeded its income, and such business as it was transacting was conducted at a loss of over $1,600 a month. In April, 1908, defendant Roeth, by his own testimony, gave up his salary of $300 per month, "so that the bank might live. I did not want to see the bank fail if I could help it." During this time defendant Gray, first vice president, took an active interest in the bank's collections. He used a classified list of the notes of the bank, and upon this list made his own notations touching their value. He classified the notes as "N. G." (meaning no good), "good," "bad," "doubtful," and "slow." Upon this list the bad loans of the bank aggregated over $226,000; the doubtful loans over $146,000, or a total of over $373,000; while the "N. G." or worthless notes had an aggregate face value of over $29,000.

Such was the condition of affairs and such was the knowledge of the defendants of this condition of affairs when, on May 22, 1908, there was published in the Oakland Tribune in the city of Oakland, the following report, entitled:

"Report of the Condition of the Union National Bank of Oakland at the Close of Business, May 14, 1908."

This was an official report to the Comptroller of the Currency as required by the national bank act. It set forth:

Resources:	
Loans and discounts..........	$675,587.45
Bonds, securities, etc..........	303,346.67
Capital Stock:	
Capital stock paid in..........	150,000.00
Surplus fund	100,000.00
Undivided profits	51,052.01

Correct—Attest: Geo. Roeth,
George D. Gray,
James L. De Fremery,
Directors.

In this report the item "Loans and discounts, $675,587.45," included at their full face value: First, every one of the "doubtful" loans of the Knight report, which loans had been set down as worth only one-third of their face, aggregating $107,155.59; second, every one of the "not valued" loans set forth in the Knight report and valued at one-half of their face value, aggregating $194,756.05; third, every one of the "bad" and "doubtful" loans specified in Gray's list, which aggregated $373,684.74; and, fourth, every one of the "N. G." and "bad" loans of Gray's list, aggregating $29,581.42, believed by Gray to be worthless. All of these notes and loans were included among the resources of the bank as being worth their full face value. Under the item "Bonds, securities, etc., $303,346.67," were bonds of the face value of $100,000 which in the Knight report, approved by the committee, were held to be worth only $50,000. Accepting the Knight report as containing a fair estimate of the value of the bank's assets, and comparing it with the published statement of May 22d, above quoted, it is apparent that the value of the capital stock paid in, there represented to be $150,000, and the amount of the surplus fund, there represented to be $100,000, and the amount of the undivided profits, there represented to be $51,052.01, or a total of $301,052.01, were actually worth $55,310.90. And from this valuation so fixed in November must be deducted the admitted losses which the bank had sustained since its reopening in January. And that the Knight report erred rather upon the side of liberality than conservatism is established by the facts that in May, 1909, a receiver took charge of the bank as an insolvent institution under the national bank act, and although between the date of this report and the failure of the bank $150,000 had been added in cash capital, and although during all of that time no new loans had been made, the assets proved insufficient, after two years of liquidation, to pay off the depositors, to whom $60,000 are still owing. It is unnecessary to add that the stockholders have received nothing. Mr. Morris, the receiver of the bank, testified that many of the notes which were valued at one-half and one-third of their face in the Knight report were still in his hands uncollected and uncollectible.

The full amount of the subscription to the $150,000 new issue of the bank stock had not been secured by the defendants. A number of subscriptions were conditional upon full subscriptions being obtained by or before July 15, 1908. The defendants were not only in managerial charge of the affairs of the institution, but had undertaken to secure these subscriptions, and had voted themselves a $5,000 commission each for so doing. On July 9th plaintiff, who was not a stockholder of the bank, and who had not been interested in the affairs of the bank, was approached by the president on the sidewalk in front of the bank, with the request for a business conversation, in the hope of interesting him in the institution. They withdrew to the president's office, where a conversation was had. There plaintiff met Mr. Roeth, the president stating that he was endeavoring to induce Mr. Macdonald to purchase some of their stock, and Mr. Roeth replying that he hoped Mr. Macdonald would become interested. The published report of May 22d was handed to Mr. Macdonald, the court finding that:

> "At said time and place defendant Roeth said to plaintiff that said report correctly set forth the financial condition of said bank as shown by the books of the bank."

Plaintiff, at the close of the interview, declared that he did not think that he was sufficiently interested to proceed in the matter, and left the bank, but, at the solicitation of the president, agreed to return the following morning. Mr. De Fremery conferred with defendant Gray after plaintiff's departure, told him he was trying to induce appellant to take some of the stock, and Gray expressed his approval. Plaintiff returned to the second conference upon the morning of July 10th, with the result that he agreed to buy 54 shares of the old issue of stock from the defendants, and did so, paying them $100 per share; they having previously bought the stock during the period of the bank's suspension for $50 per share. He also purchased 50 shares of the new issue. Plaintiff not only purchased this stock, but further undertook to aid in the rehabilitation and upbuilding of the bank. Before the purchase of the 104 shares was actually consummated, 10 shares of the stock were placed in plaintiff's name to qualify him for admission to the directorate, to which he was immediately elected. On the following day, July 11th, he wrote to his friend Mr. Metcalf a letter, urging the latter to join with himself and his associates in the reorganization of the bank. The opening paragraphs of that letter are as follows:

> "My Dear Metcalf: With a number of strong men as directors, we are reorganizing the Union National Bank, and I have suggested your name for president, or vice president, whichever position you would entertain. Inclosed is the last statement. The capital stock, fully subscribed for, has been increased $150,000, giving $300,000 capital, with $100,000 surplus and $51,000 undivided profits."

The letter proceeded to say that the writer could secure for Metcalf some of the stock at $100 per share if he desired to purchase it, and that "it would unquestionably be a very profitable venture for you." On July 17th plaintiff completed the purchase of the 104 shares. A few days thereafter one Perine, whose brother was employed in the bank, offered to sell plaintiff 270 shares of the stock at par. Plaintiff entered into an agreement for this purchase on July 31st. This sale was consummated on August 15th, when the stock was paid for by plaintiff. The day following this last purchase plaintiff testified that he was confidentially informed by the cashier of the falsity of the representations which had been made to him and of the true condition of the institution. He immediately proceeded to make an investigation, and, finding the cashier's information to be true, tendered to defendants the stock which he had purchased, demanding a return of the money and other properties paid therefor. The defendants refused to acknowledge the justice of his demand, and this action followed.

The gravamen of the charges of fraud and deceit in the second and third causes of action are the same. Plaintiff charged the official and managerial capacity of the defendants; that they were familiar with and knew the financial condition of the bank; were familiar with the values of all of the assets and liabilities of the bank; that they requested plaintiff to purchase 100 shares of the capital stock of the bank and delivered a copy of the report of the condition of the bank at the close of business on May 14, 1908, to plaintiff, at the same time telling him that that report was correct and was a true statement of the financial condition of the bank. He pleaded further that the report was attested as being correct by each of the respondents, and was made, issued, and published as required by the national bank act; that he believed and relied upon the report, and was thereby induced to buy the stock; that if the report had been correct the stock would have been worth at least the price paid for it; but "that at all of said times and at all times herein mentioned said report was false and untrue in the following particulars, to wit: The loans and discounts of said bank which were stated in said report to be of the value of $675,587.45 were of no greater value than $375,000; the bonds, securities, etc., which were stated in said report to be of the value of $303,346.67 were of no greater value than $200,000." Further plaintiff alleged that the defendants and each of them knew the report to be false and untrue in the particulars stated, and that the stock of the bank was at all times without value, and that in consequence of these fraudulent representations plaintiff sustained the damage for which he sought recovery. The third cause of action charges upon the same report and representations, and alleged that in reliance upon them he purchased the 270 shares of stock from Perine. Each defendant filed a separate answer, and to the allegations concerning the report they pleaded as follows:

> "This defendant denies that at all or any of said times or at any time said report was false or untrue in the particulars mentioned in paragraph 3 of said second cause of action or in any particular, and further denies that the loans and discounts of said bank were of no greater value than three hundred and seventy-five thousand dollars ($375,000), and further denies that the bonds, securities, etc., of said bank were of no greater value than two hundred thousand dollare ($200,000), and in connection with said denials, said defendant alleges that the statements of the value of the loans and discounts of said bank, and of the bonds, securities, etc., of said bank, and the statements of value as to all the assets and liabilities of said bank contained in said report were and each of them was an expression of opinion as to the value of said assets and said liabilities, and that said statements and none of them were statements of facts, and that said defendants and each of them believed at the time said report was made that said report represented the true condition and affairs of said bank, and that said report repre-

sented the true value of the assets and liabilities of said bank, and that said report represented the opinions of defendants and each of them as to the value of the bank's assets and liabilities and each item thereof."

The court found that the defendants were such officers of the bank, and "actively participated in the business of the bank and constituted the managing officers of the bank," and each of the defendants was familiar with and knew the financial condition of the bank, but no one of the defendants, nor all of them, "knew the value of all of the assets and liabilities of said bank." "Plaintiff knew that the defendants had been and were such managing officers and directors of the bank," and "that they and each of them were and was at all such times familiar with the financial condition of said bank, and that it is a fact that at said times plaintiff believed that said defendants and said James L. De Fremery were familiar with the value of all the assets and liabilities of said bank." The court further found it to be a fact that defendants requested plaintiff to purchase the stock of the bank. It found that defendants did deliver a copy of the official report of May 22d to defendant on the 9th of July, but found that none of the defendants "then or there or at all told plaintiff that said report was correct, or that said report was a true statement of the financial condition of said the Union National Bank"; but that it is a fact that at said time and place defendant Roeth stated to plaintiff that said report correctly set forth the financial condition of said bank *as shown by the books of said bank.* Touching the specific allegations of the falsity of the report as averred in the complaint, it found:

> "That it is not a fact that at all or any of said times, or at all or any of the times herein or in said amended complaint mentioned, said report was false or untrue in that the loans and discounts of said bank which were stated in said report to be of the value of $675,587.45, were of no greater value than $375,000, and that it is not a fact that at said time or place said report was false or untrue in that the bonds, securities, etc., which were stated in said report to be of the value of $303,346.67 were of no greater value than $200,000."

Additionally, the court found:

> "That it is a fact that plaintiff believed or relied on said report, but that it is not a fact that by reason of plaintiff's reliance on said report plaintiff purchased or subscribed for any shares of stock of said bank."

Finally the court found that at the time of the first purchase of stock and at the time of the second purchase of stock it was "not a fact that plaintiff had no knowledge of the financial condition of said bank or of the truth or falsity of said alleged statements or said alleged representations, and that it is not a fact that plaintiff believed or relied upon said alleged statements or said alleged representations; that it is not a fact that on or about the 31st day of August, 1908, plaintiff ascertained the true condition of said bank, but that it is a fact that some time in the month of July, 1908, plaintiff ascertained the true condition of said bank; that it is a fact that plaintiff was familiar with the condition and the affairs of said bank and knew the condition thereof at the time of the purchase of said stock of said bank as hereinbefore mentioned."

From the discussion which follows will be eliminated any consideration of other false representations alleged to have been made by defendants to plaintiff, as that the bank was in a sound financial condition, that it was making money, that its stock was of the value of $145 a share, as would have been the case had the official report of May 22d been true.

[1] Upon all these matters there is, as is usual, a sharp conflict in the evidence, and the findings of the court may not here be disturbed. We will limit the consideration under the findings actually made to the question whether or not these findings are supported by the evidence, and to the final question whether, if so supported, they sustain the judgment. This task would be much simpler were it not for the evasive and inconclusive nature of the findings which the court actually made. Thus the complaint charged that the official report admittedly attested and published by the defendants as representing the condition of the bank (which, as we shall hereafter see, means the *true* condition, and not a mere transcript from the books) was false in specified particulars. The answer tendered issue by a denial to the effect that it was not true, as stated in the complaint, that the loans and discounts were of no greater value than $375,000, and that the bonds and securities of the bank were of no greater value than $200,000, as pleaded in the complaint. The answer does not attempt to say that the loans and discounts and the bonds and securities were of the actual value placed upon them in the official report. Manifestly a pleader in such a verified answer would escape all consequences attaching to false denials by evidence that the loans and discounts, instead of being worth $375,000, were worth $376,000, and that the bonds and securities were worth $201,000, instead of $200,000. But such a denial, with proof to establish it, would not at all meet and avoid the allegations of the complaint that the report was materially false in these essential particulars. What the defendants rested upon in their answer in avoidance of the complaint is made clear by the last portion of the paragraph above quoted. They rested, and pleaded that they rested, upon the proposition that the statements in the official report were not statements of fact at all, but statements of opinion, and that the report "represented the opinions of defendants and each of them as to the value of the bank's assets and liabilities and each item thereof."

[2] But an expression of an opinion, to avoid an action for deceit, must be the expression of an opinion honestly entertained by the person making it. Barron's Estate Co.

v. Woodruff Co., 163 Cal. 561, 126 Pac. 351; Phelps v. Grady et al., 141 Pac. 926.

Confronted by the Knight report, wherein it is shown that the opinion of these defendants as to the value of the bank's assets was radically different from, and showed a valuation materially less than, the opinion expressed in their official report, the conclusion that the report contained a false and dishonest expression of opinion, unless a reasonable explanation be presented, is well-nigh inevitable. But the court does not find upon this, but, to the contrary, shifts its ground and declares that the defendants, in giving the report to plaintiff, declared only that it "correctly set forth the financial condition of said bank as shown by the books of said bank." Moreover, when the court comes to find upon the question of the falsity of the published official report, it fails utterly to find, as it should, what was the difference between the published value of the loans and discounts and bonds and securities and the real value, but limits its findings to the evasive declaration that this report was not false or untrue, in that the loans of the bank stated in the report to be of the value of $675,587.45 were of no greater value than $375,000. It nowhere declares what the true value was, nor what was the discrepancy between the published value and the actual value. Yet, manifestly, such a finding is essential to the disposition of the case, since, if plaintiff had the right to rely upon this published report, it is of the highest importance in determining the rights and equities of the parties to know how great is the variance between the official statement and the facts as known to, or believed by, the officials themselves when that statement was promulgated. The evidence to support such a finding was before the court in the Knight report. It was evidence of singular persuasiveness, in that it was evidence of the values fixed by the accountant employed by these defendants, which values were by the accountant himself arrived at after consultation with the defendants, and which values were carefully considered and approved by the defendants. In the same way the court limits its finding to a declaration that it is not true that the stock purchased by plaintiff was "without any value whatever." What was that value actually was easily susceptible of determination, and the evidence of the Knight report was before the court from which it could have determined it. Plaintiff paid $100 a share for his stock. If he was defrauded into making the purchase and the stock, though not valueless, was worth but $10, $15, or $20 a share, it was for the court so to have found. Again, it is to be noticed that the court fails utterly to find whether or not the report was or was not false in any essential particular, precisely as it fails to find upon the good faith of the defendants which they pleaded, to the effect that, whether correct or incorrect, the report was but the expression of their honest opinions upon questions of values. Still further, the court find it to be a fact that plaintiff *relied* on this report, but also finds that it is not a fact that by reason of his reliance on the report plaintiff purchased or subscribed for any shares of stock. It is difficult to comprehend this finding. Plaintiff was handed a report of the financial condition of the bank as contained in its last official published report. By that report the book value of the stock was approximately $145 a share. The court finds that he relied on that report, which can only mean that he relied upon it in making his stock purchases. But at the same time the court finds that it is not a fact that he purchased because of his reliance on the report. The two statements are absolutely at war with each other, and are self-destructive, saving upon the one theory that the court meant that plaintiff did not purchase in *sole* reliance upon the report. But this, if it be true, is not destructive of plaintiff's right of action.

[3] "It is sufficient, in order to maintain the action, that the false statement was one, although it may not have been the sole, inducement for the purchase." Morgan v. Skiddy, 62 N. Y. 319; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Sioux Nat. Bank v. Norfolk State Bank, 56 Fed. 141, 5 C. C. A. 448; Oliver v. Bank of England, 1 Ch. Div. 610; Addington v. Allen, 11 Wend. (N. Y.) 374.

Again, while the court finds, in effect, that appellant was familiar with the condition and affairs of the bank at the time of the purchase of the stock, this finding manifestly clashes with the finding which we have just been considering, that he relied upon the published report. Since it is found that he relied upon the published report, it becomes proper to consider what character and extent of reliance he was entitled to place upon it. From plaintiff's testimony it appears that he purchased heavily of the stock of a moribund institution, buying that stock at par when it had previously been purchased by the defendants at $50 per share, and when the report of the expert accountant fixed a value on it of slightly over $30 a share. Also we have plaintiff's letter to his intimate friend, Mr. Metcalf, inviting him also to purchase at the same price, and giving the figures from the report showing that at that price it was an advantageous purchase. We have, moreover, the verified pleadings of the defendants that the report, in their opinion, "represented the true condition and affairs of said bank, and that said report represented the true value of the assets and liabilities of said bank." It is inconceivable that, having solemnly sworn that this was what the report expressed, they should have made any other representation than that to the plaintiff.

[4] Besides, that was precisely what the law called upon that report to express. Thomas v. Taylor, 224 U. S. 75, 32 Sup. Ct. 403, 56 L. Ed. 673; Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L.

Ed. 1002. In Thomas v. Taylor it is said by the Supreme Court of the United States that the statute requires the report "to contain a true statement of the condition of the bank."

[5] In Smalley v. McGraw, 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915, it is said:

> "If the directors signing the report knew, * * * prior to signing such report, that the item 'Loans and discounts' contained paper worth much less than its face value, which would materially affect the value of its stock, they would be individually liable to a purchaser of the stock who relied in good faith upon such report as stating the true financial condition of the bank."

And it matters not whether such a report was put forth for the express purpose of inducing any particular individual to purchase. Prewitt v. Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. Rep. 586; Heard v. Pictorial Press, 182 Mass. 530, 65 N. E. 901; Hubbard v. Weare, 79 Iowa, 678, 44 N. W. 915; Morgan v. Skiddy, supra; Thomas v. Taylor, supra.

[6] If the statements and representations which were made were, in fact, false, it is immaterial that the defendants believed that the bank would eventually come through its difficulties, or that the defendants did not intend to cheat the plaintiff. Alvarez v. Brannan, 7 Cal. 504, 68 Am. Dec. 274; Bank of Woodland v. Hiatt, 58 Cal. 234; Groppengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036; Spreckels v. Gorrill, 152 Cal. 387, 92 Pac. 1011; Hubbard v. Weare, supra. The reliance which plaintiff was entitled to place upon this report then, was a reliance that the report was a true statement of the bank's financial condition, and not, as the court found, a mere transcript of the condition of the bank as shown by the bank's books. Moreover, deceit may be negative as well as affirmative. It may consist in suppression of that which it is one's duty to declare, as well as by the declaration of that which is false. If it be so that defendants did not believe, and could not have believed, that the report contained a true statement of the bank's financial condition, their failure to disclose this fact to the plaintiff in handing him the report forms the foundation of an action for deceit under the principle above stated. Civ. Code, § 1710.

[7] And, finally, upon this proposition it may not be disputed that plaintiff was justified in relying upon the respondents' representations, either actual or as contained in the report, without further independent investigation of his own. Bank of Woodland v. Hiatt, supra; Spreckels v. Gorrill, supra; Senter v. Senter, 70 Cal. 621, 11 Pac. 782; Dow v. Swain, 125 Cal. 683, 58 Pac. 271; Merrill v. Florida Land & Imp. Co., 60 Fed. 17, 8 C. C. A. 444; Union Nat. Bank v. Hunt, 76 Mo. 439.

On behalf of respondents it is urged that they were men of standing and integrity; that their good faith is shown by the fact that they invested their own money in an effort to save this failing institution; that the general findings of the court upon the question of false representation are entirely in their favor; that the $15,000 which they voted to themselves were later, upon suggestion of the bank's attorney, restored to the bank; and, finally, that in all respects they acted with a good faith which is abundantly shown. This statement is made in order that it may not be supposed that the counter contentions of respondents have been overlooked. The fact nevertheless remains that, because of the incompleteness, the evasiveness, and contradictoriness of some of the material findings, as well as the absence of other material findings, the judgment cannot be supported and must be reversed.

It is ordered accordingly.

We concur: MELVIN, J.; LORIGAN, J.

168 Cal. 165

AALWYN v. COBE et al. (S. F. 6371.)

(Supreme Court of California. July 3, 1914. Rehearing Denied July 31, 1914.)

1. Pleading (§ 205*)—Complaint—Allegations as to Adverse Claim—Demurrer.

A compalint stating a cause of action to quiet title to real property is not rendered subject to general demurrer by the addition of allegations of the details of the asserted fraud, whereby defendants' purported title was created, without clearly stating the facts constituting the fraud.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–493, 495, 496, 498–510; Dec. Dig. § 205.*]

2. Pleading (§ 207*) — Complaint — Sufficiency—Demurrer.

In an action to quiet title, a complaint alleging fraudulent acts by the defendants, in connection with the title to the real estate involved, *held* subject to special demurrer, as it could not be told whether plaintiff was asserting a title under defendants or superior to their asserted rights, or how their fraudulent acts could cloud her title.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512; Dec. Dig. § 207.*]

3. Quieting Title (§ 34*)—Complaint—Sufficiency.

In an action to quiet title, a complaint alleging fraudulent acts respecting the title to the real estate involved on the part of defendants *held* not to sufficiently allege fraud as against a defendant, to whom another defendant was charged with making a deed for a fraudulent purpose.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.*]

4. Pleading (§ 225*) — Demurrer — Amendment—Necessity of Asking Leave.

Where a special demurrer was sustained for uncertainty by an order making no mention of an amendment, and plaintiff for 17 days made no application for leave to amend, the court did not err in granting a motion to deny leave to amend and in dismissing the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–583; Dec. Dig. § 225.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. PLEADING (§ 225*)—DEMURRER—RIGHT TO AMEND.

It is error for a court arbitrarily to refuse permission to amend a complaint after sustaining a demurrer on the special ground of uncertainty or the like.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–583; Dec. Dig. § 225.*]

6. PLEADING (§ 225*) — DEMURRER — ORDER —LEAVE TO AMEND.

While the court, if requested, should grant leave to amend after sustaining a special demurrer for uncertainty, the order sustaining the demurrer need not say anything about leave to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–583; Dec. Dig. § 225.*]

7. APPEAL AND ERROR (§ 907*) — BURDEN OF SHOWING ERROR.

On appeal from the judgment of dismissal after the sustaining of a special demurrer, error would not be presumed, where the record failed to show that leave to amend was asked and refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

8. PLEADING (§ 223*)—DEMURRER — FAILURE TO AMEND—EFFECT.

A plaintiff who has declined to amend his complaint, after a demurrer sustained, which is both general and special, must stand upon his pleading, as against both grounds of demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 568; Dec. Dig. § 223.*]

Department 2. Appeal from Superior Court, San Mateo County; G. H. Buck, Judge.

Action by Alice Aalwyn against Ira M. Cobe, S. W. Swabey, and others. From a judgment dismissing the action as to the defendants named, plaintiff appeals. Affirmed.

Arthur Crane, of San Francisco, for appellant. P. L. Benjamin, of Oakland, for respondents.

MELVIN, J. Plaintiff sued to quiet title to land claimed by her, and in addition to the ordinary allegations in a complaint under section 738 et seq., Code of Civil Procedure, set up certain alleged fraudulent acts whereby her title was clouded. She asked for general equitable relief in addition to the usual prayer that her title to the property should be quieted. Defendants Ira M. Cobe and S. W. Swabey demurred generally and specially. On August 12, 1912, the demurrer was sustained, and on August 29, 1912, defendants Cobe and Swabey moved that plaintiff should be denied leave to amend her complaint and for judgment dismissing said action as to them. Their motion was granted in an order reciting that the matter came on regularly, and judgment was accordingly entered dismissing the action as to these two defendants. The appeal is from this judgment.

Appellant insists that the general demurrer could not have been properly sustained because two paragraphs of the complaint state a cause of action to quiet title, and the other parts of the pleading, however imperfect they might be, would not destroy it as against a general attack for want of facts.

It is true that in the fifth and sixth paragraphs of the complaint there is a statement of a cause of action to quiet title. These paragraphs are as follows:

"(5) That plaintiff is the owner and entitled to the possession of all that real property described as follows, to wit: All of the property referred to, described, and designated as 'Burlingame Terrace,' as recorded June 4, 1906, at page 25 on Map Book 4, county recorder's office of San Mateo county, except lot 5 and 25, block 9; lot 5, block 7; lot 24, block 1; lot 5, block 11, lots 1 and 2, block 3; and lot 4, block 12—there being sundry lots and area of and in said Burlingame Terrace in addition to the exceptions hereinabove numbered.

"(6) That said defendants claim and assert interests therein adverse to the plaintiff, and that the claims of said defendants are without any right whatever, and that said defendants have not, nor have any of them, any estate, right, title, or interest whatever in said land or premises or any part thereof."

[1] Respondents take the position that this is not an ordinary suit to quiet title, but that fraud is one of the constituent elements of the cause of action which the plaintiff endeavored to plead, and that, to support a cause of action which depends upon the proof of fraud, the facts constituting the fraud must be clearly stated. In this behalf such cases as Burris v. Adams, 96 Cal. 667, 31 Pac. 565, Estate of Yoell, 164 Cal. 546, 129 Pac. 999, Burris v. Kennedy, 108 Cal. 343, 41 Pac. 458, and McDonald v. McCoy, 121 Cal. 71, 53 Pac. 421, are cited. Whatever may have been the rule formerly, it is now settled that a cause of action to quiet title, pleaded in general form, is practically the same when to these general allegations are added the details of the asserted fraud whereby the defendant's purported title was created. Henry v. Phillips, 163 Cal. 137, 124 Pac. 837, Ann. Cas. 1914A, 39. The only difference between a general pleading and one containing added averments of fraud is that the first one stated the wrongful claim of defendants in general and the second in detailed terms. There being a general pleading sufficient in form of a cause of action to quiet title to real property, it follows that the general demurrer could not have been properly sustained. We must therefore examine the complaint in view of the special demurrer.

[2, 3] The earlier part of the complaint was devoted to allegations that A. F. Martel was the principal stockholder and the controlling power in the Market Street Bank and the Market Street Securities Company, and that he used his position to appropriate the funds and property of the said corporations, particularly of the bank, to hinder, delay, and defraud the depositors, creditors, and clients of the bank, of whom plaintiff was one. Following the assertion of title quoted above are allegations that Martel, in pursuance of a conspiracy and for his own convenience, "by and with the consent, connivance, and ac-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quiescence of the defendants" (including these demurrants), caused his "general utility man," one Charles W. Smith, fraudulently to execute a certificate and declaration that he was the owner of said property, and that said Smith did "thereon obtain the recording of a map of said real estate, in Map Book 4, at page 25, of the public records of and in the county recorder's office of said San Mateo county, Cal., wherein and whereby the formula and name 'Burlingame Terrace' was substituted for the previous surveys, metes, and bounds, adopted and used to describe and identify, and so accurately describing and identifying, said property, said change and alteration of the description being calculated and intended to confuse and mislead, and so did confuse and mislead, the identification of said property generally, except upon close scrutiny and investigation, which it was assumed by said Martel and his said co-conspirators would not be, and actually was not, made by the persons hereinafter referred to, the patrons of said Market Street Bank, and the general public whom it was intended to confuse and mislead, and likewise give and impress, respectively, with an exaggerated idea and estimate of its importance and value as Burlingame Terrace over and above its estimate and value under the description previously used and in vogue; that said Burlingame Terrace has no existence, except such, if any, as it obtained from the aforesaid false and fraudulent records of said map." It is further averred that, in pursuance of a plan to permit Martel to convert the funds of the bank to his own use, he arranged to "borrow" $4,000 from the bank by giving as security therefor a false claim against the real property, in form a deed, which was to be held by the bank without recordation and exhibited to any person or visiting authority as Martel might desire, either as a mortgage or a conveyance absolute, to impress the person seeing it with the solvency of the institution. According to the pleading, when the deed had served its purpose it was to be returned to Martel without being recorded, and the sum "borrowed" was to be credited by the bank with repayment by personal services falsely and fraudulently assumed to have been rendered by him to the bank. Pursuant to the scheme (it is averred), Martel caused Smith to execute a deed, sufficient in form, to another "utility man," Sylvester, and cause said deed to be recorded. He likewise caused Sylvester to execute a deed of said property, good in form, to the bank, but "no reference was therein made to said Burlingame Terrace, or said map thereof; said real property being described by metes and bounds as and according to survey and description previously thereto in use." This scheme was carried out to the extent of the "borrowing" or converting to his own use by Martel of $4,000 from the bank and the false crediting of its repayment in supposed services. All this, it is stated in the complaint, was done by the connivance and acquiescence of the bank. According to the further allegations, Martel concealed from the directors of the Market Street Securities Company all knowledge of the execution of the deed by Sylvester to the Market Street Bank, but in pursuance of his fraudulent scheme arranged, by mutual agreement between the two corporations, that Sylvester should be employed by the securities company, and as such employé hold a claim to said real property "as and for, and in its, said Market Street Securities Company's, interest and behalf, in order to assert a false claim to said real property." The twelfth paragraph of the complaint follows, in which it is alleged:

> "That said scheme, plan, and arrangement was thereon consummated, effected, and carried out by said Martel with the consent, connivance, and acquiescence of said Market Street Securities Company, and said Market Street Bank, and said other defendants."

It is impossible to tell whether the above-quoted paragraph refers to Martel's scheme to keep the directors of the securities company ignorant of Sylvester's deed to the bank, the arrangement by which Sylvester was employed or the plan whereby the false claim was to be asserted. Next come averments that subsequently the Market Street Bank, with full knowledge of the "falsity of said claims," and "for the purpose of creating an apparent legal title in itself to said land adverse to said beneficiaries and in violation of its agreement to keep said deed unrecorded and unpublished, caused said secret deed to itself, so as aforesaid executed by said defendant Sylvester prior thereto and theretofore, by agreement aforesaid, kept unpublished, and unrecorded, to be recorded." What "beneficiaries" are meant does not appear. It is then alleged that, after such recordation, the defendant bank executed and recorded a deed of the property to Ira M. Cobe "for the purposes aforesaid," describing the property only by reference to the map and as said Burlingame Terrace. The expression "purposes aforesaid" is exceedingly vague in view of the various sinister purposes and schemes sought to be explained in the preceding part of the complaint. Next follows a statement, on information and belief, that Cobe is a "mythical person and a fictitious creation of said Martel, and one or more of said other defendants, and an alias for said Martel." But there is the further assertion that, if he have any existence, he "cannot now, and could not at any time heretofore, be found in the state of California, but is wholly a mythical and fictitious character, assumed and represented by said Martel, or some one procured and employed by him to that end, whenever he or any of said defendants deemed or deems it necessary that he should materialize; that is to say, receive or execute any written instrument in furtherance of said conspiracy to make false claims to said property." There is a statement that Swabey and Cobe, if the latter exists at all, cannot be found in the state; that both are insolvent, and no judgment at law could be enforced against them, or either of them. The next paragraph announces that the acts of the defendants, particularly the recording of the deed executed by Sylvester, are a cloud on plaintiff's title and a fraud thereon, making said title uncertain and "in a great measure valueless." The paragraph before the prayer of the complaint contains the statement that plaintiff cannot, from lack of knowledge, be more certain and specific "as to the particulars of the claims of said defendants, and each of them, to the said property, or as to the dates, times, or further particulars of said claims, but alleges that all the said particulars are, and were at all the said times, within the knowledge of the said defendants."

The complaint is characterized in the special demurrer as uncertain, ambiguous, and unintelligible because it does not appear therefrom with sufficient certainty or at all that Martel, Sylvester, Smith, or the Market Street Bank ever had any title to the property or that the alleged title of plaintiff was derived through these persons, and because it does not appear how the purported acts of fraud denounced in the complaint operated to make plaintiff's title uncertain or in a great measure valueless.

It is asserted by counsel for respondents that plaintiff is attempting to set up a title formerly in Martel and is complaining of various alleged fraudulent acts of Martel and the other defendants tending to cloud her title; but it is very plain, says counsel, that the complaint fails to show that any of the defendants ever had any title to the property. Appellant's counsel insists that the theory of the pleading was that plaintiff had a title superior to any asserted rights of any of the defendants and antedating the false claim set up under the fabricated map of Burlingame Terrace. But the complaint utterly fails to set up any such antecedent title in the plaintiff. It contains the averment that Burlingame Terrace has no existence except such as is derived from the filing of "false and fraudulent records" of a certain map. Yet the paragraph in which is pleaded plaintiff's claim of title describes the property as certain lots designated as being in "Burlingame Terrace as recorded June 4, 1906, at page 225 on Map Book 4, county recorder's office of San Mateo county," the very map which is stigmatized in another part of the complaint as a fraudulent document. So far as these allegations are concerned, it is impossible to determine whether or not plaintiff is endeavoring to establish her title upon that falsely asserted by Smith or not. The fact that the terminology of the map filed by Smith is used lends force to the respondent's contention that here was an attempt to set up a title formerly in one of the defendants. In the view most liberal to the pleading, it is uncertain whether or not plaintiff seeks to found her title upon that of some one of the defendants. For this uncertainty and the ambiguity of the allegations, the special demurrer was properly sustained.

For like reason it is impossible to tell how the alleged fraudulent acts of the defendants could cloud any title which plaintiff might have acquired. Having pleaded that Burlingame Terrace was created in perjury and iniquity, and that she owns property therein, she has failed to allege how her title became lawful and how any fraudulent acts of the defendants or any of them (even granting that fraud is sufficiently pleaded) could impeach her title.

But there was no sufficient allegation of fraud. Cobe is variously described as a fictitious person, an alias and a mythical character assumed by Martel or some one procured by him whenever it was deemed necessary to receive or execute instruments. That such a bodiless, intangible, ethereal, mythical, imaginary, ghostly, and altogether impalpable person may not be convicted of fraudulent practices needs no argument. The commission of a fraud is a personal accomplishment, however airy and unsubstantial the means employed. There is no allegation that Cobe exists except the statement that, if he exists, he is absent from the state and cannot be found. Even if this should be deemed enough to give him a personality, there are no facts sufficiently alleged to connect him with the fraud. He was merely the grantee in the deed from the bank, and, while that conveyance was made "for the purposes aforesaid," there is nothing to show that he knew of those purposes (whatever they were), even if we assume that they were fraudulent purposes. In the seventh paragraph of the complaint both Swabey and Cobe are mentioned. It is there alleged that, "as a part of said scheme" (which had just been referred to as one "hereinafter complained of"), Martel, "with the consent, connivance, and acquiescence of the defendants" (naming Cobe and Swabey among them), caused Smith to make and record the false certificate and map by which Burlingame Terrace was given an apparent existence. It nowhere appears how they connived, in what manner they acquiesced, or how their connivance and acquiescence contributed to the injury to plaintiff's title, nor is there any statement of facts showing their participation in that part of Martel's alleged fraudulent practices following the recordation of the map.

[4] Plaintiff insists that she should have been allowed to amend her complaint, citing in that behalf Schaake v. Eagle Automatic Can Co., 135 Cal. 480, 63 Pac. 1025, 67 Pac. 759, and Bryan v. Abbott, 131 Cal. 223, 63 Pac. 363. Neither authority sustains her position. In the latter case this court merely held that the lower court erred in sustaining

the demurrer. In the Schaake Case it was held that whereas the complaint stated a cause of action, and the demurrer was sustained on the ground of uncertainty, the court abused its discretion in forbidding amendment whereby the uncertainty might be cured. In the case at bar the special demurrer was properly sustained, and the court's order made no mention of amendment. Seventeen days later, upon motion which regularly came on to be heard, the order denying leave to amend was made. Plaintiff did not appear by attorney or otherwise at the hearing of this motion, and, as there is no showing that any request was ever made for leave to amend, she may not now complain of the court's action.

[5-7] While it is undoubtedly error for a court arbitrarily to refuse permission to a pleader to amend a complaint after sustaining a demurrer on the special ground of uncertainty or the like, it is not necessary, in making the order sustaining the demurrer, to say anything about leave to amend. Smith v. Taylor, 82 Cal. 541, 23 Pac. 217. Error will not be presumed where the record fails to show that leave to amend was asked and refused. Robertson v. Burrell, 110 Cal. 579, 42 Pac. 1086; Williamson v. Joyce, 140 Cal. 671, 74 Pac. 290; Prince v. Lamb, 128 Cal. 130, 60 Pac. 689; Durrell v. Dooner, 119 Cal. 413, 51 Pac. 628; Buckley v. Howe, 86 Cal. 605, 25 Pac. 132; Campbell v. Freeman, 99 Cal. 549, 34 Pac. 113.

[8] A plaintiff who has declined to amend his complaint, after a demurrer sustained, which is both general and special, must stand upon his pleading as against both grounds of demurrer. Martinovich v. Wooley, 128 Cal. 144, 60 Pac. 760.

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

168 Cal. 120

COOLEY v. MILLER & LUX et al.

(S. F. 6298.)

(Supreme Court of California. July 3, 1914. Rehearing Denied July 31, 1914.)

1. ATTORNEY AND CLIENT (§ 144*)—CONTRACT OF ATTORNEY—CONSTRUCTION.

Where nonresident devisees employed an attorney to represent them in the administration of the estate for a certain interest in their respective shares, and while a settlement of the estate was pending an agreement was executed canceling the first and providing that, in consideration of the termination of the prior agreement and the attorney's services past and future, the devisees granted to the attorney an undivided interest in all the property of the testator equal to 3 per cent. of the interest therein devised to such devisees under the will, the later agreement constituted a present grant of such specific interest to the attorney, and was not a mortgage, though containing a further provision that, whatever compensation should be allowed to him by the superior court as attorney for "absent heirs" should be first applied to reimburse him for all outlays made in rendering services to the grantors, and the balance should be credited to them in final settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

2. APPEAL AND ERROR (§ 1099*)—DECISION ON PRIOR APPEAL—CONSTRUCTION ON WRITTEN INSTRUMENT.

A decision on a prior appeal, construing a written instrument which is the basis of the rights of the parties, is the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

3. ATTORNEY AND CLIENT (§ 144*)—CONTRACTS FOR SERVICES—INTEREST IN DEVISE—PAYMENTS—ADVANCES.

An attorney having been appointed to represent certain German devisees under testator's will as "absent heirs," they conveyed to him, in consideration of services past and future 3 per cent. of their interest in the estate, the conveyance providing that whatever compensation should be allowed to him as attorney for "absent heirs" by the court of probate should be first applied to reimburse him for all outlays made for their benefit and the balance should be credited to them in final settlement. *Held*, that allowances, so made to him as attorney for absent heirs, were to be construed as advances on his share of the amount distributable to the various devisees for whom he was attorney in severalty, and as between them as a payment on the percentage conveyed to him, so that on final settlement he should receive property of a value or money in a sum equal with the amount already received to the full amount payable to him under the contract.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

4. PARTITION (§ 87*)—ADVANCEMENT TO COTENANT—EFFECT—ACCOUNTING.

The legal effect of advancement to a tenant in common of a part of his estate is to give him that part in severalty prior to the general partition, when he will be required to account for the property so received, and be entitled to the proportion of the remainder to which he is equitably entitled.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. § 87.*]

5. ATTORNEY AND CLIENT (§ 144*)—CONTRACT FOR COMPENSATION—CONSTRUCTION.

Where a contract, employing an attorney to represent certain German devisees, granted to him an undivided 3 per cent. of the shares of such devisees in the estate, and provided that whatever compensation should be allowed by the court of probate to the attorney as attorney for "absent heirs" should be first applied to reimburse him for all outlays made by him for their benefit and the balance should be credited to them in final settlement, it was not contemplated that there should be an adjustment of interest between the attorney and the German devisees according to value of the property at each time when he received installments of allowance, but the contract should be interpreted as requiring a single adjustment when his services and outlays and payments terminated.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

6. ATTORNEY AND CLIENT (§ 166*)—CONTRACT OF EMPLOYMENT — VALIDITY — BURDEN OF PROOF—UNDUE INFLUENCE.

The rule that the burden is on one, claiming under a contract obtained by him while acting as an attorney, to show that it was obtained fairly, and to overcome the presumption that it was obtained by undue influence, etc., does not apply to an original contract, employing an attorney to render services to the client.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368–372; Dec. Dig. § 166.*]

7. ATTORNEY AND CLIENT (§ 124*)—VALIDITY—TRANSACTION BETWEEN ATTORNEY AND CLIENT—PRESUMPTIONS—UNDUE INFLUENCE.

Civ. Code, § 2219, provides that every person who voluntarily assumes a relation of personal confidence with another is deemed a trustee, not only as to the person who reposes such confidence, but also as to all affairs concerning which he thus acquires information. And section 2235 declares that all transactions between a trustee and his beneficiary during the existence of a trust are presumed to be entered into by the latter without sufficient consideration and under undue influence. *Held*, that where after an attorney had been employed to represent certain German devisees in the settlement of an estate, they conveyed 3 per cent. of their interest to him in consideration of his services, such conveyance would be presumed to have been obtained by undue influence and without sufficient consideration, so that the burden was on one claiming under it to establish the contrary.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 246; Dec. Dig. § 124.*]

8. JUDGMENT (§ 715*) — CONSTRUCTION — ESTATES—FINAL SETTLEMENT.

An attorney having been employed to represent foreign devisees in the settlement of an estate, they conveyed to him 3 per cent. of their interest, with a proviso that whatever compensation should be allowed by the court of probate to him as attorney for "absent heirs" should be first applied to reimburse him for outlays and the balance should be credited to the grantors on final settlement. The devisees subsequently filed a petition in the probate proceeding for revocation of an order allowing the attorney $12,000 a year as attorney for "absent heirs," alleging as a ground therefor that the attorney had already received under the order more than his 3 per cent. of their shares under the grant. The court thereupon revoked the order, but declared that all questions as to compensation of the attorney were reserved until the final account of the administration had been settled and the estate was ready for distribution. *Held*, that the reservation was only effective to show that the order was revoked without deciding the issue as to the attorney's compensation or the amount he had received under the grant, and hence the order of denial did not constitute an adjudication that the attorney was not entitled to receive any additional portion of the shares of the German devisees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244–1246; Dec. Dig. § 715.*]

9. PARTNERSHIP (§ 245*)—DECEASED PARTNER—INTEREST IN FIRM—INVENTORY.

The interest of a deceased partner in the property of a firm of which he was a member at death must be inventoried by his administrator or executor, and must be appraised as a single item without reference to how extensive and varied is the character of the firm's property, and for the purposes of administration it must be deemed personalty, and may be sold as such, as provided by Code Civ. Proc. §§ 1445, 1524.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514–518; Dec. Dig. § 245.*]

10. PARTNERSHIP (§ 244*)—DEATH OF PARTNER—DISSOLUTION OF FIRM—LIQUIDATION.

The death of a partner dissolves the firm, after which the surviving partners are authorized by Civ. Code, §§ 2450, 2459, to act for the firm in the liquidation of its affairs, and by section 2461, the liquidating partner may dispose of the partnership property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 511; Dec. Dig. § 244.*]

11. PARTNERSHIP (§ 245*) — DISSOLUTION — PARTNERSHIP PROPERTY—RIGHT TO POSSESSION.

On the dissolution of a firm by the death of a partner neither the executor nor the heirs of the deceased partner have any right of possession of the partnership property, until the surviving partner has liquidated the firm's affairs and has delivered over the interest of the deceased partner to his executor or administrator, who has only a right to enforce settlement and payment of his decedent's interest remaining after settlement of the firm's affairs, the surviving partner being the only legal representative of the partnership, at least as between him and the heirs and legal representatives of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514–518; Dec. Dig. § 245.*]

12. PARTNERSHIP (§ 245*)—PROPERTY—INTEREST OF DECEASED PARTNER.

Where certain German devisees of a deceased partner conveyed 3 per cent. of their shares in the estate to their attorney for his services, such attorney thereby acquired no unconditional right to a specific interest in any particular property belonging to the firm, the interest of all of the beneficiaries being subject to liquidation and sale by the surviving partner in the settlement of the partnership affairs and then to administration of the estate of the deceased partner and distribution by the executors.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514–518; Dec. Dig. § 245.*]

13. ATTORNEY AND CLIENT (§ 144*)—COMPENSATION — CONTRACTS — CONSTRUCTION — DISTRIBUTION DECREE—CONCLUSIVENESS.

Where certain German devisees conveyed 3 per cent. of their interest in decedent's estate to their attorney for services and a portion of the property distributable to them consisted of an interest in the property of a firm of which decedent had been a member, which property during liquidation by the surviving partner was conveyed to a corporation in exchange for shares, and the shares distributed to the heirs, they represented the attorney in the distribution, and the decree divested him of all right to the property of decedent's estate, including any interest in the lands of the firm, except such as had been distributed to his grantors, limiting his claim, if any, to the shares of stock so received by his grantors in lieu of their undivided interest in the property.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by Mary A. Cooley as administratrix of the estate of Thomas Ross Cooley, deceased, against Miller & Lux and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

See, also, 156 Cal. 510, 105 Pac. 981.

Edward F. Treadwell, of San Francisco (Gustav Gutsch, of San Francisco, of counsel), for appellants. Sullivan & Sullivan, Theo. J. Roche, and John J. Barrett, all of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SHAW, J. [1, 2] The claim of the plaintiff to an interest in the land is founded upon an instrument, designated in the record as Exhibit B, purporting to be a conveyance from certain legatees and devisees under the will of Charles Lux, who died on March 15, 1887. These persons are referred to in the record as the "German heirs." They were represented in California by one of their number, Henry Lux, who was the attorney in fact for the others and as such executed for them the instrument in question. It was executed on July 14, 1890, to James H. Campbell, who was at that time the attorney for the German heirs, employed by them to represent them in the matter of the administration, settlement, and distribution of the estate of Charles Lux, and to protect their interests therein in the meantime whenever it became necessary to do so. Cooley afterwards obtained the Campbell interest. The same instrument was under consideration on a former appeal in this case, the opinion being reported in volume 156 Cal. at page 510, 105 Pac. 981. In that decision we held that the instrument was not a mortgage to secure Campbell in the ultimate payment of compensation for his services under said employment, but was a present grant of an interest in their part of the estate, and intended as payment for said services. This decision has now become the law of the case, and is conclusive upon us at this time. Upon further consideration we are satisfied that it is the correct interpretation of the instrument. The document is set forth in the previous opinion, but for convenience we here give the parts thereof which are important to our present consideration, substituting "German heirs" for "parties of the first part" and "Campbell" for "party of the second part":

> "The German heirs for and in consideration of the reconveyance and agreement hereinafter contained, and of the services already rendered and to be rendered by Campbell, hereby grant to said Campbell an undivided interest in all the property of the estate of Charles Lux, deceased, equal to three-hundredths (3-100) of the shares and interests therein devised to the German heirs by said decedent in his last will and testament. * * *
>
> "It is agreed that whatever compensation shall be allowed to Campbell by the superior court of the county of San Mateo, as attorney for absent heirs, shall be first applied to reimburse him for all outlays made by him in rendering his services to the German heirs, and the balance shall be credited to the German heirs in final settlement.
>
> "It is fully understood that the compensation herein provided for shall embrace all services rendered in the administration of said estate by Campbell up to and including the final distribution thereof."

The former appeal was from a judgment given before the great San Francisco fire of April, 1906, by which the records in the case were destroyed. It was presented in this court upon a somewhat meager restored record. After the reversal, amended answers were filed in the superior court, and there was a new trial, which resulted in the judgment in favor of plaintiff. This is the subject of the present appeal.

[3] In the opinion on the former appeal in discussing the meaning and effect of this instrument, after stating that these allowances to an attorney for absent heirs, though paid to Campbell, were in the nature of a partial distribution to such heirs, and that the instrument evinced an intention to provide for an adjustment of the matter between them and Campbell, we said that the instrument in effect provided that he should deduct his outlays and "adjust the balance on final settlement of the estate, by considering the same as an advancement solely upon the three-hundredths going to him, or, as between him and them, 'crediting' the same to them." This, as we intended it to be understood, meant that upon the final distribution of the Lux estate, the sums paid to Campbell should be taken as having been advanced to the German heirs, and that, as between him and the German heirs, it should be considered as a part of his 3 per cent. given to him in advance, so that on the final settlement between them he should receive property of a value, or money in a sum, which, with the sums already received, would make up his full 3 per cent. of their shares of the estate. In a petition by the defendants for a rehearing, it was urged that the passage quoted might be understood as saying that the instrument constituted a grant to Campbell of an interest in the specific property of the estate, in kind; whereas they claimed the correct interpretation was that it was a grant of an amount equal in value to 3 per cent. of their shares of the estate, real and personal, a grant which would be satisfied by the receipt of either property or money, or both, equal in value to 3 per cent. of the value of their shares. In response to this, in denying a rehearing, the court said that if upon a new trial—

> "it should be claimed that the aforesaid instrument should be construed as a grant of a share *in value* only of the estate, and not of the specific property, and that Campbell has already received all or a large part, of it, thus satisfying the grant or a due proportion of it or if it should be asserted that he has elected to take the whole, or part of it, in money, by retaining such sums as he may have received under the orders of the court as attorney for absent heirs, and that the plaintiff is thereby estopped from now claiming any of it, or the ratable part of it, as a share of the real estate, there is nothing in the opinion rendered which precludes such inquiries."

Upon the trial from which the present appeal is taken, evidence of the circumstances leading up to and attending the execution of this instrument was introduced, and the defendants again claimed that it should be interpreted as above indicated. The court below held the contrary. It made the following findings of fact with reference thereto:

> "It was not intended to be, nor was it in fact, an agreement that Campbell should receive, as his compensation for his services as the attorney for the German heirs, money and property

equal in value to three hundredths of the shares of the German heirs in the said estate, and that he might receive the same from time to time during the administration of the said estate, in cash, through the instrumentality of the probate court. The true intent and meaning of Exhibit B, the conduct of Campbell with reference thereto, and the circumstances of its execution, were as in these findings set out."

Elsewhere the findings state that the instrument was "an absolute present grant of an undivided three hundredths of the interest of the German heirs in the estate of Charles Lux, deceased, and derived under his will," and that "plaintiff, as the successor in interest of the said James H. Campbell, holds the title in fee to an undivided three-hundredths of the shares derived by the German heirs from the estate of Lux."

As to the money, the findings are that the allowances paid to Campbell by the estate of Lux as attorney for absent heirs amounted to $88,500, and that:

"The payments of said $88,500 were not in any sense payments on account of any amount to which Campbell was entitled under said instrument, as claimed by defendants. The only bearing such payments had on the rights of the parties to that instrument was that, on a final settlement between Campbell and the German heirs, the aggregate amount of such payments should be credited to said German heirs, and made a charge against said three-hundredths interest in said property and estate of Charles Lux, deceased, granted and conveyed to said Campbell by said instrument."

The judgment declared that Campbell was the owner in fee of the three-hundredths interest in the lands, and appointed a referee to take an account of the rents and profits of the lands received by the German heirs from and after the decree of distribution of the Lux estate on June 28, 1900, and of the shares of the German heirs received by them of the rents and profits of the estate of Lux on account of their shares therein from and after his death in 1887. It provided further that if, upon the report of the referee, it appeared that the share of Campbell in such rents and profits, that is to say, three hundredths thereof, equaled or exceeded $88,500, then the same should offset the $88,500 previously allowed to and received by him as aforesaid, and three-hundredths interest in the land should be set off to plaintiff, free from any charge against it for the reimbursement to the German heirs of the $88,500, or any part thereof; but that if Campbell's share of such rents and profits did not equal $88,500, the difference between that sum and his share of such rents and profits should be charged as a lien upon the lands finally allotted to plaintiff in the partition.

The circumstances leading up to and attending the execution of this instrument, as disclosed by the findings and the uncontradicted evidence now before us, are as follows: The estate of Lux, at his death, except the Buri Buri ranch and a comparatively small amount of personal property, consisted of the interest of Lux in a very large estate, real and personal, which in his lifetime belonged to Lux and Henry Miller, as partners under the firm name, Miller & Lux. It was a farming partnership carrying on the business of farming the land owned by the firm and bought by it for that purpose. Prior to the death of Lux the partners had executed an agreement, which Lux incorporated in his will and confirmed thereby. This agreement provided that upon the death of either partner, the survivor should continue the business for the joint use of himself and the estate of the deceased partner, for such period of time as he deemed necessary to settle up the business without detriment or sacrifice, not exceeding seven years, during which time he was to have sole control and management, with power to sell and dispose of the same at his discretion, paying to the executor out of the rents and profits an allowance for the family of the decedent, and such part only of the remainder of the decedent's share thereof as he deemed not to be required for the business, of which Miller was to be the sole judge. Miller had control under this agreement, and 2 years and 4 months had passed after the death of Lux. The interest of Lux in the partnership was one-half. The will of Lux gave to the German heirs an undivided one-half of the residue of his estate after paying debts, expenses of administration, and about $250,000 in legacies. The widow, Miranda W. Lux, took the other half as community property. In January, 1888, the German heirs had employed Campbell as their attorney to advise and act for them throughout the administration of the estate until final settlement, bring and defend all actions relating thereto in their interest, and secure as speedy a settlement as possible. A written agreement, dated January 6, 1888, had been executed to that effect, and the German heirs had therein agreed to assign and grant to him, as compensation for such services, three-hundredths of their shares of the estate, upon the condition that if he failed to perform his covenants therein, the contract might be rescinded, and thereupon he should cease to be their attorney, the agreement should be annulled and he should release to them all benefits to be derived by him from its terms. He had been, in April, 1889, appointed by the court as attorney for the German heirs, they being designated in the order as "absent heirs," but he had received no compensation as such, nor any compensation for services under his employment. The estate had been appraised in May, 1890, the Buri Buri ranch being valued at $145,615, the interest of the estate in the Miller & Lux lands at $1,542,610, and the interest of the estate in the Miller & Lux personal property at $920,072.94. The Buri Buri ranch had been distributed on July 10, 1890. It was not community property, and it was devised to the widow for her life, with remainder in fee to Philip

Lux. An agreement for its sale had been made, which was executed soon afterward. On July 10, 1890, Campbell had filed an application to the probate court for an allowance out of the estate to him as attorney for absent heirs, and it had been set for hearing on July 18, 1890. Under these circumstances, on July 14, 1890, the instrument Exhibit B was executed.

[4] We perceive nothing in the extrinsic facts to change the meaning and effect of the instrument as we understood it and stated it to be upon the former appeal. On the contrary, they strengthen and confirm the interpretation then given. The grant was of an undivided interest "equal to" 3 per cent. of their shares. It was made to Campbell as compensation for his services. No debt from the German heirs to him on account of the services thereafter existed, otherwise it would have been a mere mortgage, carrying no title. Upon the former appeal this point was decided, and it has become the law of the case. It was a transfer by tenants in common of an interest in an estate consisting of real and personal property. If at any time Campbell received from the others, in severalty, upon his share, more than his proportion of any one parcel, or more than his proportion of one kind of property, the result would necessarily be that his proportional interest in what remained would be reduced correspondingly. For illustration, if four persons own $1,000 acres of land in common, uniform in value, three having each three-tenths thereof, equivalent to 300 acres each, and the fourth one-tenth, equivalent to 100 acres, and the fourth receives from the others a conveyance of 50 acres in severalty as part of his interest, he would not then be entitled, in partition, to one-tenth of the remaining 950 acres, but only to one-nineteenth thereof, that is, the proportion of 50 to 950. And if the acreage was not of equal value, a partition of the remainder could not be made without a valuation of the land so as to give each his proportion in value of what remained. So if the common estate consisted of real and personal property and before a general partition one tenant received from the others a sum of money in severalty, to be applied upon his share, the same result follows; his interest in the remainder would be reduced accordingly, and a valuation of the remainder would be required in order to make an equitable partition. There is nothing in the instrument of July 14, 1890, or in that of January 6, 1888, which can be treated as providing that the sums paid as allowances to Campbell under the order were to be considered as loans by the German heirs to Campbell, to be charged against his interest and made a lien thereon, upon a final partition, if not repaid by him previously. The intent that they were to be advancements on his share of their interests is clear. The legal effect of an advancement to a tenant in common of a part of his estate is to give him that part in severalty prior to a general partition, with the result that upon a general partition he must account for the property so received, and can have only the proportion of the remainder to which he is equitably entitled.

This is what was actually accomplished by the allowances in question. They were chargeable solely to the shares devised and bequeathed to the German heirs, of which he had an undivided 3 per cent. They constituted a receipt by him of that much of said shares in severalty, being to that extent a division thereof, and they reduced the amount to which he would be ultimately entitled, and correspondingly reduced his interest in what remained undivided of said shares. This would be the legal effect of the transaction even if the provision that they should be credited to the German heirs in final settlement had not been inserted in the grant. It follows that the findings are contrary to the legal effect of the evidence, and the judgment is erroneous. A valuation must be made of the interests of the German heirs as compared to that which Campbell received. After deducting his outlays, if any, the balance must be charged to him as property of the common estate received by him in severalty from the other tenants in common and as a satisfaction, pro tanto, of his interest. If such balance is equal to three-hundredths of the value of the shares of the German heirs, he will have received his full share, and will have no interest in the property in question. If it is less than a three-hundredths, it will not extinguish his interest entirely, but will reduce it proportionally. It will then be only such proportion of the property as the difference between such balance and the three-hundredths to which he was originally entitled bears to the value of the property remaining at that time.

[5] The question arises whether, if this principle is rigidly applied, this adjustment of interest according to value should not be repeated every time Campbell received an installment of the allowance. If this were so, it would make the adjustment at this late date well-nigh impossible, and extremely difficult at all times. We do not think such repetition was contemplated or intended. It is provided that his outlays must be first deducted. This implies that a completion of his contract to perform the services was to precede the adjustment, since until that time it could not be determined what his outlays were. The most reasonable interpretation of the instrument upon this point is that the valuation should be made at the time that his services, his outlays, and the payments under the order ceased. The adjustment could then be made and his precise remaining proportion determined. The valuation of the shares of the German heirs should be made as of the year 1896, and his remaining in-

terest determined as of that date. If any remained to him, it would of course increase or decrease in value with the rise or fall of the value of the property subsequently, but his relative proportion would remain the same.

As the result of these conclusions, the judgment and order appealed from must be reversed. Some points which will be material upon a new trial are fully presented by the record now before us, and we deem it advisable to consider and decide them.

[6, 7] In the ruling upon the motion for a nonsuit the court below held that the burden was upon the defendants to prove that the instrument designated Exhibit B was obtained by undue influence. In this we think the court erred. Campbell's employment as attorney for the German heirs was made by the agreement of January 6, 1888, designated as Exhibit A. He did not become their attorney until that instrument was executed. The relation did not exist until the negotiations were closed and the execution completed. Hence the rules regarding the presumption of undue influence against a person who obtains an advantage from another while occupying the relation of trustee toward him do not apply to that instrument. See Cooley v. Miller, 156 Cal. 524, 105 Pac. 981. But after its execution the confidential relation existed and any transaction thereafter between him and the German heirs, touching the subject-matter of his employment, whereby he gained any advantage from them, would be attended by the presumption against him that it was entered into by them "without sufficient consideration, and under undue influence." Civ. Code, §§ 2219, 2235. The instrument of July 14, 1890, under which the plaintiff claims, constituted such a transaction. The instrument of January 6, 1888, was subject to the condition expressed therein that if Campbell should violate any of his covenants therein, or neglect to perform his duties or obligations thereunder, the grant might be immediately rescinded, and that thereupon he should cease to be their attorney, and should release to them all benefits to accrue to him therefrom. The instrument of July 14, 1890, expressly annulled that of 1888, and did not contain any condition subsequent whatever. It was an outright grant. The elimination of this condition by the second contract was a distinct advantage to Campbell, and the presumption of undue influence attached to the transaction. The burden was therefore upon him to prove that the instrument was not procured by undue influence, in order to establish its validity. The fact that he obtained this advantage from them while the confidential relation existed was shown by the plaintiff's evidence in the opening of his case, but no evidence to overcome the presumption of undue influence was given by him. For this reason the court erred in denying the motion for a nonsuit.

[8] It is claimed that the proceedings upon the settlement of the final account and distribution of the estate of Charles Lux constituted an adjudication to the effect that Campbell was not entitled to receive any additional portion of the shares of the German heirs. We do not think this contention is supported by the record. It is true that in August, 1896, the German heirs, in their petition to the court to revoke the order allowing Campbell $12,000 a year as attorney for absent heirs, alleged as a ground therefor that he had already received, under said order, more than his 3 per cent. of their shares under the grant, and that the court thereupon revoked the order. But the court had power to revoke the order without determining that Campbell had received his full share, and the order of revocation shows that this question was not decided. It declared that:

> "All questions as to compensation of the said J. H. Campbell, as attorney for any heirs of said estate are hereby reserved until, the final accounts of the administration of said estate having been settled, the said estate is ready for distribution; and that said questions be then considered and determined by the court in connection with the final distribution of said estate."

This does not purport to continue the trial of the issues upon the petition for revocation to the time of final settlement, as contended by defendants. That petition was granted and that proceeding terminated. The purpose of the reservation was to show that the order was revoked without deciding the issue as to Campbell's compensation or the amount he had received under the grant, to inform the parties that all questions of compensation would be left for determination at final settlement. If at the final settlement, which took place more than three years afterwards, the German heirs had again presented the issue that his grant was satisfied, either by bringing forward the former petition or by a new one, the denial of further allowances to Campbell might have been an adjudication of the question. But the matter was not so presented. The only issue decided upon the settlement of the final account was that presented by Campbell's exception thereto. This exception was placed upon the narrow ground that the order of allowance was not revoked until January, 1897, and that at that time there had accrued to him under the order the sum of $19,500, which still remained unpaid. His claim was based entirely upon the order and upon the theory that he had a vested right to the compensation fixed until the order was revoked. So far as appears from the record before us, no claim to a share of the estate, nor any claim by the German heirs that his share thereunder had been received, was presented at that time. In fact, he had previously, on November 8, 1896, conveyed whatever interest then remained in him thereunder to John H. Campbell, who, on July 2, 1897, had conveyed and assigned the same to Cooley. No mention of these deeds appears in the record of the proceedings in the Lux estate. The adjudication was nothing more than a decision that Campbell was not entitled to any money in virtue of the order. In the Supreme Court, the decision was based upon the ground that the order was void because Campbell had been employed by the German heirs before the order was made, and hence that they were not "absent heirs" for whom the court was authorized by the statute to appoint an attorney and fix his compensation, and that in such case the attorney's fee must be determined by the contract existing between them, and upon the further ground that, conceding the power to appoint, the court had no power to fix the compensation in advance, but only after knowledge of the facts, and in such amount as it should then deem reasonable.

The remaining question of importance arises upon the claim of the appellants that the interest of Campbell's successor in a considerable portion of the land in controversy was extinguished, or transferred to certain shares of stock in the corporation known as Miller & Lux. It will be necessary to state the facts at some length.

Miller did not settle the partnership affairs as promptly as the interested parties wished. On June 10, 1892, he having resigned as executor, the other executors of Lux began an action against Miller, entitled Potter v. Miller, alleging therein that he had failed and neglected to liquidate the partnership assets and affairs and give over to the executors the money and property due to the estate of Lux, and praying that he be compelled to account and settle the same, and that, if necessary to that end, a partition be made of the land belonging to the firm, and that one-half thereof be allotted to the executors as representatives of Charles Lux, deceased. Afterwards the German heirs were made parties to the action. Campbell, however, was not made a party. In that action a partial partition was made and judgment allotting the lands partitioned was made on December 24, 1896. These are referred to in the record herein as "divided lands." They constitute a part of the lands in which plaintiff claims a three-hundredths interest. By that judgment the Lux share of the so-called "divided lands" was set off in severalty to the executors of the estate of Lux, and certain other lands not here involved were set off to Henry Miller, and it was ordered that the suit should be continued as to other matters. It is conceded by the appellants that the plaintiff is not estopped by this partition, nor by the decree of distribution in the estate of Lux, from claiming an interest in their shares of the Lux "divided lands," under and by virtue of the grant from the German heirs.

Thereafter on April 8, 1897, while said suit was still pending as to the matters not adjudicated, the said Henry Miller, as surviving partner aforesaid, the said executors of the estate of Charles Lux, the German heirs and the successors of the deceased widow, executed an agreement providing for the liquidation and settlement of the partnership affairs of Miller & Lux and for the final settlement and distribution of the estate of Lux. This agreement recited that an account of Miller, the surviving partner, had been settled between Miller and the other interested parties, showing that there was owing to Miller from the firm the sum of $125,027.75, that it had been and then was impracticable to sell any considerable part of the very large landed property of the firm or to liquidate and close the partnership business, and that it would require an extended period to do so, because of the great amount of property and complicated nature of the business, and that all parties were desirous of effecting a settlement and dividing the property between the parties according to their interests. It provided to that end that a corporation should be formed under the name of "Miller & Lux," for the purpose of acquiring the firm property, disposing of the same as speedily as should be advantageous, and dividing the proceeds among the stockholders, and, in the meantime, to conduct the business formerly carried on by the said partnership; that it should have a capital stock of $12,000,000, divided into 120,000 shares of the par value of $100 each; that all stock thereof should be issued as fully paid up and unassessable; that Miller should be the president and general manager of said corporation; that when said corporation should be formed the parties should consent to a final judgment in said suit of Potter v. Miller, ratifying and approving the settlement of the firm accounts, confirming all the acts of Miller as surviving partner, and declaring and specifying the respective interests of Miller and the estate of Lux in the partnership assets; and that thereupon Miller, as such surviving partner and as an individual, and all the other parties, should convey and assign to said corporation all of their and each of their right, title, and interest in and to all the property, assets, and effects of said firm, excepting the said "divided lands" partitioned out as aforesaid. It further declared that the consideration of said conveyances should be the capital stock of said corporation in certain stated proportions and $1,750,000 in money, one-half the stock to be issued to Henry Miller, one-fourth to the German heirs, and one-fourth to the successors of the deceased widow of Lux, the money to be paid by said corporation in the same proportions to the same persons, but in 10 annual installments aggregating $175,000 each. It also provided that a decree of final distribution should be procured in the matter of the estate of Lux, distributing to said corporation all the property so to be conveyed to it by said parties, and that the agreement itself should be subject to the approval of the court, both in Potter v. Miller and in the Estate of Lux.

In pursuance of said agreement said corporation, Miller & Lux, was formed, and on June 4, 1897, Miller, as surviving partner and individually, conveyed to it all the property and assets of said firm, except the "divided lands," and the other parties also conveyed their interests therein to said corporation. Thereafter, on July 22, 1897, in the suit of Potter v. Miller, a supplemental complaint was filed, setting up said agreement and the proceedings and conveyances under it. On August 1, 1898, in said action, judgment was given confirming all the acts of Miller as surviving partner and the account as settled by said agreement, and declaring that the conveyance made by Miller on June 4, 1897, to said corporation, of all the property and assets of said firm, be ratified, approved, and confirmed.

The petition for distribution in the estate of Charles Lux, deceased, which was filed on June 13, 1900, set forth the execution and terms of the agreement of April 8, 1897, aforesaid, the conveyances made in pursuance thereof, and the confirmation thereof in Potter v. Miller, and alleged that the executors of Lux, in pursuance of said agreement and judgment, had received one-half of the capital stock of the Miller & Lux corporation in exchange for the property so conveyed, as provided in the agreement, and that the residuary legatees and devisees under the will of Lux were entitled to distribution of said stock in proportion to their interests in the property of Lux under the will. Upon this petition and after legal notice thereof, the court, on July 3, 1890, made and entered a final decree of distribution of said estate. This decree expressly ratified, approved, and confirmed all conveyances of real property made by Miller as surviving partner prior to June 6, 1897. This included the deed of June 4, 1897, conveying the lands of the firm to said corporation. It then distributed to said corporation the lands conveyed to it in pursuance of the settlement agreement and to the German heirs the shares of stock in the corporation allotted to them by the agreement, that is, one-fourth of said shares, each being given a number of shares equal to his interest in the residue of the Lux estate. The lands so distributed to said corporation are a part of the lands of which the plaintiff now seeks partition under the grant to him of July 14, 1890.

[9-11] The interest of a deceased partner in the property of a firm of which he was a member at the time of his death must be inventoried by his administrator or executor, and must be appraised as a single item, no matter how extensive and varied in character the firm property may be, and for the purposes of administration it is deemed a part of the personal estate and may be sold as such. Code Civ. Proc. §§ 1445, 1524; Woerner on Adm. §§ 124, 126. Death dissolves a partnership, and thereafter the surviving partners are authorized to act in the liquidation of its affairs. Civ. Code, §§ 2450, 2459. Such surviving partner so acting in liquidation may "dispose of the partnership property." Civ. Code, § 2461. The agreement incorporated into Lux's will also gave Miller this power. Neither the executor nor the heirs have any right of possession of the partnership property until the surviving partner has proceeded to its liquidation and has delivered it over to them. The executor or administrator has only the right to demand and enforce settlement and payment and delivery over of such part thereof as may remain after final settlement by the surviving partner of the partnership affairs. The surviving partner is the only legal representative of the partnership, at least as between him and the heirs and legal representatives of the deceased member. Smith v. Walker, 38 Cal. 392, 99 Am. Dec. 415; Allen v. Hill, 16 Cal. 119; Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

> "The surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent." Code Civ. Proc. § 1585.

[12] It will be seen from the foregoing statement of the law that the interest of the German heirs, at the time of the grant to Campbell, was subject to a double process before it could come into their possession: First, the liquidation and settlement of the partnership affairs by the surviving partner; second, the administration of the estate of Lux and the distribution thereof by the executors of his estate, after the partnership affairs were settled. Campbell obtained no greater estate or better right than that of his grantors. He, no more than they, had the unconditional right to a specific interest in any particular parcel of the firm property, and his interest therein, as theirs, was subject to disposal thereof by the surviving partner for the purpose of liquidation.

[13] Upon the former appeal, we held that the decree of distribution did not preclude the plaintiff, as Campbell's successor, from claiming a three-hundredths interest in the property thereby distributed to the German heirs. The decree was not entirely without effect upon the plaintiff, however. It was a proceeding quasi in rem, of which he had due notice. The German heirs, in effect, represented him in the distribution, and he is bound thereby so far as they are bound, he being their grantee, if he had any interest at all. It follows that his claim was thereby divested as to all the property of the Lux estate, including its interest in the Miller & Lux lands, except that which was distributed to them. By that decree, as we have seen,

they received no interest in the lands distributed to the Miller & Lux corporation, but, instead thereof, received shares of the stock of said corporation. This disposition is binding upon the plaintiff, and it divested him of any interest he might have had in said lands, and limits his claim, if any, to the shares of stock so received by the German heirs in lieu of their undivided interest in said lands. The decree is the equivalent of a partition, and, as no appeal was taken therefrom, it is now conclusive and binding upon the German heirs and upon all persons claiming under them. William Hill Co. v. Lawler, 116 Cal. 364, 48 Pac. 323; Cooley v. Miller & Lux, 156 Cal. 519, 105 Pac. 981; McKenzie v. Budd, 125 Cal. 602, 58 Pac. 199; Cunha v. Hughes, 122 Cal. 112, 54 Pac. 535, 68 Am. St. Rep. 27; Matter of Trescony, 119 Cal. 570, 51 Pac. 951; Martinovich v. Marsicano, 137 Cal. 359, 70 Pac. 459.

To the suggestion that the lands were distributed to the Miller & Lux corporation as grantee of the German heirs, and that therefore it was substituted to their place with respect to plaintiff's claim upon their shares, and that therefore the corporation stands seized of these lands as for his use, to the extent of his interest, there are, at least, two sufficient answers. In the first place, as above shown, Miller, as surviving partner and in settlement of the partnership affairs, had conveyed these lands to that corporation, in consideration of the stock and money to be issued and paid by it to the parties interested in the firm assets. This was a disposition which he had power to make as surviving partner, and it was binding on the estate of Lux and all persons claiming interests in said estate, including the plaintiff. The heirs and devisees of a deceased partner are as much bound by the disposition of the firm property by the surviving partner in settlement of the firm affairs as they are by the distribution of the decedent's property by the probate court in the proceeding for administration. It was expressly held in Robertson v. Burrell, supra, that the heirs at law or devisees of a deceased partner have no right to sue the surviving partner to compel a settlement of the partnership affairs, that such settlement is not to be made with them, but with the executor or administrator of the deceased partner, and that such executor or administrator alone may demand and sue for such settlement. The settlement here in question was made between the surviving partner and the executors of Lux and, upon the authority of the case just cited, it was conclusive upon the heirs and devisees of the estate of Lux. The title of the corporation, prior to distribution, was therefore received from Miller as surviving partner, and not from the German heirs. Their conveyances added nothing to this title, and imposed no burden or trust thereon in favor of the plaintiff. They were doubtless given merely to forestall questions as to the title. In the second place, the corporation was manifestly acting in good faith and, in reliance upon these agreements and decrees as a final settlement of the partnership affairs and of the estate, it has issued the stock and paid the money as agreed upon. The plaintiff, as grantee of the German heirs, had the right either to present his claim and ask distribution directly to himself of his interest or the equivalent thereof in severalty, or to make no appearance, abide by the result, and be thereby afterward limited to a claim solely upon the property distributed to his grantees. He was constructively a party to the proceeding for distribution, and he is charged with notice of that which the record thereof would have disclosed to him, including the fact that the corporation was receiving this land as a distribution upon final settlement of the estate and of the partnership, and was issuing its stock and paying this money in consideration thereof. Having allowed the matter to proceed and the stock and money to be issued and paid, with full knowledge of the facts, he is now estopped to claim an interest in any property except that which was distributed to the German heirs. He cannot claim an interest in the lands conveyed by Miller to the corporation and distributed to it by the final decree of distribution in the Lux estate. The court erred in declaring that he had an interest in these lands.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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168 Cal. 173

PRICE v. NORTHERN ELECTRIC RY. CO.

(Sac. 1975.)

(Supreme Court of California. July 3, 1914.)

1. Master and Servant (§ 107*)—Liability for Injuries—Unsafe Place to Work.

Where a carpenter, employed to assist in rebuilding a railroad trestle across a river, had been trimming piles at some distance from trestle bents, and had nothing to do with the building of such bents until ordered by the foreman to assist in placing a cap on a bent, and then in removing the staging, and had been working there only about 15 minutes when injured by the bent falling on him when the staging was removed, because it was not otherwise braced, the rule that an employer is under no duty to furnish a safe place to work where the employé is engaged in work that in itself constantly changes the character or safety of the place had no application, since, so far as he was concerned, the place had already been created before he was set to work there.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

2. Master and Servant (§ 235*)—Liability for Injuries—Contributory Negligence.

Such carpenter, in the absence of actual knowledge to the contrary, or circumstances under which he would be held required to have such knowledge, had a right to assume that the bent had been so braced that it would not fall when the scaffolding was removed, and could not be held negligent as a matter of law in failing to observe the absence of bracing, however obvious that fact might have been had he made an examination.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710–722; Dec. Dig. § 235.*]

3. WITNESSES (§ 248*)—EXAMINATION—RESPONSIVENESS OF ANSWERS.

In an action for personal injuries, plaintiff was asked if he was suffering from the injury when he went to work for third parties, and answered that his capital was his labor, and he had a family to support, and had to work whether he suffered or not. *Held*, that the answer should have been stricken out on motion as not responsive to the question, which called for an affirmative or negative answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

4. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

The denial of a motion to strike out such answer did not require the reversal of a judgment for plaintiff, where the facts stated in the answer appeared, inferentially at least, by the other testimony of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146–4152; Dec. Dig. § 1047.*]

5. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

In an employé's action for injuries sustained while assisting in the construction of a trestle by a trestle bent falling on him, the error, if any, in striking out the testimony of a witness that, to a man of any experience in the construction of trestles, the fact that a trestle was not braced in any way would be a sign that it was unsafe, that this would be discernible and appreciable to any man of experience the moment he went to the trestle to work, and that the fact that a piece of trestle was not in any way braced was open to the inspection of the eye, and its dangerous character was not a hidden one, where no objection was made to the questions asked the witness, was without prejudice, where the answers were substantially the same as the inferences that would be drawn by the jury from the facts in reference to the construction of the trestle bent previously detailed by the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146–4152; Dec. Dig. § 1047.*]

6. MASTER AND SERVANT (§§ 273, 274*)—ACTIONS FOR INJURIES—EVIDENCE.

In an employé's action for injuries, plaintiff's testimony that the foreman's orders were all in a hurry-up style, that it was a rush all the time, and that: "You can guess the language and, most of the time it was language, forcible language. He did not pick the language"—was admissible on the questions of assumption of risk and contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 936–949; Dec. Dig. §§ 273, 274.*]

7. EVIDENCE (§ 471*)—CONCLUSIONS OF WITNESS—ADMISSIBILITY.

Such testimony was admissible over defendant's objection that it was an opinion and conclusion of the witness, as the subject-matter was such that the witness was entitled to give his conclusions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

8. TRIAL (§ 29*)—COMMENTS ON EVIDENCE BY TRIAL JUDGE.

In an employé's action for injuries, plaintiff testified that the foreman's orders were all in a hurry-up style, that it was a rush all the time, and that "you can guess the language and, most of the time it was language, forcible language; he did not pick the language." Defendant moved to strike out the quoted testimony on the ground that it was given only for the purpose of creating a prejudice, to which the court replied that he did not look at it as given for the purpose of prejudicing defendant, and that "it was given to hurry the men along and cause them to work all the faster, and thereby giving them a less opportunity of seeing any danger." *Held*, that the language of the judge, though not happily chosen, did not invade the province of the jury to determine the credibility and good faith of the witness and the weight of his testimony, it being clear that he intended only to state his reasons why the testimony was admissible, especially where no exception or objection to the remark was made in the trial court; it being a matter the possible prejudicial effect of which would have been obviated by a proper instruction and admonition to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80–83, 508; Dec. Dig. § 29.*]

9. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

In an employé's action for injuries caused by a trestle bent falling on him when a staging was removed, due to the absence of any bracing other than the staging, the admission of evidence that the witness would not consider the bent safe unless secured with bracings, even if improper, was not prejudicial, where it was apparently conceded by all of the witnesses that a bracing of some kind was essential, and the jury could not have found that the scaffolding could be safely removed unless the bent was first braced in some way.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

10. DAMAGES (§ 216*)—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, an instruction to award plaintiff, if his power to earn money in the future had been impaired by the injury, such sums as would compensate him for such loss of power was proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548–555; Dec. Dig. § 216.*]

11. TRIAL (§ 260*)—INSTRUCTIONS COVERED BY THOSE GIVEN.

Instructions which, so far as proper and necessary, were covered by other instructions were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

12. APPEAL AND ERROR (§ 1004*)—REVIEW—AMOUNT OF RECOVERY.

A verdict will not be disturbed on appeal as excessive, unless the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

In Bank. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by W. G. Price against the Northern Electric Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Charles W. Slack, of San Francisco, A. M. Seymour, of Sacramento, W. H. Carlin, of Marysville, and A. F. Jones, of Oroville, for appellant. L. F. Eggers, of Chico, and H. D. Gregory, of Oroville, for respondent.

PER CURIAM. This is an action for damages for personal injuries. Plaintiff had judgment, and defendant appealed to this court from such judgment and from an order denying its motion for a new trial.

The appeal was transferred by this court to the District Court of Appeal of the Third District for hearing and determination, and subsequently submitted therein for decision. Owing to a difference of opinion among the members of that court, the appeal was retransferred to this court with the opinions in writing of the justices of that court. In what follows we are using to a great extent the opinion prepared by Mr. Justice Burnett upon matters as to which there was no disagreement between him and his associates.

Following the verdict of a jury, judgment was awarded plaintiff for the sum of $2,500 as damages for personal injuries. The view that we must take of the facts reveals the following situation: Plaintiff was a carpenter, and, during the month of January, 1909, he was employed by defendant to assist in rebuilding its trestle and approach across the Yuba river, just south of Marysville. Immediately prior to the accident he was at work on a car fixing piles for the driver, that is, trimming the ends of piles so that rings could be driven on them in order that the pile driver would not split the piling. This car upon which he was at work was on the approach of the railroad crossing Yuba river and was the third car behind the pile driver, the pile driver being at the end of the bridge toward Sacramento. While he was thus engaged, the defendant railway company had a gang of men at work building and erecting trestle bents on the south side of the Yuba river. This trestle was composed of bents made of a large mud sill at the bottom, one upright post extending from the center of the mud sill perpendicularly and on each side a batter post. On top of these three posts was placed in horizontal position, at quite a distance above the mud sill, the cap, which was composed of a large, heavy piece of timber. These bents were some 15 or 16 feet apart, and on top of the caps were placed what was called the stringers, upon which were to be placed the cross-ties, and on these the rails. The last bent at the edge of the water, south of the river, had been erected and was in place, excepting that the cap had not been placed in position on top of the posts. A temporary scaffolding had been erected on the south end of this bent, composed partly of two long pieces of timber some 16 or 18 feet in length, and being in size 4 inches by 6 inches. One of these was laid parallel with the line of the railroad on each side of the bent, and they were some 8 or 10 feet apart. The ends of these 4 by 6 pieces rested on a short post 10 or 12 inches high. These two pieces held the scaffold, and they leaned against the batter posts. Upon these 4 by 6 pieces were placed railroad cross-ties built up to form a platform for the purpose of raising the cap from the ground and placing it in its proper place on top of the posts. This cap was very heavy, and it took 8 or 10 men to lift it in place on top of the posts. No bracing other than the scaffolding or staging was placed on said bent to secure it or to prevent it from falling. This bent was 12 feet high. With the bent in this condition, not having been braced except in so far as it was braced by the scaffolding or staging, the plaintiff, Price, was ordered by the foreman of the work to leave the car where he had been working and go to this bent, some 200 yards away, to assist in raising the heavy cap from the ground onto the platform, and from there placing it in its proper place on top of the posts. Plaintiff had nothing to do with the building of this trestle bent, upon which he was to assist in placing the cap, nor with the construction of any of the trestle bents which had been built at that place. The trestle, which had been built from the south up to the edge of the water, as aforesaid, was some 200 yards in length. This had all been built while plaintiff was engaged at other work. When plaintiff arrived at the said bent, as testified by him, "When I got there, there was the staging or platform fixed around the bent that had no cap. It stuck up there in the air. He [referring to Brewster, the foreman] ordered us to go up there. He told us to go up and put that cap on, 'This work is moving damn slow.'" The cap was raised by the men and placed in position and nailed fast to the upright posts. After the cap was placed in position the foreman ordered plaintiff and the other men to throw the ties down, and he then said to plaintiff: "Price, get down there and help that staging away. This thing is moving damn slow." Plaintiff jumped down and stepped to this four by six and put his shoulder under it. He was assisted by a man by the name of Hudson, and one other man and had moved a few steps and was right under the bent with his back toward it when some one called, "Look out." The bent fell and struck the timber they were carrying and knocked the plaintiff unconscious to the ground. As a result of the accident plaintiff was quite seriously injured. From the time he arrived at the bent which fell and injured him until the accident occurred was about 15 minutes. The plaintiff had never been at the place where the accident occurred before.

[1, 2] Appellant contends that the case for the plaintiff rests upon the proposition that it was the duty of the defendant to use reasonable care in furnishing a safe place for plaintiff to work, and that this duty was violated, but that this principle does not apply for the reason that such duty of an em-

ployer does not exist where the servants are engaged in a work that in itself constantly changes the character or safety of the place where they are working. In other words, it is the contention of appellant that plaintiff and his coworkers, by their own efforts, created the unsafe place, and therefore the general doctrine does not apply to the facts here.

In this connection much reliance is placed upon the case of Callan v. Bull, 113 Cal. 593, 45 Pac. 1017. We are of the opinion, however, that the principle of that case is not applicable here. In this case Price had nothing to do with the construction of the trestle bent, beyond helping, when called from his other work to do so, in putting on the cap. He was then told to assist in getting the staging away. So far as he was concerned, the place of work to which he was brought, and where he was directed by the foreman to assist, had already been created. He was working under the immediate supervision of a foreman, and was not erecting trestle bents or creating them on his own judgment and at his own risk. In the absence of actual knowledge to the contrary, or circumstances under which he would be held to be required to have such knowledge, he had the right to assume, when directed to assist in removing the scaffolding, that the bent had been so braced that it would not fall when the scaffolding was removed. And it cannot be held as matter of law, under the circumstances, that he was guilty of contributory negligence in not observing the absence of bracing, however obvious that fact might have been if he had made an examination to see what the actual condition was. It must be borne in mind that he was suddenly called to assist in this work when the bent was practically completed, and that he was simply obeying orders of the foreman to do this particular thing and that particular thing, and that the men were being urged to work quickly.

There is evidence that the defendant, through its foreman, had knowledge of the insecure and unsafe condition of the bent in question. The witness Hudson testified, referring to the foreman, that:

> "When he asked me to take down the platform and I realized that the bent needed something, I asked Mr. Brewster, the foreman, if he had a dog or any dogs to drive in to hold the bent and he said, 'To hell with the dogs; that is safe enough; go on and get that out of the way.' The dogs I speak of are sill stays or irons. You can drive it in on the bottom and then on the top, and it will hold it temporarily until you can get it properly stayed."

As said in the opinion prepared by Justice Burnett, we think the case is governed by the rule and principle announced in such cases as Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720, 852, 38 Am. St. Rep. 290, Hanley v. California, etc., Co., 127 Cal. 233, 59 Pac. 577, 47 L. R. A. 597, Powley v. Swensen, 146 Cal. 471, 80 Pac. 722, and Majors v. Connor, 162 Cal. 131, 121 Pac. 371.

It is believed that there was sufficient evidence to justify the jury in concluding that it was negligence on the part of defendant not to secure said bent; that the foreman had knowledge of its insecure condition; that the plaintiff was ignorant of it, and had a right to assume that it was a safe place in which to work; that he was not guilty of contributory negligence, under the circumstances, in undertaking the removal of the said timber, in obedience to the urgent command of the foreman, without making an examination to ascertain whether the bent was secure; and that a sufficient case was therefore made out, within the principles already announced, to justify the finding of the jury in favor of the plaintiff.

[3, 4] During the progress of the trial the plaintiff was asked by his counsel this question:

> "I will ask you to state if you were suffering from this injury when you went to work for the Diamond Match Company and Cotton Brothers?"

An objection was made by appellant on the ground that the question called for incompetent, immaterial, and irrelevant testimony, and also for his opinion and conclusion. The objection was overruled, and the witness answered:

> "Well, my capital is my labor and I have a family to support, and I have got to work whether I suffer or not."

Appellant moved to strike out the answer as not responsive to the question and for all of the reasons stated in the objection to the question. The motion was denied. It is clear that the question is one that called for an affirmative or negative answer and that the answer was not at all responsive, and the motion should have been granted. The facts, however, given in the answer otherwise appeared, at least inferentially, during the examination of the witness, and it can hardly be said that the error was of sufficient gravity to justify a reversal of the judgment.

[5] Witness Curran, called for plaintiff, was asked, on cross-examination, the following question:

> "Now, Mr. Curran, if you or any man of any experience in the construction of trestles should approach a section of the trestle which has been built, consisting of one or more bents, and they were not braced in any way, would that be a sign that it would be unsafe?"

And the answer was, "Yes, sir." And again:

> "Would that be discernible and appreciable to any man of any experience in that work the moment he went to the trestle to work? If they were not braced would he necessarily see that and notice that? A. Yes, sir."

And again:

> "So, then, the fact that a piece of trestle may have been constructed, or practically constructed, we will say, four or five, and not in any way braced, the dangerous character of that is not a hidden or secret one, is it? It is open to the inspection of the eye? A. Yes, sir; it would be, of course."

On redirect examination, in response to a question by plaintiff, the witness stated: "A man in the business of trestle building would observe whether or not a bent was braced," whereupon, plaintiff moved to "strike out the answers of the witness to Mr. Carlin's questions as to whether or not that it would be, where he answers that it would be observable," and the motion was granted. No objection was made to the questions asked upon cross-examination. Of course, a party cannot lie by and take a chance upon an answer being favorable, and, when disappointed, have a motion to strike out take the place of an objection. Besides, it will be observed that the questions on cross-examination related to a person of experience in trestle building, and the further interrogatory on redirect examination did not change, in that particular, the aspect and significance of the inquiry. It is believed, though, that if any error was committed in this behalf the error was without prejudice as the answers to the questions were substantially the same as the simple inferences that would be drawn by the jury from facts in reference to the construction of said contrivance previously detailed by the witness.

[6-8] Plaintiff was asked the question by his counsel: "To get down back to where the accident happened or injury occurred, I will ask you how, in what manner, were the orders being given down there, and the men of which you were one, being worked—just state it." Appellant objected on the ground that it is "incompetent, immaterial, and irrelevant and calling for his opinion and conclusion." The court said:

> "He calls for a fact—how were they given and who gave them. The objection will be overruled."

The witness answered as follows:

> "His orders were all in a hurry-up style. It was a rush from the time we went out until we left the works at noon or night; you can guess the language, and most of the time it was language, forcible language. He did not pick the language."

Counsel for appellant:

> "We will move to strike out the answer for all of the reasons stated in the objection to the question."

The motion was denied, and thereupon counsel for appellant said:

> "And in particular we will move to strike out that part of the answer in which he says, 'Most of the time, pretty forcible language.' That is what I understood him to say—'You can guess the language.' It can be given for one purpose only and that is to create a prejudice. The court said: 'No, sir; I don't look at it in that way, not for the purpose of prejudicing the defendant. It is given—it was given to hurry the men along and cause them to work all the faster and thereby giving them a less opportunity of seeing any danger if there was any danger in the vicinity. For that reason I will let the answer stand.'"

We are of the opinion that it was competent for the plaintiff to show that the work was being "rushed" by the foreman; that his orders along that line were given in such a manner as to impel the workmen to great speed, as bearing upon the action of the plaintiff in obeying implicitly, without examination as to the probable effect of such obedience. Such evidence was material upon the questions of assumption of risk and contributory negligence. The subject-matter of the inquiry was such that the witness was entitled to give his conclusions, for the same reasons that a witness may testify as to the appearance of another, whether rational, morose, etc. See People v. Manoogian, 141 Cal. 595 et seq., 75 Pac. 177, and cases there cited. As said in the case just cited:

> "Certain questions are of such a nature that it is impossible for a witness to convey to a jury an adequate conception of the ultimate fact except by announcing the result of his observation."

And in stating such result, the witness is really testifying to a fact.

It is claimed on this appeal that the statement of the court in denying the motion to strike out this testimony was an invasion of the exclusive province of the jury to determine the credibility and good faith of the witness and the weight of his testimony, and that the same was prejudicially erroneous. It is clear enough to us that the judge did not intend to go further than to state the reason why the testimony was, in his mind, admissible, and that he had no idea of expressing any opinion as to the credibility or good faith of the witness; and, while the words of the court were not happily chosen, we are not strongly impressed with the argument that the jury may have been in any way influenced to the detriment of the defendant thereby. Counsel for defendant apparently did not regard the remark as injurious at the time it was made, for they made no complaint. As is stated in the opinion prepared by Justice Hart in the District Court of Appeal, no exception or objection to the remark was made in the lower court, objection being made on this appeal for the first time. It seems clear that counsel should have called the attention of the trial judge to anything deemed prejudicial, thus giving him an opportunity to withdraw anything objectionable and state his real intent and meaning. Of course, the matter was of such a nature that all possible prejudicial effect would have been obviated by proper instruction and admonition to the jury.

[9-12] We have examined the record with reference to the other rulings complained of, and find nothing warranting a reversal. The testimony of Mr. Curran, to the effect that he would not consider the bent safe unless secured with bracing, if it was above five or six feet in height, even if improperly admitted, we consider to have been without prejudice. It appears to have been conceded by all the witnesses that bracing of some kind was essential, and the evidence was such that if the jury was satisfied that there was no bracing, it could not conclude otherwise than that the scaffolding could not be safely removed unless the bent was first braced in some way. Instruction No. 2, given at the request of plaintiff, reasonably construed, was not erroneous as applied to the facts of the case. So construed, we do not see how it could have been understood by the jury as imposing upon the defendant any liability due to failure to furnish plaintiff a safe place in which to work, unless it had been guilty of a want of reasonable care in the matter. Instruction 11, given at the request of plaintiff, was an attempt to state an abstract proposition of law which was not applicable under the facts of this case. We are satisfied, however, that defendant could not have been prejudiced thereby. Instruction 8 on the subject of damages, given at the request of plaintiff, appears to have been in a form approved by prior decisions. It did not authorize the jury to award any future damage except that if they believed from the evidence that the injury had impaired the plaintiff's power to earn money in the future, they might award him "such sums of money as will compensate him for such loss of power." Instructions 1 and 3 requested by defendant were covered, as far as proper and necessary, by other instructions. We are of the opinion that we cannot hold that a reversal should be had on the ground that the verdict was for an excessive amount. As has often been said, we can disturb a verdict on this ground only when it appears that the damages are so excessive that the award can be sustained on no other theory than that it was the result of passion or prejudice on the part of the jury.

The judgment and order denying a new trial are affirmed.

BEATTY, C. J., does not participate in the foregoing. SLOSS, J., being disqualified, does not participate in the foregoing.

24 Cal. App. 729

STOVEL v. NORTH LOS ANGELES DEVELOPMENT CO. (Civ. 1491.)

(District Court of Appeal, Second District, California. June 6, 1914.)

PLEADING (§ 336*)—AMENDED COMPLAINT—AFFIDAVIT OF SERVICE—SUFFICIENCY.

In view of Code Civ. Proc. § 410, providing that a copy of the complaint must be served and returned with an affidavit showing where such copy was served, and section 465 providing that copies of all pleadings subsequent to the complaint must be served on the adverse party or his attorney, an affidavit stating that plaintiff's attorney "served a copy of the amended complaint herein on * * * attorneys for the defendant herein by delivering to and leaving with said attorneys * * * a true copy thereof" was not insufficient because it stated that affiant served a copy of the amended complaint instead of saying that he served the amended complaint by delivering a true copy thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1017–1021, 1024; Dec. Dig. § 336.*]

Appeal from Superior Court, Los Angeles County.

Action by H. Roy Stovel against the North Los Angeles Development Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Hammack & Hammack, of Los Angeles, for appellant. Elliott L. Perkins, of Los Angeles, for respondent.

CONREY, P. J. This is an appeal from a judgment entered by the clerk of the superior court after entry of defendant's default for failure to answer the amended complaint. The defendant had appeared by its attorneys, who filed a demurrer to the original complaint. With respect to the amended complaint, the affidavit of service is by plaintiff's attorney and states that he "served a copy of the amended complaint herein on Hammack & Hammack, attorneys for the defendant herein, by delivering to and leaving with said attorneys in the city of Los Angeles a true copy thereof."

This affidavit is sufficient, unless it is deficient in saying that the affiant served a copy of the amended complaint instead of saying that he served the amended complaint, by delivering the true copy thereof. The briefs do not refer us to any decisions bearing upon this question. We find that section 410, Code of Civil Procedure, says that:

> "A copy of the complaint must be served, with the summons, upon each of the defendants. When the summons is served, * * * it must be returned * * * with an affidavit * * * of its service, and of the service of a copy of the complaint, where such copy is served."

Under this wording of the statute there seems to be no doubt that an affidavit showing that the process server served "a copy of the complaint," etc., would be sufficient. No good reason appears for holding that the same form of statement may not be made in proving service of an amended complaint.

> "All pleadings subsequent to the complaint, must be filed with the clerk, and copies thereof served upon the adverse party or his attorney." Code Civ. Proc. § 465.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

24 Cal. App. 656

TOMPKINS v. SUPERIOR COURT OF SAN BERNARDINO COUNTY. (Civ. 1588.)

(District Court of Appeal, Second District, California. June 1, 1914. Rehearing Denied by Supreme Court July 30, 1914.)

1. JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNDERTAKING—JURISDICTION.

The undertaking required by Code Civ. Proc. § 978, to perfect an appeal from a justice to the superior court not having been filed, the filing of a demurrer to the complaint in such court and the overruling thereof gave it no jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. § 159.*]

2. JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNAUTHORIZED TRANSMISSION OF RECORD—SECOND APPEAL.

Though, notwithstanding appeal from a justice was not perfected by giving the undertaking required by Code Civ. Proc. § 978, the justice transmitted the record to the superior court, it is to be considered as still in the office of the justice, as regards the necessity of his again transmitting it, on another notice of appeal and an undertaking being giving.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. § 159.*]

3. JUSTICES OF THE PEACE (§ 166*)—APPEAL—DISMISSAL—TRANSMISSION OF RECORD—PRESUMPTION.

An appeal from a justice is not subject to dismissal prior to time for trial, because of the justice not having transmitted the record to the superior court as required by Code Civ. Proc. § 977; it being presumed that, prior to that time, he will transmit it, such section authorizing an order compelling him so to do.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 638–646; Dec. Dig. § 166.*]

Prohibition by Henry Tompkins against the Superior Court of San Bernardino County. Peremptory writ denied, and alternative writ dismissed.

A. Boyer, of San Bernardino, for petitioner. Allison & Dickson, of San Bernardino, for respondent.

SHAW, J. Prohibition. Upon application therefor, an alternative writ was issued herein, directed to the superior court of San Bernardino county, commanding it to appear and show cause why it should not be prohibited from proceeding with the trial of a certain cause pending therein, wherein the petitioner, as plaintiff, had, in the justice's court, obtained a judgment against one Charles C. Smithson, from which judgment said Smithson had appealed to said superior court.

In response to the writ a return was made, from which and the petition it appears that the judgment of the justice was rendered on March 28, 1914; that, on April 1st following, Smithson appealed therefrom to the superior court, but neglected to perfect the appeal by giving the undertaking required by section 978, Code of Civil Procedure. Notwithstanding such neglect, the justice duly certified and transmitted to the superior court the record in the cause. A demurrer to the complaint was on April 3d interposed by Smithson and by the court overruled on April 13th, and the case set for trial on May 15th. Thereafter, on April 15th, within the time allowed him for appealing in said cause, Smithson filed another notice of appeal and gave the required undertaking therein, whereupon the justice on May 11th transmitted to the superior court a copy of his docket, but did not send up the papers and pleadings in the case for the apparent reason that he had theretofore transmitted them at the time when defendant purported to appeal on April 1st. On May 4th, pursuant to notice, petitioner moved the court to dismiss the purported appeal had and taken on April 1st, upon the ground that no sufficient undertaking had been given, and likewise pursuant to notice at the same time moved to dismiss the appeal had and taken on April 15th, upon the ground that two appeals had been taken from the same judgment, and the further ground that said last appeal was unaccompanied by any record, papers, and pleadings, or any certified copy of the justice's docket from which the appeal could be identified. At the hearing of these motions the purported appeal of April 1st was withdrawn, and, as to the motion to dismiss the appeal of April 15th, the motion was denied without prejudice.

[1, 2] Clearly the first appeal was, and is conceded to be, a nullity by reason of the fact that no sufficient undertaking was filed as required by section 978, Code of Civil Procedure. Hence the transmission of the record to the clerk made at this time by the justice was unwarranted, as the same is deemed to be in the office of the justice. The court having no jurisdiction to entertain it, the overruling of the demurrer interposed could not give it jurisdiction. Estate of Brewer, 156 Cal. 89, 103 Pac. 486. Hence on April 15th the case stood as though no appeal had been attempted.

[3] The appeal had on April 15th was, in so far as concerned the steps required to be taken by Smithson as appellant, duly taken and perfected within the time allowed by law therefor. Section 977, Code of Civil Procedure, provides that the justice must transmit to the clerk of the superior court the record and papers therein designated, "and the justice or judge may be compelled by the superior court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same." It appears that, following the taking of this last appeal, the justice neglected to transmit to the clerk of the superior court the papers and record required by the provisions of this section. His omission so to do, however, cannot be attributed to appellant. For obvious reasons the court would be unable to try the case in the absence of the pleadings and record; but, since section 977, supra, makes provision for compelling the justice to perform his duty and file same with the clerk, we must assume that prior to the time when the court will try the case the record will be transmitted to the clerk. Otherwise, in the absence of any steps taken by appellant to compel the performance of duty on the part of the justice, the court might refuse to try the case, or dismiss the same. The court evidently made the order denying the motion without prejudice, so that, if the defect in the record was not cured at the time of the trial, petitioner might at that time renew his motion upon such ground. Being improperly transmitted before an appeal was taken, the record should be refiled as accompanying the appeal had and taken April 15th.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The peremptory writ is denied, and the alternative writ of prohibition heretofore issued is dismissed.

We concur: CONREY, P. J.; JAMES, J.

24 Cal. App. 610

PEOPLE v. MARKS. (Cr. 481.)

(District Court of Appeal, First District, California. May 27, 1914.)

1. Criminal Law (§ 695*)—Trial—Introduction of Evidence—Objections.

Where an objection to evidence as incompetent and hearsay was made to a specific question as to a certain conversation and overruled, but the answer was favorable to the defendant and not objected to, she could not successfully claim on appeal that the objection was made to all evidence of conversations had by defendant with the other party to the conversation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633–1638; Dec. Dig. § 695.*]

2. Prostitution (§ 4*)—Evidence.

In a prosecution for pandering, consisting of procuring for a female a place in a disorderly house, evidence *held* sufficient to warrant a conviction of an attempt to commit such offense.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

3. Criminal Law (§ 44*) — Offenses — Attempts—Statutes—Construction.

Pen. Code, § 664, providing that every person who attempts to commit any crime, but fails, is punishable, where no provision is made by law for the punishment of such attempts, as follows, etc., does not define crimes or attempts to commit crimes, but is concerned merely with the punishment of attempts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*]

4. Criminal Law (§ 44*)—Attempts—Statutes—Construction.

An act performed in an attempt to commit the crime of pandering in violation of Act Feb. 8, 1911 (St. 1911, p. 9), in one of the methods described in the statute, is not necessarily a substantive offense covered by another of such methods so as to authorize its prosecution and punishment as an independent offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*]

5. Criminal Law (§ 44*) — Attempts — Punishment.

Though, in a prosecution for pandering, the act done in an attempt to commit the offense might be otherwise punishable as a substantive offense did not prevent a conviction of accused for an attempt to commit the crime charged under Pen. Code, § 664, providing that every person who attempts to commit any crime, but fails, is punishable, where no provision is made by law for the punishment of such attempts, as follows, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Rose Marks was convicted of an attempt to commit pandering, and she appeals. Affirmed.

James R. Kelly and Herbert Choynski, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with procuring for one Camille Meining a place as an inmate of a house of prostitution, one of the offenses designated by section 1 of the act of February 8, 1911 (Stats. 1911, p. 9), as pandering. She was tried for such offense upon the theory that she aided and abetted one Samuel Grubb in its commission. The jury found her "guilty of the crime of an attempt to commit the crime of pandering." From the judgment of imprisonment in the state prison for a period of two years, she has appealed, as also from an order denying her motion for a new trial.

The points relied upon for a reversal of the judgment and order are: Errors of the trial court in the admission of evidence; that the evidence is not sufficient to support the verdict; and that there can be no such thing as an attempt to commit pandering of which the defendant was found guilty.

[1] On the first point it is sufficient to say that the specific evidence pointed out in appellant's brief, the admission of which is claimed to be error, was received without objection. The statement of appellant's counsel that "objection was made to the entire line of testimony dealing with statements made by Sam Grubb in Los Angeles and conversations had with him there, upon the ground that the same is incompetent, irrelevant, immaterial, hearsay," is not borne out by the record. This objection was made to the specific question: "What did he say, if anything, with respect to the business you were to go into with Rose Marks?" This question was permitted to be answered; and the answer, so far from being prejudicial to the defendant, tended rather to exculpate her from the offense charged. We hardly think counsel is serious in urging this contention, and that it should be classed with another statement in his brief to the effect that: "We also assign as error the admission of each and every part of the evidence introduced at the trial."

[2] The next contention of appellant is that the evidence is insufficient to support the judgment, or, as the matter is put by counsel, there is no evidence to support a judgment of conviction.

The evidence shows that Camille Meining, the prosecuting witness, a woman almost blind, was residing in a rooming house in Los Angeles, and there met one Samuel Grubb. They became friendly owing to little acts of kindness rendered by Grubb to her, necessitated by her defective vision. Desiring, for the benefit of her health and other reasons, to leave Los Angeles, and having been informed that the climate of San Francisco was more salubrious, she mentioned the matter to Grubb, who then told her that he had a friend in San Francisco and would write to her, suggesting that Camille Meining go and stay with her. He stated that this friend was the keeper of houses of prostitution, but had a nice room in a flat where she herself lived. As the matter was talked over, it developed that Camille was expecting to receive a sum of money, and expressed the desire to go into business with this friend. Grubb thereupon undertook to write to Rose Marks (the defendant and the friend in question) proposing the matter to her; and a few days afterwards came to Camille and said: "I got an answer from the old girl, and she tells me to send the girl at once." The prosecuting witness stated, when testifying to this matter, that Grubb "swept the telegram across my face and says, 'Here is your answer: "Send girl at once. Everything is O. K."'—and that the telegram was signed 'Rose Marks.'" The language of this telegram seems to have created some suspicion in her mind as to the precise nature of Grubb's communication to his San Francisco friend, and she then said to Grubb: "I would rather she write. I don't believe you wrote her so she understood exactly." Grubb then wrote a letter, to which he received an answer from Rose Marks; also a telegram, the latter reading, "Send party," and the letter urging haste. Camille then agreed to go to Rose Marks; accordingly she came to San Francisco, being met by her at the railroad depot, and escorted by her to a house of prostitution at 620 Jackson street. Arriving there, Rose Marks took off Camille's veil and coat, conducted her to a bedroom, set her suitcase and things on the bed, and said, "Now here, this will be your room." The house was crowded with male visitors, some of whom approached the prosecuting witness with the proposal that they engage in sexual intercourse, offering her money, all of which offers she declined, and requested to be taken from the house. There was testimony of other witnesses that No. 620 Jackson street was conducted by Rose Marks as a house of prostitution. The defendant offered herself as a witness, and, referring to Camille, said: "She told me she was staying in a hotel there (Los Angeles), and of course she did not exactly come out and tell me what she was doing, but I understood she was there just as well as anybody else; they make money in any hotel." When arrested she stated to the officer: "I received a letter from Mr. Grubb saying he had a girl, and asked me if I needed another in 620 Jackson street. I answered by letter and told him I did. After getting her I took her to 620 Jackson street that night." The defendant took the witness stand, and testified that she was acquainted with Grubb, had known him for 2½ years; had met him a number of times in her house of prostitution; that she had never asked him to interest himself in getting a partner for her, and did not know where he got the idea that she wanted one.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We think the evidence, of which the foregoing covers the salient points, justified the jury in bringing in its verdict of an attempt to commit the crime charged.

[3] Finally, the defendant contends that the verdict is invalid, for the reason that there is no such crime under our statutes as an attempt to commit pandering, and that, if there be such a crime, provision is made by law for its punishment as a substantive offense, and not as an attempt.

In support of this position defendant cites section 664 of the Penal Code. That section reads as follows:

> "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows. * * *"

It will be observed that this section is not concerned with defining crimes or attempts to commit crimes, but merely with the punishment of attempts to commit them. The argument of counsel is that the defendant, not having, according to the verdict of the jury, succeeded in committing the crime charged, and the acts of which she was found guilty constituting, as he claims, a substantive crime punishable as such, no punishment can be meted out to her under the verdict of the jury, which designates her offense as an "attempt." It is pointed out that the statute defining pandering enumerates a series of a dozen or more acts any one of which may constitute the crime; and he asserts that it is impossible to fail in the attempt to commit one of those acts without succeeding in committing another of them; that consequently, if the jury returns a verdict of attempting to commit one of them, the defendant cannot be punished under such verdict because the acts performed by the defendant in the abortive attempt themselves constitute a substantive crime for which a punishment is specifically provided by law.

[4, 5] This contention of counsel rests upon two assumptions, with neither of which can we agree: First, that an act performed in the attempt to commit the crime of pandering in one of the methods described in the statute is exactly covered by another of such methods, and can be prosecuted and punished by charging such act alone; and, second, that even if an act done in an attempt to commit a given crime should incidentally elsewhere in the Penal Code be made itself a substantive offense, it cannot be punished as an attempt to commit the given crime.

We think that the language of section 664, "where no provision is made by law for the punishment of such attempts," applies exclusively, and must be confined to "attempts" designated by the statute as such, and does not refer generally to acts done in the attempt to commit one crime, and which, if done without relation to the offense, might be separately punished. For instance, in an attempt to commit burglary a door or window is fractured. Such damage to property might, separately considered, come within the definition of malicious mischief; but the offender convicted of an attempt to commit burglary where burglary was charged would not be heard to say that he could not be punished for such attempt because his fracture of the door or window was itself an offense punishable by law. And so in the present case, though the acts committed by the defendant might possibly bring her within another description of the offense of pandering, yet, being done in an attempt to commit the particular act charged in the information, she cannot object to having her offense punished as an attempt.

What we have said on this question disposes also of the defendant's objection to the court's charge to the jury on that subject.

The judgment and order are affirmed.

We concur: RICHARDS, J.; LENNON, P. J.

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24 Cal. App. 641

VAUGHAN v. BIXBY et al. (Civ. 1489.)

(District Court of Appeal, Second District, California. May 29, 1914.)

1. ANIMALS (§ 23*)—"AGISTER"—DUTY OF—"REASONABLE CARE."

One who takes in horses to pasture, having control of them, is an agister, and, while he is not an insurer, he is bound to take reasonable care of the animals, which is that degree of care that an ordinarily careful man would have exercised under the same circumstances with reference to his own stock.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 43–48; Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 1, p. 278; vol. 7, pp. 5954–5956; vol. 8, p. 7779.]

2. ANIMALS (§ 23*)—AGISTERS—NEGLIGENCE—JURY QUESTION.

Where it was claimed that an agister failed to take reasonable care of horses left in his charge, the question was one for the jury, unless the facts and circumstances were such that reasonable men could draw only one conclusion.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 43–48; Dec. Dig. § 23.*]

3. ANIMALS (§ 23*) — AGISTERS — ACTIONS — JURY QUESTION.

In an action against an agister for negligence which resulted in the death of horses left in his pasture, evidence *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 43–48; Dec. Dig. § 23.*]

4. ANIMALS (§ 23*)—AGISTERS—NEGLIGENCE—VERDICTS—SPECIAL VERDICTS.

In an action against an agister for his negligent failure to furnish horses with water, a general verdict for plaintiff was not overthrown by a special finding that the pasture was equipped with sufficient water, where there was an additional finding that the water was inaccessible to horses.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 43–48; Dec. Dig. § 23.*]

5. TRIAL (§ 96*) — OBJECTIONS TO EVIDENCE BELOW—NECESSITY.

Where a witness, who gave competent testimony, was allowed without objection to give some incompetent testimony, a motion to strike out all of his testimony was properly refused, not being directed to the incompetent portion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Henry N. Vaughan against Fred H. Bixby and others. From a judgment for plaintiff, defendants appeal. Affirmed.

E. W. Freeman, of Los Angeles (A. D. Laughlin, of Los Angeles, of counsel), for appellants. W. H. Dehm and Constan Jensen, both of Los Angeles, for respondent.

SHAW, J. Action to recover damages on account of negligence of defendants, resulting in the loss of certain horses placed in defendants' pasture. The case was tried before a jury, which rendered a verdict for plaintiff. Judgment followed, from which, and an order denying their motion for a new trial, defendants appeal.

It appears that defendants were the owners of some 5,000 acres of inclosed, mountainous land, cut by deep canyons and gulches, which they used in the business of receiving stock for pasture thereon for hire; that plaintiff and his assignor, about the 1st of May, 1912, delivered to defendants four horses to be pastured upon said lands. It is alleged that, by reason of defendants' negligence during the time when said horses were in their possession and being pastured, they died for want of water.

The chief assignment of error is insufficiency of evidence to justify the verdict.

[1] One who takes in horses to pasture, having charge and control of them, is termed an agister. Howard v. Throckmorton, 59 Cal. 79; Williams v. Miller, 6 Pac. 14. While he is not an insurer against injury to or loss of the stock intrusted to his keeping, he is bound to take reasonable care thereof, and injury or loss resulting from ordinary casualties that could have been averted by the exercise of such reasonable care constitutes negligence for which he is responsible. Williams v. Miller, supra; Rey v. Toney, 24 Mo. 600, 69 Am. Dec. 444; Halty v. Markel, 44 Ill. 225, 92 Am. Dec. 182. In this case reasonable care is that degree of care which it is presumed an ordinarily careful and prudent man would have exercised under the same circumstances with reference to his own stock.

[2] Unless it can be said the facts and circumstances established were such that reasonable men could reach but one conclusion therefrom, the question as to whether or not defendants exercised the required degree of car in looking after the welfare of the horses while in charge of them was a question for the determination of the jury. Even if there be no conflict in the evidence, nevertheless, if the inferences fairly deducible therefrom are such that different conclusions might ration-

ally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the jury should be deemed final and not disturbed on appeal for want of sufficient evidence to justify the verdict. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 Pac. 651; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 Pac. 53.

Applying this rule to the evidence disclosed by the record, we are clearly of the opinion that the evidence fully justified the verdict reached by the jury.

[3] While not free from conflict, the evidence fairly tends to show that plaintiff and his assignor, who had never seen the pasture, delivered the stock to one of the defendants, who, when he received the same, said:

> "We will look after them, and put them where (there) is feed and water, and in the event the pasture becomes run down, and the stock is not holding up, we will notify you and have you take them out."

At that time said defendant requested plaintiff to notify them in advance before calling for the horses, in accordance with which request plaintiff some time in June, upon learning that the pasture was poor, wrote defendants and expressed his intention to remove the horses, and, not hearing from them, went there about July 1st, when he found three of the horses dead, two of them lying in a gulch at a point about 50 or 100 feet from a pool of water therein, and the other upon a narrow, level plat of ground adjoining the gulch. At the place where the horses were found, the gulch was eight or ten feet in depth, with perpendicular walls, by reason of which the horses were prevented from reaching the water otherwise than by climbing an abrupt hill or mountain and traveling a distance of some four miles and coming in on the other side of the gulch. By reason of the gulch and mountain, as well as other topography of the country, the place where the horses were found was something of a box canyon, out of which it appears they were unable to find their way. There was also evidence tending to show that the horses had been dead some ten days or two weeks, though there was evidence given on the part of defendants that they were seen, at the point where their carcasses were found, on June 15th, when they appeared to be gaunt and in want of water, at which time one of the defendants drove them some distance to another spring, but afterwards, on June 19th, he from a distance, but not going near, saw them at or near the same place from which he had taken them on June 15th when he thought they were in need of water, and where they had gone probably seeking the inaccessible water in the ditch. There was also testimony to the effect that defendants knew of the existence of the condition of this part of the pasture and had on occasions rescued stock which had been imprisoned in gulches therein; that it was the custom of those engaged in conducting like business to ride the range twice a week and, if they missed seeing any of the stock contained in the pasture on one of these trips, to look them up on the second ride. While plaintiff stated that he could not tell what the cause of death was, it is apparent that the jury concluded from the testimony that the horses had become imprisoned in this box canyon where their carcasses were found, and whence, it was reasonably apparent from the fact that all vestige of vegetation and brush had been eaten off, they had been unable to find their way out, and, while there was water in the gulch some eight or ten feet in depth, they could not reach it; that two of them, in an effort to do so, had struggled or fallen into the gulch when too weak to regain their feet and remained there until death relieved their suffering.

[4] In response to certain issues, the jury rendered a special verdict wherein, among other things, they found there was sufficient water in the pasture for the horses. Appellants insist that the general verdict should be set aside and a new trial granted for the reason that the general verdict is predicated upon the fact that the horses died for want of sufficient water, and, since the jury found specially there was a sufficient supply of water in the pasture for the horses, such finding must control the general verdict. This finding as to the sufficiency of water in the pasture, however, is limited by a finding made in response to the question, "Was the water in the pasture accessible to the horses described in the complaint as having died for want of water?" to which they replied, "No." The finding, therefore, as to the sufficiency of water in the pasture is qualified by the further finding that the water so found to be in the pasture was inaccessible to the horses, and hence is entirely consistent with the general verdict.

[5] Some of the testimony given by witness Copeland, called on behalf of plaintiff, was incompetent. No objection, however, was made thereto, and he was fully cross-examined thereon. After plaintiff rested his case, defendants moved the court, without stating the ground therefor, to strike out all of his testimony, which motion was denied. The ruling was not error for the reason, among others, that, since some of the evidence was proper, the motion should have been directed to those parts of the testimony to which doubtless an objection would have been sustained had it been interposed.

We find no error in the record. The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

24 Cal. App. 686

HOFER v. GRUNDY et al. (Civ. 1563.)

(District Court of Appeal, Second District, California. June 3, 1914.)

Appeal and Error (§ 797*)—Dismissal—Motion.

Where appellants on March 19th by stipulation filed a substituted appeal bond, a motion to dismiss the appeal for failure to serve and file a transcript within the time prescribed by rule 2 (119 Pac. ix), requiring the transcript to be served 40 days after the appeal is perfected, which was served and filed on March 21st and submitted on April 28th, is premature and should be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149–3154; Dec. Dig. § 797.*]

Appeal from Superior Court, Los Angeles County.

Action by Fred A. Hofer against C. Fred Grundy, W. Grundy, and J. R. Grundy, a copartnership doing business under the name of the Grundy Motor Sales Company. From a judgment for plaintiff, defendants appeal. On motion to dismiss. Motion denied.

H. M. Barstow and Howard E. Reach, both of Los Angeles, for appellants. Charles W. Fourl, of Los Angeles, for respondent.

CONREY, P. J. Respondent moves to dismiss defendants' appeal from the judgment herein upon the ground that appellants have wholly failed to serve and file a transcript within the time prescribed by rule 2 (119 Pac. ix). The record shows that by stipulation a substituted bond on appeal was filed on March 19, 1914. Respondent's notice of motion to dismiss the appeal was served and filed on March 21st, and was presented and submitted to the court on April 28th.

Manifestly the motion was prematurely made and should be denied.

It is so ordered.

We concur: JAMES, J.; SHAW, J.

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24 Cal. App. 734

ROSS et al. v. THOMAS, Constable, et al. (Civ. 1444.)

(District Court of Appeal, Second District, California. June 9, 1914.)

1. Fraudulent Conveyances (§ 154*) — Transfer of Personalty—Delivery and Change of Possession.

A mere writing, the execution of which is unknown, except as between the parties thereto, is insufficient, in the absence of an actual and visible change of possession, to prevent the transfer from being fraudulent under Civ. Code, § 3440, providing that a transfer by one having control and possession of personal property is conclusively presumed to be fraudulent as against his creditors, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485–492; Dec. Dig. § 154.*]

2. Fraudulent Conveyances (§ 146*) — Transfer of Personalty—Husband and Wife.

A transfer of personalty by bill of sale from husband to wife was void as against creditors of the husband, where there was nothing done by either to inform the public of the transfer, and there was no actual change of possession of the property, but both continued to perform the same duties and apparently occupied the same relation to the business in which the property was used as they did prior to the transfer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 454–456, 471, 472, 482–484; Dec. Dig. § 146.*]

3. Sales (§ 464*)—Conditional Sales—Validity.

A contract of sale of personalty, whereby possession thereof is delivered to the purchaser while the title remains in the vendor, is not invalid because conditional.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1352; Dec. Dig. § 464.*]

4. Sales (§ 480*) — Conditional Sales — Wrongful Attachment — Conversion — Damages.

Where property sold under a conditional contract, retaining title in the seller, was attached for debts of the buyer, this amounted to a conversion of the property and entitled the seller to damages for injury to his interest, in the measure prescribed by Civ. Code, § 3336, for detriment caused by wrongful conversion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439–1448; Dec. Dig. § 480.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by A. J. W. Ross and others against Charles R. Thomas, Constable of Los Angeles Township, and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Paul Overton, J. H. Powell, and John W. Luter, all of Los Angeles, for appellants. D. A. Jacobs, of Los Angeles, for respondents.

SHAW, J. Action to recover damages for the alleged wrongful attachment of personal property. Judgment went for plaintiffs, from which defendants, adopting the alternative method in bringing up the record, appeal.

The complaint alleges that at the time of the alleged wrongful acts defendant Thomas was constable of Los Angeles township, and his codefendants were his official bondsmen; that W. H. and Sarah A. Stager were husband and wife; that on January 29, 1913, plaintiffs Ross and Sarah A. Stager were the owners of certain personal property situated at No. 253 South Main street, in the city of Los Angeles, consisting, among other things, of a printing press and outfit, a camera and outfit, and a cash register; that Ross was the owner of the title to the property, and that Sarah A. Stager was in possession thereof under a certain written contract made between said Ross of the one part and Sarah A. Stager and W. H. Stager of the other part, whereby the former agreed to sell, and the latter agreed to buy, the property, including that herein specified, for the sum of $6,500, of which amount Stager and his wife had paid the sum of $3,250; that on January

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

22, 1913, W. H. Stager, in consideration of $300, sold and transferred all his interest in the property to his wife, who is now the lawful owner thereof; that on January 29, 1913, defendant Thomas, as constable, pursuant to a writ of attachment issued out of the justice's court of Los Angeles township in a certain case wherein W. H. Stager was made defendant, levied upon, took possession of, and removed from 253 South Main street the printing press, camera, and cash register; that Thomas refused to comply with a demand for its release from attachment; that the value of the property is the sum of $425, in addition to which plaintiffs suffered loss to their business by reason of the taking and detention of same in the sum of $1,000. The answer, among other things, denied the allegation as to ownership of the property; denied that Sarah A. Stager was the owner or holder of a contract for the purchase of the property from Ross, or that she was in possession of the property; denied the sale and transfer thereof as alleged to have been made to Sarah A. Stager by her husband; and, as a separate defense, alleged that on January 15, 1913, W. H. Stager, who was then the owner of all the personal property located at 253 South Main street, including that so levied upon, was indebted in the sum of $125 to the Los Angeles Gas & Electric Corporation, which demanded payment of said indebtedness, and, upon refusal of said Stager to pay the same, instituted suit for the recovery thereof, and on January 29, 1913, procured the levy of an attachment upon the property as alleged in the complaint; that between the 15th and 29th of January W. H. Stager made a pretended sale and transfer of the property for the purpose of defrauding the attaching creditor; "that said property was at the time of said pretended sale and transfer, and continued thereafter, in the possession and under the control of the said W. H. Stager at the time of said levy and attachment so made by" defendant Thomas, and that it never has been in the possession, control or custody of Sarah A. Stager.

The court found all the allegations of the complaint to be true, and the allegations of the separate defense, other than as to the levy of the attachment, untrue.

Waiving all question as to the competency thereof, it appears from the evidence that on October 25, 1911, plaintiff Ross was the owner of certain personal property in what was known as a penny arcade, conducted at 253 South Main street, Los Angeles. On said date he executed a conditional contract of sale, whereby he sold to W. H. Stager and one F. D. Saffell all of said personal property for the sum of $6,500, payable $400 cash and $50 per week, it being provided in said contract that the title to all of the property should remain in Ross until such time as Stager and Saffell had made full payment of the purchase price, and upon the making of which it was agreed that Ross should by bill of sale convey and transfer to them title to the property. Pursuant to this contract Stager and Saffell entered into possession, and for some time conducted the business, when Saffell sold his interest therein to Stager. Sarah A. Stager was not a party to this contract; neither was any assignment thereof ever at any time made to her. She did advance $285 of the $400 cash payment made to Ross, which sum was evidenced by a promissory note of her husband, due one day after date, to secure which he, on February 24, 1912, executed to her a chattel mortgage on the property. From the time of the purchase she was engaged as an employé in in the business of which her husband was the head and manager. On January 22, 1913, Stager gave to his wife a bill of sale transferring to her all his interest in the property and business so acquired by him under the contract from Ross and the purchase made from Saffell, in payment of the chattel mortgage and interest thereon, the total of which, as stated in the bill of sale, was $300, and upon the contract so made with Ross he had received the sum of $3,250 on account of the purchase price of the property. Included in the contract of purchase from Ross was the property upon which the attachment was levied.

[1] Where one having control and possession of personal property transfers the same, such transfer is conclusively presumed to be fraudulent and void as against his creditors, unless accompanied by an immediate delivery and followed by actual and continued change of possession of the thing transferred. Section 3440, Civ. Code. It has been repeatedly held that the change contemplated by the statute must be actual, visible, and apparent and such as to give to the public evidence of the claim of the new owner. A mere writing, the execution of which is unknown except as between the parties thereto, in the absence of an actual and visible change, will not satisfy the statute. George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53; McKee, etc., Co. v. Martin, 126 Cal. 557, 58 Pac. 1044; Guthrie v. Carney, 19 Cal. App. 144, 124 Pac. 1045.

[2] There is nothing in the record which in the slightest degree tends to show that anything was done by either Stager or his wife to acquaint the public with the fact that he had transferred the property to her. On the contrary, she testifies that after the execution of the bill of sale each, in so far as concerned the outward apparent relation to the property, occupied the same relative position thereto as they did prior to the transfer. As between themselves, the prior relation, wherein Stager was owner and his wife employé, was reversed, but nothing was done to disclose such change; each continued to perform the same duties and apparently occupied the same relation to the business. There was no actual change of possession, by

reason of which fact Sarah A. Stager, as against the attaching creditor of Stager, acquired no interest in, or title to, the property, the purported transfer thereof being void. The finding that the transfer to her was not fraudulent and that she was the owner and entitled to possession of the property is not supported by the evidence.

[3] Conditional contracts of sale of personal property whereby possession thereof is delivered to the purchaser while the title remains in the vendor have received full recognition in this state. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Houser, etc., Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Lundy, etc., Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41.

[4] By the express terms of the contract the title to the property levied upon, possession of which was delivered to Stager, was retained by Ross, and as to his interest therein, although he had no interest in the business conducted as a penny arcade, the taking of the articles levied upon was as to him a conversion of the property. Section 3336, Civil Code, provides:

> "The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> "1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and
>
> "2. A fair compensation for the time and money properly expended in pursuit of the property."

Since Ross had no interest in the profits of the penny arcade conducted by Stager and wife, he could not have suffered any damage by reason of loss of the business due to the taking and detention of the property levied upon. Hence, the finding that he was damaged in the sum of $300, due to loss to the business on account of the detention of the property, is not supported by the evidence. As to the interest of Ross, the taking of the property was wrongful, and he alone is entitled to damages, the measure of which is fixed by section 3336, Civil Code.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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24 Cal. App. 730

SWANK & LETTON v. ROBERTS. (Civ. 1449.)

(District Court of Appeal, Second District, California. June 6, 1914.)

1. Evidence (§ 461*) — Understanding of Witness — Meaning of Written Contracts.

Where a broker's written contract provided that if he succeeded in consummating a deal with a purchaser he should be paid $500, an objection to an interrogatory, asking the broker what was meant by that clause, to which he replied that "his very clear understanding" was that when he obtained $1,500 for his client's lease he was to receive $500 for it, was improperly overruled.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

2. Appeal and Error (§ 1050*)—Rulings on Evidence—Prejudice.

Error in permitting a party to testify as to what was meant by a clause in his written contract of employment was without prejudice, where the court sustained his interpretation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

3. Judgment (§ 708*)—Evidence—Relevancy—Res Inter Alios Acta.

In an action for a broker's services for selling defendant's lease for $1,500, the judgment roll, in an action by the purchaser against the defendant, wherein the purchaser unsuccessfully sought to recover the $1,500, which was the first payment on the assignment contract, was inadmissible as res inter alios acta.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 708.*]

4. Brokers (§ 64*) — Contract — Construction—Services—Performance—Action for Commissions.

Defendant employed a broker to obtain a purchaser for a lease of a building for $1,500, agreeing that, should the broker succeed in consummating a deal with a purchaser at that sum, he should be paid $500. The broker produced a purchaser, who entered into a written contract with defendant and paid $1,500 for an assignment of the lease, but it was also agreed between defendant and the purchaser that he should also pay $1,833.33 on or before the 15th of the succeeding month to reimburse defendant for money deposited with the landlord to secure the rent of the last two months of the term. The purchaser not having been able to comply with this agreement, the lease was not transferred. *Held*, that the broker succeeded in "consummating" the deal when he obtained the purchaser who paid $1,500 for the transfer of the lease, and that the broker was therefore entitled to commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 67, 97; Dec. Dig. § 64.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Swank & Letton against C. I. Roberts. Judgment for plaintiff, and defendant appeals from an order denying her motion for a new trial. Affirmed.

John D. Pope and Hartley Shaw, both of Los Angeles, for appellant. M. J. Finkenstein and Minor Moore, both of Los Angeles, for respondent.

CONREY, P. J. The defendant presents this appeal from an order denying her motion for a new trial. On June 22, 1911, the defendant agreed in writing with Walter J. Sherwood, plaintiff's assignor, for services to be rendered in the sale of defendant's lease of certain apartments in the city of Los Angeles. Said writing contained the following agreement:

> "It being understood that Walter J. Sherwood has now a prospective purchaser from whom he expects to secure a sum of fifteen hundred dollars for the lease on the above mentioned apartments, and should he succeed in consummating a deal with this purchaser shall be paid the sum of five hundred dollars."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On June 23, 1911, Sherwood brought to plaintiff the prospective purchaser, one Sumner Cummings, who then and there entered into a written contract with the defendant and paid the sum of $1,500, of which $100 went directly to the agent and $1,400 to the defendant. By the terms of said writing with Cummings the defendant acknowledged receipt of $1,500, "part payment for lease on Navarro Apartments, * * * and upon receipt of the further payment of $1,833.32 on or before the 15th day of July, 1911, I agree to transfer the said lease and deliver possession to said Sumner Cummings. * * *" The evidence shows that at the meeting of Sherwood, Cummings and Roberts, Mrs. Roberts explained that the landlord held $1,833.32 of her money as security for the rent of the last two months of the term of the lease, and that the purchaser would have to pay that before she could transfer the lease to him. To this Cummings consented, and the time stated in the contract was allowed him to obtain and pay that amount. Cummings failed to make the additional payment, and no transfer of the lease was ever made. The court having entered judgment in favor of plaintiff for $400, with interest, the defendant moved for a new trial. This appeal is from the court's order denying said motion.

[1, 2] Appellant claims that the court erred in overruling her objection to the fourth direct interrogatory in the deposition of Sherwood, which ruling is assigned as an error of law occurring at the trial. Referring to the agency contract, the witness was asked to state what was meant by that clause in the contract reading as follows: "And should he succeed in consummating a deal with this purchaser shall be paid the sum of five hundred dollars," to which the witness answered: "My very clear understanding was that when I obtained $1,500 for her lease, I was to receive $500 for it." The objection should have been sustained. But in view of our interpretation of the contract as hereinafter stated, the error was without prejudice.

[3] The defendant offered in evidence the judgment roll in a certain action between Cummings as plaintiff and Roberts as defendant, wherein Cummings sought to recover said sum of $1,500, and the judgment was in favor of the defendant. The objection was that the record was not binding on the plaintiff or its assignor, and that it was res inter alios acta. Appellant contends that the record in question should have been admitted as showing the inability or refusal of Cummings to perform his contract of purchase of the lease. We think that the objection was correctly sustained on the ground stated. Besides, it was later made to appear as an undisputed fact that Cummings never did receive the money which he had expected to use in making the final payment, and never did offer to make that payment. The clear inference is that he was not able to do so.

[4] The principal contention of appellant is that the contract between Sherwood and Mrs. Roberts was more than an ordinary broker's contract because under its provisions he was not to be entitled to a commission unless he should "consummate a deal" with a purchaser. The decision of this court in Connor v. Riggins, 21 Cal. App. 756, 132 Pac. 849, is relied upon, where the court said:

> "Moreover, since the word 'consummate' means to bring to completion, and the court found that the oral agreement was to consummate an exchange of both the real and personal property of defendant, and 'that said trade or exchange of the properties between J. W. Riggins and John T. Sweatt has never been consummated,' it would seem clear that plaintiff is not entitled to recover commissions."

In that case the evidence was that the defendant had authorized the plaintiff's assignor to effect an exchange of property between defendant and one John T. Sweatt, and that by reason of failure of title of Sweatt with respect to some of the property which he was to transfer to defendant, no exchange had ever taken place. The thing which the agent had been authorized to do never was done.

In the case at bar the agreement was that the agent Sherwood should "succeed in consummating a deal" with the proposed purchaser whereby the purchaser would pay the sum of $1,500 for the lease. So far as this agency contract is concerned, the agent not only performed all that he could perform in such a transaction, but he actually secured the payment to the defendant of the full sum of $1,500, which was all that he agreed to procure for her. The fact that in dealing with the purchaser she obtained from him an agreement to pay an additional sum of money, and that because of failure to obtain such additional sum she has refused to transfer the lease, cannot defeat the agent's right to the commission, unless we are authorized to read into the agency contract an additional obligation concerning the $1,833.32. This we cannot do. Looking at the agency contract alone, and by which alone the rights of the principal and agent are to be determined, we find that the agent did succeed in consummating the deal to the extent that he procured to be transferred to his principal everything that he agreed to obtain for her. Under such circumstances we hold that the agent is entitled to his commission.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

24 Cal. App. 725

SIMS v. FREW. (Civ. 1382.)

(District Court of Appeal, Second District, California. June 6, 1914.)

1. PRINCIPAL AND AGENT (§ 3*)—CONTRACT—CONSTRUCTION — AGENCY OR INDEPENDENT CONTRACTOR.

Defendant, desiring the services of F. in an aeronautical exhibition, agreed with him to furnish an exhibition park and advance money up to $10,000 for expenses, for which sum he was to be reimbursed from the first proceeds of the sale of admissions. The contract then provided that in the disbursement of the total income the first $10,000 should be subject to the expenses incurred by defendant, and the balance should be paid out in percentages to various persons or classes of persons, including 10 per cent. to F. for his services; it being further stipulated that defendant should not be responsible for any obligations incurred by F., unless approved by defendant. *Held*, that such last provision implied a recognition of the agency of F. to act for defendant and his responsibility, subject only to the condition of obtaining defendant's approval, and hence the contract was one of agency, and did not create F. an independent contractor.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 3–9, 11, 12; Dec. Dig. § 3.*]

2. PRINCIPAL AND AGENT (§ 169*)—ACTS OF AGENT — PRINCIPAL'S LIABILITY — OBLIGATIONS INCURRED—APPROVAL—WAIVER.

Where a contract by which defendant employed F. to act as his agent in exploiting an aeronautical exhibition provided that defendant should not be responsible for obligations incurred by F., unless approved by defendant, such provision was for defendant's exclusive benefit, and could be waived by parol, and was waived by defendant accepting and paying many bills for expenses incurred by F. without defendant's approval.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. § 169.*]

3. PRINCIPAL AND AGENT (§ 133*)—AGENCY CONTRACT—OBLIGATIONS OF AGENT—PRINCIPAL'S LIABILITY — SETTLEMENT WITH AGENT—STATUTES.

Defendant employed F. as his agent in exploiting an aeronautical exhibition, defendant to furnish an exhibition field and $10,000 for expenses; it being agreed that in the disbursement of the total income the first $10,000 should be subject to the expenses so incurred by defendant, and the balance paid out in certain percentages to various persons, including 10 per cent. to F. *Held* that, defendant not having exhausted the $10,000 fund by expenses properly chargeable to it at the conclusion of the enterprise, and the amount remaining being more than sufficient to satisfy plaintiff's claims for debts incurred by F., defendant's settlement with him was no defense to such claims under Civ. Code, § 2335, providing that, if exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by any settlement by him with his agent in good faith, before receiving notice of the creditor's election to hold the principal responsible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 472–475, 500; Dec. Dig. § 133.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by J. H. Sims, Jr., against Will L. Frew. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Andrew M. Strong, of Los Angeles, for appellant. H. S. Clewett and Davis, Kemp & Post, all of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff recovered judgment for sums found to be due on accounts for merchandise sold and delivered to the defendant by plaintiff's assignors. From the judgment and an order denying defendant's motion for a new trial, the defendant appeals.

There is no controversy over the correctness of the charges or the amount of the judgment. The goods were furnished on the order of one Dick Ferris, and were charged to him, and the defendant's contention is that he occupied no relation to Ferris that would make him responsible for this indebtedness.

On the 6th day of December, 1911, the defendant, Will L. Frew, as party of the first part, and Dick Ferris, as party of the second part, entered into a written contract concerning a proposed aeronautical exhibition to be held on Dominguez Field in Los Angeles county during the following January. Frew was in possession of said premises as lessee thereof, and desired to obtain the services of Ferris "to promote said meet and to act as and to bear the title of general manager, to secure publicity for said meet through the daily papers and magazines, to arrange for the services of competent press agents and to devote his entire time and energy toward the devising and carrying out of a plan for producing an important, attractive, and entertaining exhibition, and to aid in causing the public to patronize the same." For this purpose the contract was written wherein Frew agreed to furnish for said meet the Dominguez Field with certain equipment and to police the grounds and furnish the necessary ticket sellers, ushers, and other attaches necessary to the enterprise. It was further agreed that "all other expenses incurred in conducting said meet, not to exceed the sum of ten thousand dollars, shall be advanced by said first party, and said first party shall be reimbursed by retaining from the first proceeds of the sale of admissions to said meet of every kind and nature, a sufficient amount to pay the same, not to exceed, however, the sum of $10,000." It was then provided that in the disbursement of the total income the first $10,000 should be subject to "the expenses incurred by said party of the first part as above set forth," and the balance was to be paid out in percentages to various persons or classes of persons. This included 10 per cent. to Ferris "for his services as hereinafter set forth in this agreement," and the last remaining 19 per cent. thereof, together with all concessions of every kind and nature, was to be retained by

Frew in compensation for the use of Dominguez Field and for his personal services in conducting the exhibition. It was further stipulated that "said first party shall not be responsible in any way for any obligations, bills, or contracts incurred or entered into by said second party, unless the same have been sanctioned and approved by said first party in writing."

Said exhibition was held from January 20 to 28, 1912, and the gross income slightly exceeded $40,000. A few days later there was a settlement between Frew and Ferris resulting in the payment to Ferris of his percentage under the contract; the amount being based upon an assumption that the expenditures made or incurred under the $10,000 clause of the contract had amounted to $10,000. There was a controversy over the accounts, and it was known to both parties that there remained some outstanding bills. The defendant contends that he made that settlement in reliance upon the assurance of Ferris that the bills would not bring the total amount to above $10,000. It remains true, however, that at the time of making said settlement the defendant knew that there were outstanding and unpaid accounts pertaining to the business.

With possibly one small exception, the defendant knew that these goods were being ordered, and he had this knowledge, before they were delivered, but plaintiff's assignors were without knowledge of any agency relation between Frew and Ferris, and were without knowledge that Frew had anything to do with the business in question.

[1] It is contended by appellant that Ferris was an independent contractor, and not his agent; that therefore the acts and contracts of Ferris were his own, and that for them he alone is responsible. It appears to us, however, that the relation established between the parties to that contract was that of principal and agent. Frew was to secure the services of Ferris for certain defined purposes, and was to pay Ferris therefor in the manner described in the contract. The special provision made that Frew would not be responsible for obligations incurred by Ferris in connection with the services thus to be performed, "unless the same have been sanctioned and approved by said first party in writing," implies a recognition of the agency and the responsibility, subject only to the condition stated.

[2] The condition that bills must be sanctioned and approved in writing was a condition made exclusively for the benefit of the defendant, and could be waived by parol. Knarston v. Manhattan Life Ins. Co., 140 Cal. 58, 62, 73 Pac. 740; Wyman v. Hooker, 2 Cal. App. 36, 41, 83 Pac. 79; Ellsworth v. Knowles, 8 Cal. App. 630, 633, 97 Pac. 690. That this waiver took place is fully shown by the record. The defendant accepted and paid for many items of expense incurred by Ferris without having sanctioned or approved the same in writing. This condition of the contract was diregarded from the beginning to the end of the business connected with this enterprise.

[3] Finally it is contended that by reason of the settlement between defendant and Ferris and the payment to the latter of $2,286.30, the percentage above mentioned, the defendant is exonerated from liability on these claims. Section 2335 of the Civil Code reads as follows:

> "If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible."

Assuming that, if the moneys paid out by Frew, together with the then unpaid bills incurred by Ferris, had more than exhausted the $10,000 fund, this defense would be sustained, we find that the total amount thus chargeable under the contract was less than $10,000, and that the balance remaining was sufficient to satisfy plaintiff's claims.

The sum of $10,179.86, paid out by the defendant and charged against this fund by the defendant, included $1,159.30 of items which under the contract were not so chargeable. It is true that in the settlement between Frew and Ferris when said percentage was paid to Ferris these items were allowed by Ferris. But at the time when plaintiff's assignors furnished the supplies included in their accounts this modification of the contract was not in force. This being so, their rights are to be determined by the written contract, and they cannot be affected by a subsequent diminution of the amount reserved for the payment of such demands. The total amount of the accounts included in the judgment, exclusive of interest and costs, is only $939.65.

The judgment and the order denying a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

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24 Cal. App. 685

LAPIQUE v. PLUMMER. (Civ. 1303.)

(District Court of Appeal, Second District, California. June 3, 1914. Rehearing Denied by Supreme Court July 31, 1914.)

APPEAL AND ERROR (§ 82*)—APPEALABLE ORDERS—ORDERS SETTING ASIDE DEFAULT.

An order setting aside a default of defendant entered by the clerk, not being an order after judgment or one of the interlocutory orders enumerated in Code Civ. Proc. § 963, as being appealable, was not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 468–471; Dec. Dig. § 82.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Lapique against E. R.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Plummer. From judgment for defendant, plaintiff appeals. Appeal dismissed.

J. Lapique, of Orange, in pro. per. Shirley E. Meserve and W. A. Sumner, both of Los Angeles, for respondent.

CONREY, P. J. The appeal in this case is from an order vacating and setting aside the default of the defendant entered by the clerk—an order made before the entry of any judgment in the action. Appellant's contention that such order entered by the clerk is to be regarded as a judgment, proceeds upon an entirely erroneous assumption.

> "Certainly it is not true that an order setting aside a default in an action where no judgment has been entered upon the default is the subject of a separate appeal. It is in no sense an order after judgment, and it is not one of the interlocutory orders enumerated in section 963 of the Code of Civil Procedure." Savage v. Smith, 154 Cal. 325, 97 Pac. 821.

The appeal is dismissed.

We concur: JAMES, J.; SHAW, J.

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24 Cal. App. 637

OLIVER v. STOLTENBERG. (Civ. 1305.)

(District Court of Appeal, Second District, California. May 29, 1914. Rehearing Denied June 26, 1914.)

1. NEGLIGENCE (§ 136*) — ACTIONS — JURY QUESTION.

The question of negligence in a given instance is for the jury, unless reasonable men could not differ as to whether due care had been used.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

2. LANDLORD AND TENANT (§ 169*)—NEGLIGENCE OF LANDLORD—ACTIONS—JURY QUESTION.

Where the owner of an apartment building had it raised without notice to the tenants, so that the edge of the porch was four or five inches above the step, which before had been almost even with the porch, and a tenant who did not know of the change, fell on the step and was injured in leaving the building, the owner cannot, as a matter of law be held free from negligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644–646, 664–667, 681–684; Dec. Dig. § 169.*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Maybelle Oliver against Emma Stoltenberg. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

H. A. Massey, of Los Angeles (Peyton H. Moore, of Los Angeles, of counsel), for appellant. D. Z. Gardner, of Los Angeles, for respondent.

JAMES, J. Appeal was taken in this cause from the judgment entered against defendant, and also from an order denying her motion for a new trial. The cause of action was one for damages for personal injuries alleged to have been suffered by the plaintiff as a result of the negligent acts of defendant.

Appellant was the owner of an apartment house in the city of Los Angeles, and respondent was a tenant therein. Being desirous of having the house raised to a greater height above the surface of the ground, appellant employed one Young, a contractor, to do the work, and he commenced the task on Saturday, the last day of September, 1911. On Sunday morning at about 10 o'clock the building had been raised at the front about 5 inches. As it had stood theretofore there were two cement steps leading from the porch at the front to the sidewalk, and the top step was about 1½ inches below the level of the porch. When the house was raised to the height of about 5 inches there was then created another step from the porch surface to the top of the first cement step, and a space was left where the riser is ordinarily placed. When the steps were in that condition plaintiff came out of the building and proceeded as she ordinarily did to reach the sidewalk, without noticing that the building had been raised. Not expecting to find the first cement step lower than it had previously been, her foot slipped, and she fell, sustaining injuries for which the trial court awarded her damages in the sum of $1,500. As to the facts just stated there was no dispute between the parties, and it was also agreed that the contractor, Young, was an independent contractor in his connection with the work, but that he had no duty to perform under his agreement with appellant as to the steps; these latter he was not to molest or change. The court determined by its findings all of the facts as they have been narrated, and further found that the change in the position of the porch at the time of the accident to respondent "was not apparent to any one passing from said porch to said steps."

[1] Upon such a state of the record it is contended on the part of appellant that there was not sufficient evidence to show that appellant had committed any negligent act which caused respondent's injuries; and, second, that it appeared that respondent was guilty of negligence which contributed to cause the accident. It is first claimed that, upon the facts as presented to the trial court and shown in the statement on motion for a new trial, it became a question of law as to whether or not appellant had been guilty of negligence, and that, such a question is here presented for review. It is an unusual case, indeed, where the facts and circumstances surrounding the happening of an event involving a question of negligence present a case where it can be said without any qualification that all men, considering the matter in a rational and reasonable light, would agree as to whether ordinary care had been used by the person charged with negligence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such a difference as to the inferences which might fairly be drawn from conceded facts. Where this is the case, the issue must go to the jury, no matter what may be the opinion of the court as to the value of the evidence or the credibility of the witnesses. So, if the issue narrows itself to a distinction between what is reasonably safe and what is not so, the question is emphatically one for the jury. It is for the court to say whether there is any evidence in the case from which negligence might reasonably be inferred; and then it is for the jury to say whether, from the facts thus proved, negligence ought to be inferred." Shearman and Redfield on Negligence, vol. 1, par. 54.

As illustrating the application of the rules declared in the text-book referred to, the case of Humphrey v. Leonard, 151 Cal. 375, 90 Pac. 705, may be cited, wherein it is said:

> "Appellant's proposition is that the facts being undisputed, it was a question of law as to whether or not defendants were negligent, and that the finding and determination of the court is against the law and against the evidence. This, however, may not be said. It was for the court, as it would have been for a jury, considering all of the circumstances and facts shown by the evidence, to declare whether the defendants were or were not negligent. * * * The defendants were called upon to exercise the care which the circumstances required in the construction and maintenance of the temporary driveway, and what was ordinary care it was peculiarly the province of the court below, sitting as a trier of the facts, to determine."

There is, then, on this branch of the case, but one query to answer: Was there any substantial evidence from which the trial court might draw its conclusion that in leaving the steps in their changed condition, without warning to her tenants, appellant acted in a manner other than ordinary prudence would suggest she should act, having reasonable regard for the safety of the occupants of her building.

[2] There can be no doubt at all that appellant would have been negligent had she raised the house without the knowledge of, or notice to, her tenants and one of them had gone upon the steps in the dark and been injured. The same case is presented here, with the exception that the respondent was injured in the daytime. And the same conclusion must follow, unless it can be said that the conditions were such as to apprise those who had occasion to go from the building that the steps had been lowered through the raising of the building; and these conditions would need to be so plain as to give notice to the tenant as effectually as would a barrier, a sign, or other familiar form of warning appliance. There was no such plain notification shown to have been given here. It was a fair inference for the court to draw from all of the testimony that persons emerging from the building, unless their eyes were kept ahead of their feet, would not have noticed the fact that the edge of the porch had been raised above the cement step four or five inches. The court did find that the change was not apparent to any one passing from the porch to the steps. Hence this court cannot say, as a matter of law that the conclusion of the trial judge was erroneous. For precisely the same reasons it must be concluded that the finding that respondent was not guilty of any act of negligence which contributed to cause her injuries is not the subject of review; there was some evidence of a substantial nature upon which to found the finding.

The case of Smith v. Buttner, 90 Cal. 95, 27 Pac. 29, is cited in support of appellant's contention that the complaint in this action did not state facts sufficient to constitute a cause of action. In this case the particular defect which caused the injuries to plaintiff is described, and it is then alleged that respondent, while passing out of the house, fell upon the steps, by reason of the negligence of the appellant "as aforesaid." It seems that the complaint made a sufficiently clear statement of the facts illustrating the conditions out of which appellant's negligence arose, and sufficiently showed that it was due to these conditions that respondent fell upon the steps.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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24 Cal. App. 675

YAHACHI SHIMODA v. BUNDY et al.
(Civ. 1528.)

(District Court of Appeal, Second District, California. June 3, 1914. Rehearing Denied by Supreme Court July 31, 1914.)

1. Evidence (§ 474*)—Opinion of Witness—Competency—Speed of Automobile.

Any person of ordinary intelligence and opportunity for observation is competent to testify as to the speed of an automobile.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

2. Evidence (§ 474*)—Opinion Evidence—Speed of Automobile—Knowledge.

In an action for injuries from a collision between a motorcycle and an automobile, plaintiff's testimony relative to the speed at which the automobile was traveling when it struck him was improperly excluded on an objection that he did not have sufficient opportunity to form an opinion thereon, where he testified that he not only saw the automobile before it struck him, and had time to change the course of his motorcycle, but saw and estimated its speed while it was running a distance of half a block after it struck him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

3. Municipal Corporations (§ 706*) — Streets — Collision with Automobile — Negligent Speed—Direction of Verdict.

Where, in an action for injuries from a collision between a motorcycle and an automobile on a city street, the evidence was conflicting on whether defendants' automobile was being negligently operated at an excessive rate of speed and raised inferences relative thereto from which reasonable and impartial men might draw different conclusions, and it appeared that, though the trial judge might set aside a verdict for plaintiff, he would not be compelled to do so, it was error to direct a verdict for defendants.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

4. MUNICIPAL CORPORATIONS (§ 705*) — STREETS — COLLISION WITH AUTOMOBILE — DEFENSE—VIOLATION OF ORDINANCE.

In an action for injuries from a collision between an automobile and a motorcycle on a city street, it was no defense that plaintiff had not registered his motorcycle as required by city ordinance, where the accident was due to the negligent operation of defendants' automobile at an excessive speed, and plaintiff's violation of the ordinance neither bore any causal relation nor contributed to the injury sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Yahachi Shimoda against John Bundy and another, for personal injuries. From a judgment for defendants on directed verdict and a denial of a new trial, plaintiff appeals. Reversed.

Flint, Gray & Barker and Gray, Barker & Bowen, all of Los Angeles, for appellant. George P. Adams and Stephens & Stephens, all of Los Angeles, for respondents.

SHAW, J. This is an action to recover damages for personal injuries alleged to have been sustained as a result of the negligence of defendants in operating an automobile which collided with a motorcycle upon which plaintiff was riding on Ninth street in the city of Los Angeles. At the close of the evidence the jury, under direction of the trial court, returned a verdict for defendants. The appeal is from the judgment and an order denying plaintiff's motion for a new trial.

The collision occurred at a point where Ninth street, which extends east and west, intersects an alley 19 feet and 7 inches wide, extending north and south. According to plaintiff's testimony, he was engaged as a gardener, and about 9 o'clock a. m. on January 19th, having completed his work, he mounted his motorcycle at a point on the west side of the alley distant 150 feet north of its intersection with Ninth street, and, without using the power, but pedaling the machine, started towards Ninth street, traveling at a speed of less than five miles per hour. He was on the west side of the alley, and as he neared Ninth street kept within two or three feet of the west line thereof. As he approached Ninth street he looked on both sides of the alley where it opened into Ninth street and saw a gravel wagon on Ninth street approaching from the east towards the alley; the heads of the horses drawing the wagon being distant six or seven feet from the east line thereof, and another wagon which had passed the alley going west. Although he looked, he saw no automobile and, though he listened, heard no horn or other warning of its approach. He passed out of the alley in front of the gravel wagon, immediately after which defendants' automobile, traveling west on Ninth street, struck the left side of the front wheel of plaintiff's motorcycle, throwing him down, as a result of which he was seriously injured. When thrown down he immediately jumped up to see the automobile, and saw it pass over Burlington avenue. He did not lose consciousness and had full possession of his faculties from the time of the collision until removed in the ambulance; he saw the automobile the instant before it struck him and turned the handle-bars of his motorcycle to the right, thus changing his course, in an effort to avoid the collision; after being struck he got up, but fell down again; he watched the speeding automobile until it reached Burlington avenue, the street next west of the alley; he had attended automobile school, qualified as a driver, and knew and had estimated their speed within one-half mile per hour. A city ordinance was introduced which limited the speed of and made it unlawful for any one to operate an automobile at the point where the collision occurred at a speed in excess of 20 miles per hour. Thereupon he was asked the question, "Can you estimate the speed at which that automobile was traveling at the time that it struck you?" to which an objection, upon the ground that it was incompetent and immaterial and no foundation laid as to the estimate, was by the court sustained on the ground, as stated, "that from the testimony of the witness already given it is impossible for him to make the estimate." He was further asked, "Now, Shimoda, what was the speed of the automobile at the time that you first saw it?" to which the court sustained an objection. He was again asked, "What speed was the automobile going in miles per hour at the time it struck you?" to which defendants' objection, upon the ground that it was incompetent, irrelevant, and immaterial and no proper foundation laid, was sustained. Thereafter plaintiff offered to prove by the witness that from seeing the automobile at the time it struck him and immediately prior thereto and thereafter, and as he saw it afterwards while being run to Burlington avenue, he could and did form an estimate of the speed in miles per hour at which it was running, and that, at the time it collided with his motorcycle, it was running at a speed of from 30 to 40 miles per hour. The court refused to permit him to so testify. This ruling of the court is assigned as error. Counsel for respondents attempt to justify the same upon the well-recognized rule that whether or not one be qualified to testify as an expert is a question of fact to be determined by the trial court, whose decision will not be disturbed unless error clearly appears;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in reply to which it may be said that the witness was not called as an expert.

[1] No question other than the speed of a moving object was involved, as to which any intelligent person accustomed to observing moving objects would be able to express an opinion of some value. The rule, as to which there is little conflict and applicable alike not only to automobiles, but to all moving objects, is that a person of ordinary intelligence having opportunity for observation is competent to testify as to the speed at which an automobile is being operated at a given time. Wolfe v. Ives, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; Matla v. Rapid Motor Vehicle Co., 160 Mich. 639, 125 N. W. 708; State v. Watson, 216 Mo. 420, 115 S. W. 1011; Detroit & M. R. R. Co. v. Van Steinburg, 17 Mich. 104; Johnsen v. Oakland, etc., Ry. Co., 127 Cal. 608, 60 Pac. 170.

[2] The ruling, however, appears not to have been based upon the grounds stated in the objection to the question, but by reason of the fact that, in the opinion of the learned trial judge, plaintiff did not have sufficient opportunity to form an opinion upon the question as to the rate of speed at which the automobile was running. This by reason of the fact that, as shown by his testimony, plaintiff was knocked down immediately after emerging to a point from which he could see the automobile. This conclusion finds some support in Wright v. Crane, 142 Mich. 508, 106 N. W. 71, where it appeared that the witness, who testified that an automobile when he first discovered it was but 20 feet from his horse's head, based his opinion upon the ground that, while he did not see it, an automobile running at a high rate of speed makes little noise and makes much more noise when running at a low rate of speed. It appears here that not only did plaintiff see the automobile before it struck him and had time to turn the handle-bars so as to change his course, but saw and estimated its speed while running a distance of half a block to Burlington avenue. In the case of Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178, the plaintiff testified that the car was 10 or 15 feet from him when he first saw it and was running so fast that, although he made an effort, he had no time to get away from it. He was then asked at what rate of speed it was running, and answered that it was 15 miles an hour. This answer was stricken out on the ground that it appeared he did not have sufficient opportunity to form an opinion on the question of speed. The court held the ruling to be error. A mathematical calculation shows that, if the automobile was running 20 miles an hour, it would have required one-half second to cover 15 feet. If running at 40 miles per hour, as claimed by plaintiff, it would have covered 30 feet in the same length of time. The opinion or estimate of the witness as to the rate of speed at which the automobile was being propelled at the time of the collision might, by reason of his lack of opportunity to judge thereof, be entitled to little value, but this merely goes to the weight to be given the testimony, which was a question for the jury. The court erred in excluding the testimony.

[3] Max Spaeny, called as a witness on behalf of plaintiff, testified that he saw the collision when the automobile struck the front of the motorcycle, knocking plaintiff off and down, and watched the automobile until it went up to Burlington avenue; that plaintiff, after being knocked down, tried to get up, but, being unable to do so, raised his head and looked steadily after the automobile; that he was in the alley as plaintiff passed him going out. This witness testified that he was unable to determine or estimate the speed at which the automobile was running, but, for the purpose of showing the speed at which it was operated at the time of the collision, the witness was permitted, without objection being interposed thereto, to testify that at the time of the collision the automobile was running at about the same speed as a car operated over the same street and at the same place, the speed of which he had witnessed a few days before the trial, and testimony was then offered to show that this car, with which the witness had compared the speed of defendants' automobile, was at the time operated at an actual speed of 27½ miles per hour. It is conceded the testimony given by the chauffeur in charge of the car contradicted the evidence adduced on behalf of plaintiff as to every material issue. He testified that he knew of and was familiar with the location of this alley and knew that it was used as a thoroughfare by people using wagons, motorcycles, and other vehicles; that, as he approached the point on Ninth street intersecting the alley, his view thereof was obstructed by a wagon loaded with hay, over the top of which he could not see, and which with the team drawing the same, extended across seven-eighths of the mouth thereof; that he was looking at his speedometer and was running at a speed of only 15 miles per hour and did not see plaintiff or know that he had struck him until, feeling a jar from the collision, he stopped his car within eight feet of the point where the collision occurred, and looking back saw plaintiff lying in the street.

The question presented is whether or not under this evidence the court was warranted in taking the case from the jury and directing a verdict for defendants. In the late case of Estate of Baldwin, 162 Cal. 471, 123 Pac. 267, it is said:

> "A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence."

And further as touching the question it is said:

> "It is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right to exercise this

power, if there be a conflict, it must be a substantial one."

In support of which proposition a number of California cases are cited. Accepting as the law this latest expression of the Supreme Court, announced in the Baldwin Case, can it be said the rule applies to a case where, as here, it is sought to recover for the alleged negligence of defendants, the existence of which depends upon inferences to be drawn from the facts and circumstances shown by the evidence, and as to which reasonable and impartial men may differ in the conclusions drawn? Negligence is not absolute, but relative, depending upon some circumstance of time, place, or person, or combination thereof. If the jury had been satisfied that defendant Bundy, as he stated, was operating his car at a speed of only 15 miles per hour and had it under such control that enabled him to stop it within a distance of 8 feet from the point of collision, and this notwithstanding the fact that he did not see plaintiff before striking the motorcycle, or, on the other hand, that he was running at 30 miles per hour and was familiar, as he stated, with the fact that the alley was used as a thoroughfare by parties operating vehicles in coming therefrom into the street, and that in either case the mouth of the alley was not obstructed by any wagon, whether loaded with hay or gravel, by reason of which fact Bundy could have seen plaintiff had he looked, or looking did see him and made no effort to avoid the collision, and that plaintiff, as stated by him, did look and listen, but neither saw nor heard anything indicating the approach of an automobile, they might have concluded plaintiff's injuries were due to a want of reasonable care on the part of the defendants, in which case, had the trial court denied a motion for a new trial, this court on appeal could hardly be expected to reverse same for want of evidence to support the verdict. Other fairly debatable theories based upon evidence adduced might be constructed which, if accepted by the jury, might entitle plaintiff to recover. While the case presented is one where the trial judge might have set aside a verdict rendered for plaintiff, nevertheless it is not one in which the court would be compelled to do so.

[4] There was introduced in evidence a city ordinance requiring all motorcycles to be registered and numbered. This ordinance provided that every owner of a motorcycle should file in the office of the city clerk a statement in writing showing the name and address of such person, description of the motorcycle, name and maker thereof, and factory number, and that the city clerk should issue to him a metal seal, approximately two inches in diameter, upon which should be stamped, "Registered Motorcycle No. ———, City of Los Angeles," with the registration number inserted therein, which seal was required to be conspicuously displayed upon the motorcycle to which it was assigned. Section 4 of the ordinance made it unlawful for any person to operate a motorcycle upon the streets unless the registration seal and number belonging thereto was displayed thereon as required by the ordinance. Section 5 provided that:

> "It shall be unlawful for any person * * * to use or operate * * * any motorcycle * * * upon or in any public street or thoroughfare, unless the owner thereof shall have complied in all respects with this ordinance."

For violation of the provisions of the ordinance, the offender was made subject to punishment by fine or imprisonment, or both. It is conceded that plaintiff did not file a statement with the city clerk, nor procure the registration of his motorcycle, as required by the provisions of the ordinance. Respondents insist that by reason of such neglect and failure on the part of plaintiff to comply with the ordinance, and even though it be conceded that the negligence of defendants was the direct and proximate cause of the damage sustained by him, he is not entitled to recover therefor. This contention is based upon the theory that, since the ordinance made it unlawful for him to operate the motorcycle, he was, as to defendants and the city, a trespasser upon the street, to whom defendants owed no duty other than to refrain from willfully or wantonly injuring him or his property. This view finds support in the case of Dudley v. Northampton Street R. Co., 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561, which involved an act of the Legislature containing a provision not unlike those contained in the ordinance before us. It is there held, quoting from the syllabus:

> "One operating an automobile on a public highway, in violation of a statute forbidding the operation thereon of unregistered machines, has no right of action against one who injures it merely by want of ordinary care."
>
> "The Legislature," says the court, "in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them as to persons lawfully using the highways, no other right than that of being exempt from * * * wanton or willful injury."

The general rule appears to be that the violation of an ordinance which directly contributes to the injury caused by the negligence of another bars the right to recover, but, where such violation bears no causal relation to nor contributes to the injuries sustained, the rule has no application. Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Frontier Steam Laundry Co. v. Connolly, 68 L. R. A. 425, 72 Neb. 767, 101 N. W. 995; Needham v. San Francisco & S. J. R. Co., 37 Cal. 409; Schierhold v. N. B. & M. R. R. Co., 40 Cal. 447; Monroe v. Hartford St. Ry. Co., 76 Conn. 201, 56 Atl. 498; Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; Shaw v. Thielbahr, 82 N. J. Law, 23, 81 Atl. 497. Indeed, the Massachusetts court, in a later case entitled Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701, refused to extend the doctrine of the Dudley

Case to one where the plaintiff was in default in that he had not complied with an act requiring the issuance of a license as a condition of lawfully operating a vehicle. Even where the violation of an ordinance constitutes negligence per se, there must be, in order for plaintiff to recover, a causal relation between the violation of the ordinance and the injury complained of. Lindsay v. Cecchi (Del.) 80 Atl. 523, 35 L. R. A. (N. S.) 699. The conclusion of the Massachusetts Supreme Court, divided, however, as it was, appears to have been based upon the theory that the Legislature of that state intended by the act to create a duty to other travelers upon highways, and not merely to declare a public duty to be enforced by the imposition of the penalties therein prescribed in the ordinary administration of the criminal law. We are unable to appreciate the distinctions sought to be drawn, and unwilling to accept its decision as the law of this state when applied to the ordinance in question. Moreover, if the automobile was operated at a rate of speed in excess of that prescribed by the ordinance, it was not lawfully traveling upon the street, as was defendant in the Dudley Case which fact is given particular emphasis. While the courts, invoking the maxim, "Ex pacto illicito non oritur actio," in a certain class of cases close their doors in the face of one guilty of moral turpitude in attempting to enforce an illicit contract, thus leaving the parties as they found them, such principle is wholly inapplicable to the facts here involved. Our conclusion is that one who violates an ordinance wherein a penalty is fixed for noncompliance with its provisions may be subjected to the penalties therein prescribed, but he cannot, in addition thereto, be deprived of his civil right to recover damages, perhaps in many thousands of dollars, sustained by reason of the negligence or wrong of another, when such violation bore no relation to the injury and did not contribute in the remotest degree thereto. In our opinion, such was not the intent of the legislative body of the city of Los Angeles in adopting the ordinance.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

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24 Cal. App. 623

PEOPLE v. LUSINCHI. (Cr. 494.)

(District Court of Appeal, First District, California. May 29, 1914. Rehearing Denied June 27, 1914; Denied by Supreme Court July 28, 1914.)

1. LIBEL AND SLANDER (§ 145*)—"LIBEL"—WHAT CONSTITUTES.

The complaining witness was chairman of an entertainment committee, and funds collected by the committee were lost. Defendant, the editor of a newspaper, published an article calling on the complaining witness by name, and demanding that he make a clean breast of the mysterious disappearance of the funds and tell into which pocket the money strayed. *Held*, that the article was libelous within Pen. Code, § 248, defining a libel as a malicious defamation in writing tending to impeach the honesty or reputation of the one libeled and expose him to public hatred or contempt.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 404; Dec. Dig. § 145.*

For other definitions, see Words and Phrases, vol. 5, pp. 4116–4125.]

2. LIBEL AND SLANDER (§ 159*) — CRIMINAL LIBEL—INSTRUCTIONS.

In a prosecution for criminal libel by a newspaper, instructions on the right of the newspaper to criticize the acts of persons not holding public office are properly refused; the word "criticize" having no well-defined meaning in law.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 444; Dec. Dig. § 159.*]

3. LIBEL AND SLANDER (§ 146*) — "CRIMINAL LIBEL"—DEFENSES.

Under Pen. Code, § 248, defining a criminal libel as a malicious defamation tending to impeach the honesty of the one libeled and expose him to public hatred, contempt, or ridicule, a newspaper has no right to print a defamatory article, unless it comes within the statutory definition of privileged communications; there being no special exemption in favor of newspapers.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 405; Dec. Dig. § 146.*

For other definitions, see Words and Phrases, vol. 2, p. 1749.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

August Lusinchi was convicted of criminal libel, and he appeals. Affirmed.

Costello & Costello and P. A. Bergerot, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Dep. Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of criminal libel.

The facts leading up to the publication complained of are briefly these: The defendant and one Leon L. Rey were publishers of rival French newspapers in the city of San Francisco, and were at swords' points in journalism. Leon L. Rey had been the chairman of a committee which had in charge the finances of a celebration of the fall of the Bastille, during the course of which the sum of $600 of the funds provided for the celebration and passing through the hands of the committee disappeared. The whereabouts of this money not having been explained by the chairman of the committee to the satisfaction of the defendant, as editor of "Le Franco-Californien," he published in his said newspaper the article complained of in this case. Thereupon he was arrested, tried, and convicted of criminal libel, and fined the sum of $500, from which judgment he prosecutes this appeal.

The first contention of the appellant is that the article complained of does not in itself contain matter which was sufficient to bring its writer and publisher within the terms of the section of the Penal Code defining criminal libel, and that the general demurrer to the information ought therefore to have been sustained. In this connection the appellant contends that the prosecution, in drawing the information, and realizing the insufficiency of the article to support a charge of criminal libel, undertook by innuendoes to eke out the infirmities of the article by imputing to its phrases a criminal meaning which their words do not warrant, and that for this additional reason the demurrer to the information should have been sustained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It will be conceded that an article alleged to be defamatory and to have been published of and concerning another cannot have its words and phrases enlarged beyond their natural import and plain and ordinary meaning by innuendo, and that in case this is attempted in the information the remedy is by way of demurrer. With this in mind we have given to the article in question a most careful reading, after eliminating from it the innuendoes of the information, and also the excursions into editorial flippancies with which it is replete. Thus stripped down to its real intendment and naked import, we are satisfied that the article does quite clearly impute to the subject of it a course of acts, concealment, and conduct which, if not actually criminal, do strongly tend to impeach the honesty, integrity, virtue and reputation of Leon L. Rey, and thereby expose him to public hatred, contempt, and ridicule. The article is headed "Make a Clean Breast of It." It is directed to Leon L. Rey, as its subject, by name; it refers to "the mysterious disappearance of $600 of the money received by and tabulated in the report of the finance committee of the 14th of July celebration," of which Leon L. Rey was the chairman; it urges him to tell "into which pocket or pockets have strayed the $600"; it avers that "mistakes, irregularities, forgeries, and even embezzlements of money have been ascertained in the published statements of account of this committee"; it demands an explanation of Leon L. Rey; and in doing so asserts that "an honest man never hesitates to justify himself when he is accused of committing offenses such as these with which he has been charged"; it states that Leon L. Rey is "obstinately resolved to be mum on this subject," and finally closes, as it began, with the insistence that Leon L. Rey should "make a clean breast of it."

We think that a newspaper article couched in the foregoing phrases and aimed at the complaining witness comes clearly within the provisions of section 248 of the Penal Code, relating to criminal libel, and that such article does not require the use of innuendoes to render it actionable; and hence that the fact that the drawer of the information made use of innuendoes in aid of the actual intent and meaning of the article complained of neither strengthens nor weakens the information as a pleading, and that both the general and special demurrers thereto were therefore properly overruled. Tonini v. Cavasco, 114 Cal. 266, 46 Pac. 103, and cases cited.

[2, 3] The next contention of the appellant is that the court erred in refusing to give certain instructions to the jury at the defendant's request. These instructions, of which there are several, refer to the asserted right of a newspaper to fairly and justly "criticize" the actions of those committees or members of committees having in charge the celebration of holidays and anniversaries, and that the defendant, as the editor of such paper, had the right to direct public attention to the actions and conduct of the committee of which Leon L. Rey was chairman, in relation to the alleged disappearance of a portion of the funds with which he was intrusted, and to call upon him and his committee for an explanation, and to comment upon his refusal to give such explanation for the enlightenment of the readers of the newspaper and of the public generally, in response to the duty which the newspaper owes to its subscribers and the public in that regard, and that such a publication is a privileged communication. The twofold vice of the series of instructions of which the foregoing is a brief synopsis consists: First, in the use of a term which in law has no defined meaning—that is, the word "criticize"; and, secondly, consists in the suggestion that the criticisms and comments of the press upon the acts and conduct of persons in charge of public celebrations are privileged communications. The law defines criminal libel to be "a malicious defamation, * * * tending * * * to impeach the honesty, integrity, virtue, or reputation, * * * of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Pen. Code, § 248. The comprehensive terms of this section of the Code permit no exception in favor of those who may be publishers of newspapers as distinguished from the disseminators of written or printed matter in any other form. The thing, by whomever published and in whatever form, must be such, in point of truth and of intent, that it will pass through the meshes of this section of the Penal Code, or it will be criminal libel, unless it shall also be found to come within the terms of those sections of the Code which define privileged publications. The article in question does not purport nor pretend to be a report of any judicial, legislative, or other public official proceeding; and it has never yet been held, so far as the industry of counsel discloses, that a mere newspaper publication of the kind in question is such a communication to a person or persons interested therein as would come within the provisions of section 256 of the Penal

Code. The proffered instructions of the defendant dealing with this branch of the case were therefore properly refused.

As to the other proposed instructions of the defendant which were also refused by the trial court, we find their essential subject-matter to have been quite fully covered by the instructions which the court gave to the jury upon its own motion.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

24 Cal. App. 696

BORGER v. CONNECTICUT FIRE INS. CO.

(Civ. 1404.)

(District Court of Appeal, First District, California. June 4, 1914. Rehearing Denied by Supreme Court, Aug. 3, 1914.)

1. Insurance (§ 634*)—Fire Policy—Action—Complaint.

A fire policy provided that the insurer within 20 days after receipt of proofs of loss must notify the insured of its partial or total disagreement with the amount of the loss, and if the insurer failed to give such notice, it should be deemed to have assented to the amount of the loss claimed, but that if notice should have been given within 10 days thereafter the parties might agree on the amount of the loss, and in the event of disagreement, an appraisement should be made on the insurer's demand. A further provision declared that the loss, if any, was payable 30 days after the amount had been ascertained, but if such ascertainment were not made within 60 days after receipt of proofs of loss, then the loss should be payable 90 days after such receipt. *Held*, that, such policy having been made a part of plaintiff's complaint in an action thereon, an allegation that the sum claimed was long since due was insufficient to show compliance by plaintiff with the condition required of plaintiff after presentation of proofs, and, the complaint failing to allege that the loss had been ascertained, and that the time specified for payment had expired under the terms of the policy, before suit brought, it was demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1593, 1596, 1598, 1603–1606, 1608; Dec. Dig. § 634.*]

2. Pleading (§ 34*)—Complaint—Construction—Presumptions.

A policy provided that loss should be payable 30 days after the amount had been ascertained by agreement or appraisement, but if no appraisement was had within 60 days after receipt of proofs of loss, then the loss should be payable within 90 days after such receipt. A complaint on the policy averred that on the "—— day of May, 1912," plaintiff furnished defendant with the proofs of loss, while the transcript showed that the action was begun June 15, 1912. *Held*, that in determining the sufficiency of the complaint on demurrer, no presumption could be indulged in to fill the blank with a date earlier than 30 days before the date on which suit was begun, nor could plaintiff rely on a presumption to supply a failure to allege the ascertainment of the amount of loss as provided for by the policy, or whether, if so ascertained, that the date of such ascertainment was at least 30 days before suit brought.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. § 34.*]

3. Appeal and Error (§ 233*)—Presentation of Questions in Trial Court.

Where, in an action on a policy, defendant demurred to the complaint and urged that the suit was prematurely brought, and again presented such question by denial in its answer and in a motion for a new trial, it was sufficiently raised in the trial court to entitle defendant to a review of the question on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 594, 596, 599–635; Dec. Dig. § 233.*]

4. Insurance (§ 621*)—Fire Policy—Action—Time.

A policy provided that after furnishing proofs of loss, the insurer must within 20 days after receipt, notify the insured in writing of any disagreement with the amount claimed, and if the insurer failed to give such notice, it should be deemed an assent to the amount claimed; that the loss should be payable 30 days after ascertainment of the amount, but if such ascertainment was not had within 60 days after receipt of proofs of loss, it should be payable in 90 days after such receipt. Proofs of loss were furnished May 12, 1912, and no objection was made by the insurer within the 20 days. An action was brought June 15, 1912. *Held*, that the insurer had the whole of the 20 days within which to assent or object to the proofs of loss, as made, and 30 days thereafter within which to pay the claim, and hence the action was premature.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1542, 1543; Dec. Dig. § 621.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Alex. Borger against the Connecticut Fire Insurance Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Coogan & O'Conner, of San Francisco, and Drew & Drew, of Fresno, for appellant. W. P. Thompson, of Fresno, for respondent.

RICHARDS, J. This is an action brought to recover the sum of $1,000 with interest, alleged to be due upon a fire insurance policy as the result of the destruction by fire of the premises insured. A copy of the policy was attached to and expressly made a part of the complaint. There was a general demurrer, which was overruled. Thereupon an answer was filed, admitting the issuance of the policy but denying liability thereon upon numerous alleged grounds, and also denying that the loss, if any, was due or payable or unpaid, according to the terms of the policy, at the time of the commencement of the action. Upon the trial of the cause judgment was rendered and entered in favor of the plaintiff for the sum of $801.98, with interest and costs. A motion for a new trial was denied, and from such judgment and order denying a new trial the defendant appeals.

[1] The first point made by the appellant is that the general demurrer should have been sustained. We think the point is well taken. It is a cardinal rule of pleading that a complaint must show upon its face an existing and ripened cause of action. The complaint in this case, after setting forth the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

facts regarding the issuance of the policy covering the property, and its transfer by several assignments from the original parties, insured to the plaintiff with the assent of the insurer, and after averring the occurrence of the fire and the destruction of the property at some unspecified time during the year 1912, proceeds to allege:

"That on the ——— day of May, 1912, plaintiff furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part, that said defendant has not paid said loss or any part thereof, and that the same is long since due, owing, and unpaid according to the terms of said policy of insurance."

Then follows the prayer.

The difficulty with the plaintiff's pleading arises out of the fact that while he has made the policy in question a part of his complaint as an exhibit and by reference, he has not alleged the things which the policy requires to have been done subsequent to the presentation of his proof of loss, nor has he averred any facts with respect to the passage of the time which the policy requires must have elapsed before the loss became payable and his cause of action arose. The policy provides that after the insured has furnished the insurer with the proofs of his loss, the insurer must, within 20 days after the receipt thereof notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him; and, in case the insurer fails to give such notice within the specified time, it shall be deemed to have assented to the amount of the loss claimed by the insured, but that if such notice shall have been given then within 10 days thereafter, the parties may agree upon the amount of the loss, and in the event they do not agree, an appraisment shall be made, upon the demand of the insurer, as to the loss or part of the loss about which the parties disagree. The policy also contains the following provision:

"Loss when payable: A loss hereunder shall be payable within thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss then the loss shall be payable in ninety days after such receipt."

The foregoing conditions and provisions of the insurance policy upon which the plaintiff seeks to recover, having been expressly made a part of his complaint, it was incumbent upon the pleader to show upon the face of his complaint that the loss had ripened into a chose in action at the time the suit was begun. Gillon v. Northern Ins. Co., 127 Cal. 480, 483, 59 Pac. 901; McCormack v. Ins. Co., 78 Cal. 468, 21 Pac. 14; Cowan v. Ins. Co., 78 Cal. 181, 20 Pac. 408; Doyle v. Ins. Co., 44 Cal. 264; California Sav. Bank v. American Surety Co. (C. C.) 82 Fed. 866.

[2] The complaint avers that on the ——— day of May, 1912, plaintiff furnished defendant with the proofs of his loss. The transcript shows that the action was begun on the 15th day of June, 1912. For the purpose of testing the correctness of the ruling of the trial court upon the demurrer no presumption can be indulged in to fill the blank in the complaint as to the exact date of presentation of the proof of loss with a date earlier than 30 days before the date on which the suit was begun; nor can the pleader appeal to any presumption by which to supply the answer to the logical inquiry as to when, how, and whether the amount of the loss for which he sues was ever ascertained by any of the modes provided by the foregoing requirement of the policy, or whether, if so ascertained, the date of such ascertainment was at least 30 days before the date upon which the action was begun.

We are of the opinion that these were essential matters of averment in the plaintiff's complaint, and that they are not supplied by the allegation that the sum claimed "is long since due," for that is a mere conclusion of law. It follows that the general demurrer to the complaint herein should have been sustained, and that the order overruling it was error. Irwin v. Ins. Co. of North America, 16 Cal. App. 143, 116 Pac. 294.

[3] It is further contended by the appellant that the undisputed evidence in this case shows that the action was prematurely brought. In answer to this contention the respondent insists that the appellant cannot be heard to urge this point for the first time in this court. This might be a good objection if it were borne out by the record in the case; but, as we have already seen, this point was first presented by the general demurrer, which being overruled, the defendant again presented it in the denials of his answer, and also in the notice of motion for a new trial and in the specifications of error embraced in the bill of exceptions. How insistently the point may have been urged or how fully argued in the trial court we are not advised by the record; but we think there is enough in the record to warrant the appellant in insisting upon it here.

[4] The question thus presented is this: The evidence showed that the insured presented to the insurer his proofs of loss on the 12th day of May, 1912; that no objection to the amount of loss therein claimed was made by the insurer within the 20 days allowed to it by the terms of the policy, and that therefore, by its terms, the insurer must be held to have "assented to the amount of the loss" claimed by the insured in his proofs of loss. The action was commenced on June 15, 1912. The policy provides that the loss shall be payable in 30 days after the amount thereof has been ascertained, either by agreement or appraisement. The problem here presented is as to which date the assent of the insurer to the amount of loss claimed by the insured is referable, whether to the date of presentation of proofs of loss, or to a date 20 days thereafter, during which intervening

time the insurer might have made its objection to the amount of loss claimed by the insured. If to the former date, then the loss was payable on and after the 12th of June, 1912; but if to the latter, it was not payable until July 1, 1912, in which case the action would have been prematurely brought. The court has not been furnished by either side with any authority bearing upon the construction to be given to the foregoing terms of this policy, and it assumes, therefore, that no such authority exists, and that it must rely solely upon reason to determine as to the date when the time within which this policy should be payable began to run.

The purpose of the policy in allowing the insurer 20 days after the presentation of the proofs of loss within which to signify its assent or objection to the amount claimed by the insured was doubtless that of allowing that time within which the insurer might make an investigation as to the propriety of assenting or objecting to the amount of the asserted claim of the insured; and, this being so, the insurer had the whole of the 20 days within which to manifest its assent or objection thereto; and if, as the result of such investigation and at the end of its allotted time the insurer had expressly assented to the plaintiff's asserted amount of loss, it could not be seriously disputed that, according to the terms of the policy, it would have had 30 days thereafter within which to pay the claim. Must not the same conclusion result from its implied assent? We think this logical deduction is irresistible, and hence that in the case before us the time within which the loss was to become payable began to run 20 days after the proven date of the presentation of the plaintiff's proof of loss. It follows necessarily that the present action was prematurely brought.

There are certain other points presented upon this appeal, but the two questions already disposed of, standing as they do upon the threshold of the case, render unnecessary any further discussion of alleged errors committed in the course of the trial.

The judgment and order denying a new trial are reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

24 Cal. App. 627

PEOPLE v. IDEN. (Cr. 328.)

(District Court of Appeal, Second District, California. May 29, 1914. Rehearing Denied June 26, 1914; Denied by Supreme Court, July 28, 1914.)

1. Chattel Mortgages (§ 232*)—Offenses—Information.

The information charged that accused was the mortgagor of certain dairy cows, and that, after the giving of the mortgage in July, which was duly recorded, accused, in September, while the mortgage was in full force, sold the cattle to third persons, informing neither the purchaser of the mortgage nor the mortgagee of the sale. Pen. Code, § 538, makes the sale of mortgaged property without notice to the purchaser and service of written notice on the mortgagee an offense punishable as larceny. *Held*, that the information was sufficient under section 952, requiring an indictment to be direct and certain as to the offense charged and the particular circumstances charged the mortgage being referred to in such a manner that accused could tell which one was meant.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 484–487; Dec. Dig. § 232.*]

2. Chattel Mortgages (§ 233*)—Offenses—Evidence.

In a prosecution for the unlawful disposition of mortgaged cattle, evidence of the means other than the brand mark by which the mortgagee identified the cattle *held* admissible.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494; Dec. Dig. § 233.*]

3. Criminal Law (§ 1130*)—Appeal—Presentation of Grounds of Review.

Accused's brief should point out that part of the transcript in which an assigned error may be found.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965–2970, 3205; Dec. Dig. § 1130.*]

4. Chattel Mortgages (§ 233*)—Disposition of Mortgaged Property—Evidence—Admissibility.

In a prosecution for the unlawful disposition of mortgaged cattle, the exclusion of a question to the mortgagee as to whether he had not attempted to dispose of the same cattle was not error.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494; Dec. Dig. § 233.*]

5. Chattel Mortgages (§ 230*)—Disposition of Mortgaged Property—Defenses.

It is no defense to a prosecution for the unlawful sale of mortgaged property to show that the mortgagor afterwards discharged the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489–493; Dec. Dig. § 230.*]

6. Chattel Mortgages (§ 233*)—Disposition of Mortgaged Property—Defenses.

In a prosecution for selling mortgaged cattle in violation of Pen. Code, § 538, requiring the mortgagor to give written notice to the mortgagee of his intention to sell, evidence that the mortgagee told the mortgagor to sell the cattle, and that he was his agent, was properly excluded; no question of agency being applicable.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 494; Dec. Dig. § 233.*]

7. Witnesses (§ 277*)—Cross-Examination—Rebuttal.

In a prosecution for the unlawful disposition of mortgaged cattle, where accused testified to facts in effect showing that the mortgage was not intended to be operative, and that the mortgagee was really indebted to him, the state could cross-examine accused as to matters tending to show the validity of the mortgage.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979–983; Dec. Dig. § 277.*]

8. Chattel Mortgages (§ 230*)—Disposition of Mortgaged Property—Defenses.

In a prosecution for the unlawful disposition of mortgaged cattle, it is no defense that the mortgage was intended to be used as an accommodation mortgage; for, as such use contemplated a transfer by the mortgagee to a third person, the mortgagor was not relieved of the duty of giving the notice required by Pen. Code, § 538.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 489–493; Dec. Dig. § 230.*]

9. CRIMINAL LAW (§ 829*)—APPEAL—HARMLESS ERROR.

Where the court charged that the jury was the judge of the credibility of the witnesses, and that accused was a competent witness in his own behalf, the refusal of a requested instruction that a witness is presumed to speak the truth, that the presumption extends to accused, and that the jury is the exclusive judge of the credibility of the witnesses was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. CHATTEL MORTGAGES (§ 232*)—DISPOSITION OF MORTGAGED CHATTELS—PROSECUTION—INFORMATION.

Though the information charging an unlawful sale of mortgaged chattels averred that it was made with intent to defraud the mortgagee, the jury need not find that fact, for Pen. Code, § 538, declaring the sale of mortgaged chattels without notice to the mortgagee to be larceny, does not make intent a part of the offense; and hence the averment in the information was surplusage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 484–487; Dec. Dig. § 232.*]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

W. A. Iden was convicted of the disposition of mortgaged property without notice to the purchaser or mortgagee, and he appeals. Affirmed.

J. S. Clack, of Visalia, J. C. Thomas and E. G. Soule, both of Sacramento, Edwards & Smith, of Dinuba, and E. J. Fleming and B. F. Woodard, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., Frank Lamberson, Dist. Atty., and James M. Burke, Deputy Dist. Atty., both of Visalia, for the People.

CONREY, P. J. [1] On information filed by the district attorney of Tulare county the defendant was accused of the crime of felony committed as follows: It was charged that the defendant, on or about the 26th day of September, 1912, at said county, was the mortgagor of the following described personal property, to wit: 25 head of dairy cows, 21 head of which said cows were branded "I" on the left hip, and which said personal property was then and there located on certain real property described in the information, all of which said personal property had been theretofore mortgaged by said W. A. Iden and his wife to one E. A. Stellar by a mortgage dated July 18, 1912, to secure the payment of the sum of $3,500 by the mortgagors to the mortgagee, and which said mortgage had been, on August 16, 1912, duly recorded, and was on said 26th day of September, 1912, in full force and effect; that on said last-named date the defendant at said county did willfully, etc., and with intent to defraud said Stellar, sell and transfer all of said mortgaged personal property to M. P. Costa and Lucy Seimas, "and the said W. A. Iden did not then or there, or at any other time, or at all, inform said M. P. Costa and Lucy Seimas, or either of them of the existence of said prior mortgage, and the said W. A. Iden did not then or there, or at any other time or at all, inform said E. A. Stellar, mortgagee as aforesaid, of said personal property, in writing, of said intended sale and transfer by giving the name and place of residence, or either of them, of the party to whom said sale and transfer was to be made"; and at the time of said sale the said personal property, to wit, said cows, were of the value of $47.50 per head, etc. The defendant, having been convicted after trial on this information and his plea of not guilty, appeals from the judgment and from an order denying his motion for a new trial.

The first proposition urged in behalf of defendant is that the information does not charge a public offense in that "it fails to charge the offense alleged to have been committed under section 538" of the Penal Code, and that it does not meet the requirements of section 952 of the Penal Code by directly and certainly alleging the particular circumstances of the offense charged. The demurrer to the information stated these objections, and especially set forth that "the information nowhere alleges that these were all the cows in the said mortgage, and, if not all, it nowhere alleges in said information which cows, nor does it give the description therein alleged to have been made."

The information was sufficient, and set forth the particular facts of the offense charged with all necessary certainty. The mortgage was referred to in such terms that the defendant could not be at any disadvantage in knowing whether it was the mortgage which had been made by him. If he had not made it, that fact alone would be his complete defense. If he had made the mortgage, then he would know whether 25 cows were all or less than all of the mortgaged cows. If the mortgage described more than 25 cows, then under this information he was not told which ones of the total number mortgaged he was charged with having unlawfully sold. But this was an item of evidence, and not an essential element in description of the offense charged. The case is appropriate for application of the rule stated in People v. Platt, 67 Cal. 21, 7 Pac. 1, where the court said:

> "We think the defendant is sufficiently apprised by the information of the charge which he must be prepared to meet on the trial. If innocent, there is no more danger of his being convicted than there would be if the property had been described with the greatest minuteness, although his chance of escape, if guilty, might have been much better if it had been so described."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The first and principal witness for the prosecution was the mortgagee, E. A. Stellar. The mortgage was received in evidence, and in it the cows and heifers are separately described, and are consecutively listed by numbers from 1 to 116. There appear to have been 73 cows and 43 heifers. The note and mortgage are dated July 18, 1912, and the note by its terms was to mature July 18, 1913. The affidavit to the mortgage was subscribed and sworn to by all the parties on July 19th, and was acknowledged by the mortgagors before a notary on July 19, 1912. There was also a form of acknowledgment before the notary by E. A. Stellar on August 10, 1912, and the mortgage was recorded in Tulare county on August 16, 1912.

The witness Stellar testified that on August 3, 1912, he went with the defendant to a place known as the Sherman ranch, and an adjacent 80 acres which had been leased by Stellar to the defendant, there being a road between the two places; he took the mortgage and compared the stock that were described in the mortgage with the stock that he viewed; that about 100 of the animals were in one field, and the others were on the leased land above mentioned; that he saw the cattle there, and that he and the defendant both saw them and discussed them there together. Stellar further testified that afterwards, on the 10th of August, 1913, he saw, on the ranch of Mrs. Lucy Seimas in Kings county, 28 of the cattle that were placed under that mortgage; that he identified them by the description contained in a certified copy of the mortgage which he had with him. The witness then gave the numbers as given in the mortgage, of 22 of these cattle, and gave testimony in detail concerning the marks thereon. He further stated that he did not, on the 26th day of September, 1912, or at any time, receive any notice in writing or otherwise from the defendant, or any other person, of any intended sale of any cattle named in that mortgage, or of the name and place of residence of any person to whom they were to be sold.

It was admitted by the defendant that on September, 26, 1912, he sold 30 cows to M. P. Costa and Lucy Seimas, but denied that any of them were cows that had been included in the mortgage. It was proved by the testimony of Costa that the defendant did not give to Costa or Seimas any information of the existence of a prior mortgage on the cattle sold to them. In addition to the defendant's denial that those cattle were covered by the Stellar mortgage, the defendant claims that he had a right to make sales of the mortgaged cattle without giving the notices required by the Penal Code, first, because at the time of the sale defendant did not owe Stellar anything on the mortgage, and also because Stellar gave him an oral permission to do so. The numerous specifications of error set forth in the briefs for appellant relate almost entirely to rulings by which the court limited the cross-examination of Stellar and the direct examination of the defendant by his counsel upon matters which they claimed were relevant to these lines of defense.

[2] The defendant objected to the introduction of testimony by which Stellar described the cattle that he saw on the Seimas place and identified them by other marks in addition to the "I" on the left hip. Defendant claims that the overruling of this objection was a flagrant error, but we are unable to perceive any reason why the court should have refused to receive any testimony descriptive of the property, by which the witness was enabled to say that it was the same which he had previously identified in connection with the making of the mortgage. The objection is without merit.

[3] It is contended by appellant that the court erred in refusing to permit him to introduce evidence showing that the mortgage debt had been paid, but the pages of the transcript cited in the brief contain nothing that relates to the point suggested. We are not under obligation to search through 750 pages of transcript to find something which might prove the alleged error. We do find, however, that the court did several times assure defendant's counsel that if they had any evidence showing that the mortgage was paid, or that the defendant was authorized to sell the property, they might present such evidence. The difficulty experienced by the defendant in the introduction of his testimony along this line arose out of the fact that his counsel persistently offered questions designed to show that the mortgage was paid by transactions subsequent to September 26, 1912, and that ultimately the mortgagee did not lose anything by reason of defendant's acts in diminishing the security.

[4, 5] On defendant's cross-examination of the mortgagee (the witness Stellar) the court sustained the objection made to a question in which the witness was asked to state what cattle those were which in answer to the next preceding question he had said that he was preparing to sell in August, 1913. The ruling was correct. The charge against the defendant was that on September 26, 1912, the defendant had sold a part of the mortgaged cattle without giving the information required by the statute. Even if in August, 1913, the mortgagee undertook to sell the same cows which the defendant was charged with selling wrongfully in 1912, such proceeding by the mortgagee would have no bearing upon the truth of the facts charged against the defendant, or the guilt or innocence of the defendant. And if the object was to show that ultimately the mortgagee obtained full payment of the debt, that also was immaterial. The case against the defendant was to be determined by two facts, both relating to September 26, 1912, namely, whether the mortgage debt was unpaid and whether the defendant sold some of the mortgaged cows

in the manner and under the circumstances charged in the information.

The record does not sustain appellant's claim that the court erred in refusing to hear evidence about partnership transactions between Stellar and defendant, Iden. Counsel for defendant say they would have shown that the mortgage was only an "accommodation mortgage." The court, while declining to allow "extended examination or hearing of evidence as to partnership deals," further said:

> "If you have any special transaction which shows that the mortgage was paid, or that the defendant was authorized to sell the property, you can do so."

This gave the defendant ample liberty to develop this line of defense. The defendant was allowed to testify on this subject, and stated that at the time this mortgage was made Stellar was indebted to him in the sum of $7,600; that the mortgage was made as an accommodation mortgage; that Stellar was to care for it; that the defendant never received from Stellar any money on the mortgage, except the sum of $2,000.

The court did not err in sustaining the objections made on cross-examination of Mr. Stellar to questions asking the witness whether he had not stated, in August, 1913, that, owing to certain deals which he had made with Mr. Iden, he had not lost anything on him, and would not lose anything on him. The court held that:

> "The payment of the mortgage after the offense is committed, if it was committed, does not constitute any defense to the action."

It would scarcely need authorities to support this ruling, but the rule has been affirmed under a similar statute in Alabama. Steed v. Knowles, 79 Ala. 446; Nixon v. State, 55 Ala. 120.

[6] The court was justified in striking from the record testimony of the defendant that in the first week of August, 1912, the defendant said to Stellar that defendant would have to sell some cows to care for the rest of his cattle, and that Mr. Stellar replied:

> "Sell the cows. You are my agent up here and I am your agent down there. Whatever you do is all right. I will take care of that mortgage."

The only reason given by defendant's counsel in response to the motion to strike was, "We are relying on agency." The Penal Code, § 538, defining the offense charged herein, requires that in making a sale of mortgaged chattels the mortgagor must, at or before making the sale, inform the prior mortgagee in writing by giving the name and place of residence of the party to whom the sale is to be made, and must also inform the purchaser of the existence of the prior mortgage. Defendant had a right to sell his cattle without permission of the mortgagee, by giving the information as required by law. No question of agency was applicable to the transaction.

[7, 8] On cross-examination of the defendant by the prosecuting attorney, the court did not err in admitting questions designed to meet the direct testimony of the defendant that at the time when defendant made this mortgage to Stellar there was an indebtedness then existing of $7,600, owing from Stellar to Iden. Counsel for defendant in their brief say that this statement had been stricken from the record, but the record shows the contrary. The fact thus asserted by defendant was connected with his claim that the mortgage was made for accommodation and did not represent a real debt. The prosecution was therefore entitled to inquire of defendant concerning other transactions preceding the execution of this mortgage, and apparently inconsistent with his testimony about the $7,600. Moreover, the claim of defendant that this mortgage was given "for accommodation" implies that the note and mortgage were made to be pledged or otherwise used in some business transaction, and the maker of such a mortgage is no more excused from observing the provisions of the Penal Code than is the maker of any other chattel mortgage. Further, it should be noted that during an argument to the court (the jury having been excused in order that such argument might be freely made) the defendant's attorneys were endeavoring to establish their claim of right to show transactions between Stellar and Iden subsequent to the date of the alleged crime, and their claim then was that certain of those transactions resulted in "paying off the Iden mortgage down to within something like $200 and $300." The court, while ruling out these subsequent transactions, stated to defendant's counsel:

> "If you can show that Mr. Iden ever received any money on this mortgage—that it was paid at the time it was made, or before it was made—you may show it."

The court very correctly held to the fact that this case was a prosecution by the state for a public offense, and not a settlement of accounts between Stellar and the defendant.

The instruction given to the jury on the subject of reasonable doubt is the standard instruction given and approved innumerable times. It does not contradict the instruction offered by defendant on the same subject, but substantially agrees with it, and the court's action, both with respect to the instruction given and the instruction refused, is approved.

[9] The following instruction was offered on behalf of defendant and refused by the court:

> "A witness is presumed to speak the truth. This presumption applies to the defendant when he becomes a witness in his own behalf. But this presumption applying to any witness in the case, whether he or she be the defendant or not, or whether the witness is interested or not interested in the case or the result, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by his or her motives, or by contradictory evidence, when such contradictory evidence is on

> a material issue of the case. You are instructed that your power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to rules of evidence. The jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony."

The principal part of the foregoing instruction follows the language of section 1847 of the Code of Civil Procedure, and no reason has been suggested showing why it should not have been given. We observe, however, in the instructions given by the court, that the jury was told that to the jury exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses, that the defendant was a competent witness in his own behalf, and a very full statement was made of the matters to be considered by the jury in determining the weight to be given to the testimony of a witness. In view of all these instructions given, the omission to give the requested instruction was without prejudice to any substantial right of the defendant.

[10] Finally, it is claimed on behalf of the defendant that the court erred in refusing to instruct the jury that in order to convict the defendant, they must be morally certain, not only that the defendant sold to the persons mentioned in the information, and at the time and place therein stated, one or more of the cows described therein, but that they must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant sold and delivered such cow or cows "with the intent in him to defraud the mortgagee named in said mortgage." In People v. Wolfrom, 15 Cal. App. 732, 115 Pac. 1088, the language of section 538 of the Penal Code is construed with reference to the phrase "intent to defraud," as contained therein. We agree with the opinion there expressed that that part of section 538 which refers to the selling of mortgaged property does not make the intent with which the act is done an indispensable element of the offense, and that:

> "When the intent is not made an affirmative element of the crime, the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven."

As was said in People v. O'Brien, 96 Cal. 171, 31 Pac. 45:

> "When an act, in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered."

So in the information in the case at bar, although it was therein set forth that the acts and omissions of the defendant were "with intent to defraud E. A. Stellar," this was a superfluous clause in the allegation, and the proof made of the said acts and omissions of the defendant carried with it a necessary implication of intent to defraud both the mortgagee and the purchasers of the mortgaged property.

The judgment and the order denying a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

24 Cal. App. 667

JACKS v. TAYLOR, County Treasurer.

(Civ. 1343.)

(District Court of Appeal, First District, California. June 2, 1914. Rehearing Denied July 2, 1914; Denied by Supreme Court July 31, 1914.)

1. Counties (§ 206*)—Allowance of Claim—Conclusiveness—Jurisdiction.

The allowance of a claim against a county by the board of supervisors is not conclusive on the right to enforce payment, where the board was without jurisdiction to consider the claim.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325–330; Dec. Dig. § 206.*]

2. Counties (§ 206*)—Refusal to Pay Approved Claim—Mandamus—Defense.

In mandamus to compel the county treasurer to pay a claim allowed by the board of supervisors, the board's want of jurisdiction to consider the claim may be pleaded as a defense.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325–330; Dec. Dig. § 206.*]

3. Counties (§ 200*)—Allowance of Claim—Jurisdiction of Board—Prerequisites.

Compliance with Pol. Code, § 4076, providing that no account shall be passed on by the county board of supervisors unless filed three days prior to the meeting at which it is to be allowed, is a prerequisite to the board's jurisdiction to allow claims; the purpose being to permit examination of claims that intelligent opposition may be made under section 4074, allowing any person to oppose allowance of any claim.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 315; Dec. Dig. § 200.*]

4. Mandamus (§ 165*) — Proceedings — Answer—Demurrer.

In mandamus to compel a county treasurer to pay a claim allowed by the board of supervisors, an answer stating that it appeared from the indorsements on the claim "that it was not filed with a clerk * * * or with said board for three days prior to the * * * regular session at which it was to be allowed, but that said claim was presented * * * on said 6th day of January, 1913, and was * * * approved and ordered paid * * * on said 6th day of January 1913," was not subject to a general demurrer.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 360½–364; Dec. Dig. § 165.*]

5. Counties (§ 168*) — Approved Claim — Payment—Duty of Treasurer.

Since Pol. Code, § 4041, authorizes the county board of supervisors to approve only such accounts as are "legally" chargeable against the county, the county treasurer may refuse to pay warrants known to him to have been drawn for claims not authorized by law, though such claims have been approved by the board.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 250–254; Dec. Dig. § 168.*]

6. Counties (§ 111*)—Contracts by Grand Jury—Validity—Examination of Books.

Under Civ. Code, § 1667, providing that "that is not lawful which is contrary to an express provision of the law," a contract by the grand jury employing an expert to examine the books of county officers is illegal, where it is in direct disregard of Pen. Code, § 928, providing that such expert shall be employed "at an agreed compensation not to exceed ten dollars a day, to be first approved by the court."

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 181; Dec. Dig. § 111.*]

7. Counties (§ 206*)—Approved Claim—Legality.

A claim against a county for services performed under an illegal contract with the grand jury in examining the books of county officers is illegal, though it has been allowed by the board of supervisors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 322, 323, 325–330; Dec. Dig. § 206.*]

8. Mandamus (§ 187*)—Appeal—Objection to Pleading—Presentation Below.

An objection that the answer of defendant in mandamus contained uncertainties, ambiguities, and conclusions of law could not be considered on appeal, where no special demurrer or motion to strike out was presented below.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 427–437; Dec. Dig. § 187.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Mandamus by Will Jacks against James Taylor, as County Treasurer of Monterey County. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Chas. B. Rosendale, of Salinas, for appellant. Daugherty & Lacey, of Salinas, for respondent.

LENNON, P. J. This is a proceeding in mandamus. The petitioner in the court below will hereinafter be referred to as the plaintiff, and the respondent in that court as the defendant.

The plaintiff prayed for and procured a judgment, commanding the defendant, James Taylor, as the treasurer of Monterey county, to pay to the plaintiff, as the assignee of one Anson Herrick, the sum of $3,500, which the petition for the writ alleged had been previously allowed and ordered paid by the board of supervisors of said county to said Herrick, as the assignee of Lester, Herrick & Herrick, for services rendered between August 11, 1912, and November 19, 1912, in "experting the official books and records of the various county and district officers of Monterey county." The petition further alleged that the claim in controversy was indorsed, countersigned, certified, and attested in the usual and ordinary form by the clerk, and chairman of the board of supervisors, and then presented to the county auditor, who, in turn, indorsed thereon his warrant to the defendant, as treasurer, duly signed, and attested, and then delivered the same to plaintiff's assignor; that thereafter said claim, with the warrant indorsed thereon, was for a valuable consideration assigned to plaintiff, who presented the same for payment to the defendant as treasurer, but the latter refused payment, notwithstanding the fact that there was at all times sufficient unappropriated money in the fund out of which the claim was allowed and ordered paid.

The defendant in his answer admitted all of the allegations of the petition, save and except the alleged assignment of the claim in controversy to plaintiff. Defendant, however, further answering, averred, among other things, in substance, that the claim in controversy was based upon a contract between the grand jury of Monterey county and the firm of Lester, Herrick & Herrick for the experting of the county books; that said contract was illegal and void in the particulars that it "was not first approved by the court as prescribed by section 928 of the Penal Code of the state of California, and that said contract was for a sum in excess of ten dollars per day for an expert, and that said contract was in excess of $5 per day for each assistant of said expert, as provided by section 928 of said Penal Code"; that said claim did not contain an itemized statement of the services rendered; that said claim was allowed at a regular meeting of the board commencing upon the 4th day of January, and ending on the 6th day of January, 1913; that it appeared from the indorsements on said claim "that it was not filed with the clerk of said board of supervisors or with said board of supervisors for three days prior to the commencement of said regular session at which it was to be allowed; but that said claim was presented to said board of supervisors on said 6th day of January, 1913, and was acted upon and allowed and approved and ordered paid * * * on the said 6th day of January, 1913."

The plaintiff demurred to the defendant's answer solely upon the ground that it did not state facts sufficient to constitute a defense. The lower court sustained the demurrer without leave to amend, and thereupon rendered and entered judgment for the plaintiff, from which an appeal has been taken upon the judgment roll.

[1] We are of the opinion that the demurrer was wrongfully sustained. It is not disputed that when passing upon the correctness of the claim in controversy the board of supervisors was sitting and acting as a quasi judicial body, and that therefore its conclusion that such claim should be allowed and paid was an adjudication which, when supplemented by the warrant of the auditor, would ordinarily be final and conclusive upon the defendant as treasurer. Admittedly this is the settled and general rule in this state; but the rule presupposes jurisdiction in the board to consider the claim at all. The mere presentation of the claim was not sufficient to clothe the board with jurisdictional power to consider and allow the same; nor did the order for its allowance ipso facto operate to forever foreclose consideration of the question as to whether or not the board did, in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fact, have the requisite jurisdiction. Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731.

[2] It was the duty of the defendant as county treasurer to refuse payment if, upon the face of the claim, it appeared that the board did not have jurisdiction to consider the same; and therefore such apparent lack of jurisdiction might be properly pleaded as a defense to the writ. Carroll v. Siebenthaler, 37 Cal. 193; Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682; Ventura County v. Clay, 114 Cal. 242, 46 Pac. 9; Power v. May, 114 Cal. 207, 46 Pac. 6.

Section 4041 of the Political Code declares that "boards of supervisors, * * * shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law, * * * to examine, settle and allow all accounts legally chargeable against the county." Section 4075 of the same Code provides that the board "must not hear or consider any claim in favor of any * * * person, * * * or allow any claim or bill against the county * * * unless the same be itemized, giving names, dates and particular services rendered, * * * character of work done, number of days engaged, etc. * * * If, in case of any claim which requires itemizing, the board do not hear or consider the same because it is not itemized, they shall cause notice to be given to the claimant or his attorney of that fact, and give time to have the claim itemized and reverified." The following section provides that "no account shall be passed upon by the board, unless * * * filed with the clerk three days prior to the time of the meeting * * * at which it is * * * to be allowed."

While the language of section 4075 of the Political Code, requiring an itemization of claims against the county, is at the outset apparently mandatory in making compliance with such requirement essential to the jurisdiction of the board to even consider such a claim, nevertheless the proviso in the concluding clause of the same section would indicate that compliance with the requirement is directory, and therefore not essential to the board's jurisdiction to pass upon and allow claims against the county. County of Colusa v. Welch, 122 Cal. 428, 55 Pac. 243.

If this be so, then, with reference to the allegation that the claim in controversy was not itemized, the lower court was correct in holding that the answer of the defendant did not state facts sufficient to constitute a defense.

[3] The same reasoning, however, cannot be applied to section 4076, which provides that "no account shall be passed upon by the board, unless * * * filed with the clerk three days prior to the time of the meeting of the board at which it is * * * to be allowed." This language is mandatory in character; and nothing to the contrary elsewhere appearing, must be held to mean that compliance with its terms is a prerequisite to the jurisdiction of the board to consider and allow claims against the county. "Any person may appear before the board and oppose the allowance of any claim or demand made against the county." Section 4074, Pol. Code.

Plainly the primary purpose of the statute in this particular is to permit a public and timely examination of all claims which may have been presented to the board for allowance, in order that subsequent opposition to their payment may, if necessary, be intelligently and effectively made. The provisions of the statute immediately under consideration are analogous in their essential features to a statute of the state of Nevada which required boards of supervisors, upon the filing of a protest by any citizen, to suspend for a period of ten days the consideration of a claim against the county, when, unless in the meantime court proceedings had been instituted to test its validity, the board might proceed to consider such claim. The Supreme Court of the state of Nevada, when construing this statute, said, in effect, that the filing of objections to a claim or demand against the county operated to suspend the jurisdiction of the board for at least ten days, and declared that this was so because the board of supervisors was "a tribunal with limited jurisdiction, and possessed only of quasi judicial powers, and cannot proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that provided for and pointed out by the statute. It possesses no common-law jurisdiction or powers. The statute is its guide, and a strict adherence to it is essential. All the authorities are to this effect, and there can be no safety in any other rule." State v. Gallagher, 22 Nev. 80, 35 Pac. 485.

This language may be pertinently applied to the statute before us; and a parity of reasoning, we think, compels the conclusion that the requirement relative to the time within which a claim must be filed before it can be considered by the board is a condition precedent to the jurisdiction of the board to hear and determine such claim.

[4] In the present case it was the apparent purpose of the answer of the defendant to plead as a defense to the writ that the claim in controversy showed upon its face that it had been prematurely considered, and that, as a consequence, the board was without jurisdiction to order its payment. As against a general demurrer, we think this defense was sufficiently well pleaded to require a hearing upon the merits.

[5] This brings us to a consideration of that portion of the defendant's answer which purports to plead, in effect, that the board was without jurisdiction in the premises because the claim in controversy was founded upon a contract which was, in effect, illegal. "The board shall have jurisdiction * * *

to examine, settle and allow accounts legally chargeable against the county" (section 4041, Pol. Code); and the defendant, as county treasurer, is by law required to pay only such warrants as are founded upon orders of the board of supervisors for the payment of claims legally chargeable against the county. He may and should refuse to pay warrants known by him to have been drawn for claims not authorized by law (Perry v. Ames, 26 Cal. 372; Kelly v. Seranous, 114 Cal. xvi, 46 Pac. 299; Linden v. Case, 46 Cal. 171; Von Schmidt v. Widber, supra; L. A. County v. Lankershim, 100 Cal. 525, 35 Pac. 153, 556).

[6] Section 928 of the Penal Code makes it the duty of the grand jury annually to make a complete examination of the books, records and accounts of all county officers, "and if, in their judgment, the services of an expert are necessary, they shall have power to employ one, at an agreed compensation, not to exceed ten dollars a day, to be first approved by the court; and if, in their judgment, the services of assistants to such expert are required, they shall have power to employ such, at a compensation to be agreed upon and approved by the court, not to exceed, however, five dollars a day for each assistant." It will thus be seen that the power of a grand jury to make a contract for the services of an expert and such assistants as may be necessary, is not only limited in price to a designated per diem, but that the approval of the court is expressly made a condition precedent to the execution of such contract.

"That is not lawful which is contrary to an express provision of the law" (Civ. Code, § 1667); and the general principle is well established that a contract is illegal which is made in direct disregard of the provisions of a statute which provides for and regulates the making of such contract. (1 Dillon's Municipal Corp., § 457 [3d Ed.]; Wiegel v. Pulaski County, 61 Ark. 74, 32 S. W. 116; King v. Mahaska County, 75 Iowa, 329, 39 N. W. 636; Jefferson County v. Arrighi, 54 Miss. 668; Maupin v. Franklin County, 67 Mo. 327; Tullock v. Webster County, 46 Neb. 211, 64 N. W. 705; Brady v. New York, 20 N. Y. 312; Tomlinson v. Hopkins County, 57 Tex. 572; Murphy v. Napa County, 20 Cal. 497).

Applying this general principle to the contract upon which the claim in controversy is alleged to have been founded, there is no escape from the conclusion, it seems to us, that such contract was illegal.

[7] Being so, it follows as a necessary consequence that the claim based thereon was also illegal (Perry v. Ames, 26 Cal. 372), and that therefore the board of supervisors had no jurisdiction to allow it (Keller v. Hyde, 20 Cal. 593). The mere fact that the claim was allowed by the board did not invest it with a validity which it did not theretofore possess. Phelan v. San Francisco, 6 Cal. 531; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880; Santa Cruz, etc., v. Broderick, 113 Cal. 628, 45 Pac. 863; Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Wiegel v. Pulaski County, supra. The original illegality of the claim in controversy constituted a good defense to the writ (Keller v. Hyde, supra; Power v. May, 114 Cal. 207, 46 Pac. 6); and if such claim was upon its face and in fact illegal, "then indubitably the treasurer was authorized to refuse payment and to show this in his answer." (Power v. May, supra).

[8] In the absence of a special demurrer and a motion to strike out, the plaintiff will not be heard to complain of the uncertainties, ambiguities, and conclusions of law which run throughout the answer of the defendant. Despite these manifest defects in pleading, we are satisfied that, upon the whole, the answer of the defendant, as against a general demurrer, states facts sufficient to constitute a defense to the writ. Power v. May, supra.

The judgment appealed from is reversed, with instructions to the lower court to overrule the demurrer.

We concur: RICHARDS, J.; KERRIGAN, J.

24 Cal. App. 646

PEOPLE v. WILLIAMS. (Cr. 243.)

(District Court of Appeal, Third District, California. May 29, 1914.)

1. CRIMINAL LAW (§ 759*)—TRIAL—INSTRUCTIONS.

In a prosecution for rape, the refusal of an instruction that certain facts raised a presumption that no rape was committed, was proper; for, under Code Civ. Proc. § 2061, subd. 2, a presumption is evidence, and Const. art. 6, § 19, forbids the court to charge the jury with respect to matters of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1738, 1790–1793; Dec. Dig. § 759.*]

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—REFUSAL.

The refusal of an instruction that the jury, in considering the weight of the testimony of the prosecutrix, in a rape case, should consider the circumstances is not error, where the court charged that the prosecutrix's testimony should be carefully scanned, and that, while corroboration was not necessary, the jury must find, beyond a reasonable doubt, that accused had sexual connection with the prosecutrix; this being particularly true as the surrounding circumstances tended to support prosecutrix's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. RAPE (§ 2*)—STATUTORY RAPE—STATUTES—REPEAL.

At the time of a statutory rape on a girl below the age of 16, Pen. Code, § 261, made it rape to have sexual intercourse with a female under the age of 16 years not the wife of the perpetrator, but before trial the age of consent was raised to 18 by St. 1913, p. 212, and by St. 1913, p. 213, section 264, Pen. Code, prescribing the punishment, was materially changed. *Held* that, as Pol. Code, § 329, provides that the repeal of any law creating a criminal offense shall not be a bar to the punishment of an act already committed, unless such intention is expressed in the repealing act, accused might be convicted under the prior statute, though it was repealed by the act of 1913.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. Criminal Law (§ 683*) — Trial — Rebuttal.

Whether questions are properly asked on rebuttal is largely a matter of discretion with the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615–1617; Dec. Dig. § 683.*]

5. Criminal Law (§ 931*)—Trial—Waiver.

Where accused's attorney knew of the intoxication of a juror, but did not ask the court to discharge the jury on that ground, and took a chance on a favorable verdict, he cannot thereafter attack the verdict on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2136; Dec. Dig. § 931.*]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

John Williams was convicted of rape upon a girl under the age of 16 years, and he appeals from the judgment and from an order denying new trial. Affirmed.

B. K. Collier, of Yreka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of rape upon a girl under the age of 16 years, and was sentenced to imprisonment for the term of 5 years. He appeals from the judgment and from the order denying his motion for a new trial.

It is not contended that the evidence is insufficient to support the verdict. Briefly, the evidence was that defendant, with numerous other persons, including the prosecuting witness and her mother, attended a ball on New Year's eve, 1913; that the party broke up about 3 o'clock January 1st, and defendant walked part of the way from the place where the ball was conducted with the prosecuting witness and her mother towards her home; that the mother left the daughter and defendant at the gate of a neighbor's premises and went on to her residence; that defendant and the prosecuting witness were at this neighbor's house alone some little time, during which they sat on the porch of the premises where the alleged crime was committed. A family was living in this house, but whether any of its members were awake at that early hour of the morning does not appear.

[1] 1. The following instruction offered by defendant was refused, and the ruling is alleged as error, especially, as is claimed, in view of the testimony of the prosecuting witness that defendant used some physical force in accomplishing his object. She testified also that he overcame her by having first aroused her passions, which deprived her of the power of resistance. She also testified that she made no outcry, and did not until some time later inform her mother of the assault. The instruction is as follows:

"If the jury believe from the evidence that at the time of the alleged rape other people were at the same time in the same house, who might easily have heard her had she made any outcry, and that she, in fact, made no outcry at the time the defendant was attempting to have connection with her, these facts will tend to raise a presumption that no rape was committed upon her at the time."

Defendant cites People v. Howard, 143 Cal. 316, 76 Pac. 1116, where it is claimed a somewhat similar instruction was refused. The decision was in bank. The instruction was not commented upon in the main opinion but, in a concurring opinion by the Chief Justice, speaking of one part, he said: The "instruction contains a proposition that might very properly have been given to the jury if it had been clearly stated by itself." That is, the failure to made outcry might be considered "with all the other evidence in determining the credibility of such witness and whether a rape was, in fact, committed or not." The instruction refused in the present case was addressed to the fact that she made no outcry when there were persons in the house "who might easily have heard her had she made an outcry," which, it is claimed, would "tend to raise a presumption that no rape was committed upon her at the time." The difference between the two instructions is obvious. A presumption is evidence, and may outweigh the positive evidence of witnesses against it. Code Civ. Proc. § 2061, subd. 2; People v. Milner, 122 Cal. 171, 179, 54 Pac. 833; Estes v. Ballard, 22 Cal. App. 344, 349, 134 Pac. 361. To say that certain facts raise a presumption that no rape was committed is equivalent to saying that the facts constitute evidence that no rape was committed. But the court is forbidden to charge the jury "with respect to matters of fact." Const. art. 6, § 19.

The law is well settled that it is immaterial whether the prosecuting witness consented or was forced to submit. Her failure to make any outcry furnished no presumption that a rape was not committed.

[2] 2. The following instruction asked by defendant was refused:

"In this case the prosecution relies for a conviction upon the testimony of Belle Dollarhide, the prosecuting witness, and no other witnesses were called by the prosecution to testify directly to the time and place or circumstances of the alleged offense; and you are instructed, in cases where the prosecution relies upon the uncorroborated testimony of the prosecutrix, unsustained by other evidence, or by facts and circumstances corroborating it, that you should view such testimony with great caution. You are further instructed that in considering her testimony you may take into consideration the facts and circumstances surrounding the place where the alleged offense is charged to have been committed. All the facts and circumstances at the time and immediately after the alleged offense was committed, in determining the weight of her testimony, and the reasonableness thereof, as tending to show to your minds the credit to be given to the same."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The court gave an instruction as follows:

> "It is not essential to a conviction in this case that the prosecutrix, Isabelle Dollarhide, should be corroborated by the testimony of other witnesses as to the particular acts constituting the offense. It is sufficient if you believe from her evidence and all the other testimony and circumstances in proof in the case beyond a reasonable doubt that the crime charged has been committed. While it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; by the law of this state, a female child under the age of 16 years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child by one not her husband will constitute the crime of rape, whether with or without the consent of such child, and in this case, if you believe from the evidence beyond a reasonable doubt that the defendant had sexual connection with the prosecuting witness on or about the 1st day of January, 1913, as alleged in the information, and that at the time she was under the age of 16 years, and not the wife of the defendant, then the defendant is guilty of rape, and the jury should so find."

By this latter instruction the defendant had the benefit substantially of all he asked in the refused instruction. The circumstances immediately after the alleged offense tended, we think, to corroborate the testimony of the prosecuting witness, rather than to discredit it. It appeared, by the testimony of defendant, as well as by others of the parties present, that the prosecuting witness and defendant and a young man and another girl went into the unoccupied front room of the house referred to, after the alleged intercourse had taken place, and the prosecuting witness spent most of the time until daylight in defendant's lap, hugging and kissing each other, and the other girl and her companion were similarly engaged.

3. Instruction numbered 5, asked by defendant, was fully covered elsewhere in the instructions.

[3] 4. At the time of the commission of the crime sections 261 and 264 of the Penal Code, as they read in 1912, were in force. By section 261 rape was there defined as:

> "An act of sexual intercourse, accomplished with a female, not the wife of the perpetrator, under the following circumstances: 1. When the female is under the age of sixteen years."

Then follow five other subdivisions covering other circumstances. By an amendment in 1913 (Stats. 1913, p. 212) section 261 reads: "1. Where the female is under the age of eighteen years." In all other respects the section is unchanged. Section 264, prescribing the punishment for rape, was materially changed. St. 1913, p. 213. It is now contended that the statute of 1912 was repealed by the act of 1913 and there was therefore no law under which defendant could be tried or convicted.

Section 329 of the Political Code is as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

There is no such express intention shown in the repealing act of 1913. The sentence imposed was authorized by the earlier act. People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; 12 Cyc. Crim. Law, p. 770; monographic note, 94 Am. Dec. 217, 219.

[4] 5. Misconduct of the district attorney is complained of on the ground that he asked a question of a witness called by the people in rebuttal which properly should have been asked as part of the people's case in the examination of the witness in chief. It appears from the record that a further objection was made on the ground that it called for a confidential communication and the court sustained the objection apparently on this latter ground. Whether the question involved might properly be put to a witness in rebuttal was largely a matter of discretion with the court. We cannot see that defendant was prejudiced by the mere asking of the question which was not answered.

[5] 6. It is urged that a new trial should be ordered because two of the jurymen were in an advanced state of intoxication both during the trial of the case and during the recess of the court. On the motion for a new trial affidavits were read in its support. These affidavits related to Juryman Rantz and Juryman Mugler. As to the evidence concerning the conduct of Juryman Rantz, the affidavits were concededly in substantial conflict, which removes the matter from consideration on appeal.

Hazel Vaughan deposed that she was present at the trial and "carefully watched said jurors who were impaneled to try said case; that Albert Mugler, one of said jurors, was drunk and in an intoxicated condition on the 10th, 11th, and 12th, both on the streets of Yreka, Cal., and on the 12th in the courthouse at Yreka, while he was on the jury in said case, and was utterly unfit to serve as such juror." C. W. Kaler attended the trial on the 10th, 11th, 12th, and 13th of November, 1913; he deposed "that he had special chance to observe the conduct of said jurors; that Albert Mugler, who was a juror in said case, was drunk while on the jury; and that, in the opinion of affiant, said Mugler was not in a condition to serve as such juror, and was incapacitated by reason of his intoxicated condition." Callie Jones deposed that she was present at the trial during the four days mentioned; "that she knows Juror Albert Mugler; that said Juror Albert Mugler was drunk on each and every day that he sat at said courthouse as a juror; that he was drunk when said court opened on Monday morning; that he was drunk on that day while on the jury; that he was drunk on Tuesday all day; that he was very drunk on Wednesday; that he was utterly unfit to serve as a juror, owing to said intoxication; that the court did fine the said juror for being drunk; that said case was continued for 12 hours owing to his intoxicated condition." John C. Naves deposed that during an intermission of said trial (the day not stated) Juryman Wilkins "spoke to this affiant on the streets of Yreka and said as follows: 'John (meaning affiant), where is Collier (defendant's attorney)? For God's sake put him on to this man Mugler. He has been drinking all day, and if he keeps in that condition, I, for one, will refuse to sit on the jury with him. We never will be able to agree on a verdict with a man like that.' This affiant further states that he knows Juror Albert Mugler, and that on Tuesday evening after court had adjourned, said Albert Mugler was very drunk and utterly incapable of attending to any business," and that during the day of Wednesday "the said Juror Albert Mugler was again so intoxicated that he was unable to serve as a juror in said cause." Juror Wilkins made affidavit that in the jury room when the jury were deliberating upon their verdict Mugler was in a condition to and did fully, fairly, and intelligently consider the evidence and discuss the same. Several other jurymen made like affidavit. But Wilkins did not deny making the statement to affiant Naves; neither did he nor any other juryman depose that Mugler was in a sober condition at other times during the trial. Mugler may have been duly sober when the jury retired to consider their verdict, but it by no means follows that while evidence was being submitted to the jury he was in a condition to receive correct impressions as to the weight and significance of such evidence. Defendant was entitled to have the judgment of each juror uninfluenced by the stimulating and disturbed condition of mind which drunkenness produces. If one juror was by his drunkenness while acting as a juror incapacitated fairly and intelligently to hear and pass upon the evidence, it would be a reproach to the law should a verdict of guilty in which his vote was necessary be allowed to stand. It appears from the record of the trial that on Wednesday afternoon at 2 o'clock, when the trial was resumed, Mugler was in such an intoxicated condition as to compel the court to adjourn the further hearing, and the juror was fined $20 for contempt of court. Deponent Hugo V. Miller deposed that "during the trial of said cause he saw the said Albert Mugler many times and particularly before the verdict in said cause, and knows that the said Albert Mugler was drunk and utterly incapable of serving as a juror in said case; that prior to the verdict in said cause the said Mugler expressed his opinion freely and openly about said case, and about the testimony in said case, and stated freely and openly how he would vote, and that he had made up his mind and nothing could change him; that affiant frequently requested said Mugler not to discuss said case, and when he refused to desist and continued to express his opinion publicly about said case and about the merits thereof, this affiant notified the attorney for the defendant, and, with the assistance of John C. Naves, from the office of the attorney for the defendant, they tried to get said juror to bed, but he still continued to talk and express his opinion about said case, and to say how he would vote thereon and that nothing could change him." Deponents Linton and Hutchens deposed to Mugler's drunken condition on Wednesday, the 12th of November, and that in that condition he "publicly expressed his opinion as to what he would do in the case."

Juror Starr deposed that, on Thursday morning, the day after he was fined for contempt, Mugler "came into court in a sober condition, remained in that state and went into the jury room duly sober, and was in a condition to discuss, and did discuss, the evidence in the case intelligently." Deponent did not speak of Mugler's condition during the other days of the trial, and there was no evidence submitted on Thursday. Juror Mugler deposed that, "on Wednesday, November 12th, affiant became intoxicated and on convening the court on the afternoon of that day (there was no session in the forenoon) the court, at the request of both the district attorney and counsel for defendant, granted a continuance of the case until Thursday morning at 10 a. m., and at that time affiant was duly sober; that the case was given to the jury on the afternoon of Thursday, November 13, 1913, and at that time, and all times while hearing the evidence, affiant fully and intelligently considered the evidence; * * * that he never to his knowledge ever formed or expressed an opinion as to the guilt or innocence of the defendant until he had retired to the jury room to deliberate on the verdict, and in this regard affiant admits that on one or two occasions during the times herein mentioned he was quite intoxicated outside the courtroom and during the adjournment of court and at the convening of court on Wednesday afternoon, November 12th, but that he never was in a condition of intoxication while evidence was being taken or rulings of the court being made or arguments of counsel were had not to fully and intelligently hear and consider all that was going on in said trial." District Attorney Hooper deposed to the intoxication of Mugler on the 12th and the contempt proceedings and that on the following morning Mugler came into court "apparently sober."

It appeared that deponent Hazel Vaughan is defendant's sister, and deponent Callie Jones is his mother, and that deponent Naves was a clerk in the office of defendant's attorney, Mr. Collier. It also appeared that defendant's attorney was told of the facts stated in the depositions of Miller and Linton that Mugler had, while in an intoxicated condition, declared that his mind was made up, and nothing could change it.

In the case of People v. Romero, 12 Cal. App. 466, 470, 107 Pac. 709, 711, the alleged intoxication of the juryman occurred during recess of the court and, as was stated in the opinion:

> "Several jurymen deposed that at no time during the proceedings while evidence was being taken or when the jury retired to consider their verdict was Hayes intoxicated, but, on the contrary, he was 'sober during the trial, and in all ways perfectly able to consider the evidence introduced at the trial of said cause and to intelligently exercise his judgment thereon.'"

It was further said in the opinion:

> "The fact that a juror drank intoxicating liquor during recess of the court will not vitiate the verdict if it appears from the affidavits of his fellow jurymen, as here, 'that the juror, while sitting or deliberating as a juror, was sober intelligent and in a fit condition to understand and deliberate upon the evidence and determine the verdict'"—citing People v. Deegan, 88 Cal. 602, 26 Pac. 500.

In People v. Boyd, 16 Cal. App. 130, 135, 116 Pac. 323, the question of excessive indulgence in liquors by jurymen during recess of the court was under consideration, but there was a substantial conflict of evidence on the subject which, under the rule, removed the question from consideration here. Besides, there was no evidence showing that the juror complained of was not sober while he was actually engaged in performing his duties as a juror.

In the present case there is some evidence that Juryman Mugler was intoxicated while in the jury box, during the progress of the trial, to an extent which incapacitated him from intelligently considering the evidence. There is no conflict in the affidavits, unless it can be said that Mugler's affidavit creates it. Two of the affiants, who deposed to his condition while evidence was being taken, were closely related to defendant—one his mother and one his sister—to which fact the court must have attached sufficient importance to justify it in disregarding their opinion. The only other affiant deposing to Mugler's condition while evidence was being taken was affiant Kaler. His statement was that Mugler was drunk every day of the trial, and particularly on the first three days, and while "he was on the jury," but he does not state that he was in that condition while evidence was being taken. On the fourth day the affidavits show clearly that Mugler was duly sober. The court doubtless concluded that, as between the sweeping statement made by Kaler and the specific statement made by the juror, the latter was the more dependable. To say that there was no substantial conflict we must hold that the court was not justified in accepting Mulger's statement as true. We cannot see our way clear to do this. Besides, we are influenced in some degree in our conclusion by the fact that defendant's counsel knew of the condition of Mugler during the recess of court, and that he had made statements while intoxicated as to how he would vote when considering the verdict. Where misconduct of a juror is known to the complaining party and is of such a character as to disqualify the juror, it is the duty of the party complaining promptly to call the attention of the court to such misconduct. In Ipswitch v. Fernandez, 84 Cal. 639, 641, 24 Pac. 298, the court said:

> "If, then, the intoxication, which plaintiff avers to have commenced at the beginning of the trial, and continued to its close, was apparent to him, he could not keep quiet on the subject, take the chances of a favorable verdict, and then avail himself of it for the first time after defeat."

See 1 Hayne on New Trial, § 27; Monaghan v. Rolling Mill Co., 81 Cal. 190, 194, 22 Pac. 590; Doolin v. Omnibus Cable Co., 140 Cal. 369, 375, 73 Pac. 1060. But for this feature of the matter we should be disposed to hold that defendant did not have such a trial as the Constitution entitled him to. Had the conduct of Mugler been called to the attention of the court and satisfactory proof made of it, and a demand made that he be discharged, it would have been the duty of the court, in the interest of justice and of orderly procedure, to grant the demand. As defendant seems to have knowingly taken the chance with this juror, he must be deemed to have waived the objection now urged, and should not be heard to complain of the verdict.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(24 Cal. App. 687)

YELLOW JACKET GOLD & SILVER MINING CO. v. HOLBROOK. (Civ. 1218.)

(District Court of Appeal, Third District, California. June 3, 1914.)

1. CONTRACTS (§ 218*) — CONSTRUCTION — AGREEMENT TO PAY MONEY.

Where a written order by H. on L. to pay a certain sum of money to Y. was accepted by L., provided any money should be received by him for H.'s account, H.'s subsequent written agreement to pay the money on a certain date, "in case said sum shall not have been paid at said time by said L. in accordance with the terms of the foregoing order," was not conditional on L. having, at such date, collected any money for H.'s account.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1011–1014; Dec. Dig. § 218.*]

2. BILLS AND NOTES (§ 44*)—PROMISSORY NOTE—WHAT CONSTITUTES.

A written promise, reciting a consideration, to pay to the order of a certain person a specified sum of money, was a promissory note as defined by Civ. Code, § 3244, though the promise to pay was conditioned on payment not being made by another.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 52; Dec. Dig. § 44.*]

3. BILLS AND NOTES (§ 459*)—ACTION ON NOTE—NECESSARY PARTIES.

In an action on a note binding H., the sole maker, to pay a specified sum on a certain date "in case said sum shall not have been paid at said time by said L. in accordance with the terms of the foregoing order," the order referred to having been accepted by L., provided any money should be received by him to the maker's account, L. was not a necessary party.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1424–1433; Dec. Dig. § 459.*]

4. Bills and Notes (§ 120*)—Construction—Parties—Accepted Order—Joint and Several Liability.

The liability of the drawer and drawee on an accepted order was a joint and several liability, and under Code Civ. Proc. § 383, either or both could be sued thereon; and hence, in an action against the drawer, the liability of the drawee was immaterial.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.*]

5. Bills and Notes (§ 467*)—Complaint—Allegation of Ownership—Necessity.

The complaint, in an action on a note, need not allege plaintiff's ownership of the instrument sued on.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1480–1488, 1490, 1491; Dec. Dig. § 467.*]

6. Bills and Notes (§ 493*)—Consideration—Burden of Proof.

In an action on a note, the burden was on defendant to establish want of consideration as a defense.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652–1662; Dec. Dig. § 493.*]

Appeal from Superior Court, City and County of San Francisco; John E. Richards, Judge.

Action by the Yellow Jacket Gold & Silver Mining Company against C. H. Holbrook, Jr. From judgment for plaintiff, defendant appeals. Affirmed.

A. A. Sanderson, of San Francisco, for appellant. Charles H. Sooy and David Levy, both of San Francisco, for respondent.

CHIPMAN, P. J. The action was to recover upon the following instrument, designated in the complaint as "a contract and promissory note":

"San Francisco, California, March 23, 1911.

"Mr. F. R. Lewis, San Francisco, California—Dear Sir: Please pay to the Yellow Jacket Gold & Silver Mining Company, or order, the sum of $1,227.86, with interest at seven per cent. per annum from April 1, 1908, out of the first money you shall receive on my account from the estate of F. W. Sisson, deceased.

"C. H. Holbrook, Jr.

"The foregoing order is herewith accepted this 30th day of March, 1911, provided any money is ever received by me for account of C. H. Holbrook, Jr., from estate of F. W. Sisson, deceased. **F. R. Lewis.**

"In consideration of forbearance on the part of the Yellow Jacket Gold & Silver Mining Company, and for other valuable consideration, the receipt whereof is hereby acknowledged, I agree to pay to said company, or order, the sum of $1,227.86 (with interest thereon from April 1, 1908, at seven per cent. per annum), on April 1, 1912, in case said sum shall not have been paid at said time by said F. R. Lewis, in accordance with the terms of the foregoing order. C. H. Holbrook, Jr."

It is alleged that, on April 1, 1912, and frequently since said date, plaintiff demanded of F. R. Lewis, one of the parties to said contract, that he pay to plaintiff the sum of $1,227.86, with interest at 7 per centum per annum from April 1, 1908, to date of demand, but that the said Lewis has refused and does now refuse to pay the same; that prior to the commencement of the action and on May 6, 1912, "and at several other times," plaintiff demanded of defendant, Holbrook, that he pay to plaintiff said sum, with interest according to said contract and promissory note, but that the said Holbrook "has not paid said sum or any portion thereof, except the sum of $343.76 on account of interest to April 1, 1912"; that "ever since said 23d day of March, 1911, plaintiff has been and now is the owner and holder of said promissory note and contract"; "that no part of said note, or the amount due under the terms of said contract * * * has been paid, except said sum of $———, interest, but that the whole amount specified in said note and contract, together with interest thereon from April 1, 1912, to date is now due, owing and unpaid."

Defendant demurred to the complaint on general grounds and specially on the grounds: (1) That it does not appear from the complaint that said Lewis has received from said Sisson estate any money; (2) that it does not appear that any demand of payment was made upon said Lewis after April 1, 1912, and prior to the commencement of the action; (3) that there is a misjoinder of parties defendant, and that said Lewis should be made a party defendant; (4) that the complaint is ambiguous in that it does not appear therefrom "what was the 'forbearance' on the part of said plaintiff toward said defendant, Holbrook, as a consideration received by said defendant, Holbrook, for the making of the promise to pay said plaintiff the money named in the complaint." The demurrer was overruled, and defendant answered, denying that he executed and delivered to plaintiff "his certain promissory note or any promissory note," but does not deny executing the instrument set out in the complaint; that defendant has no information whether or not plaintiff demanded payment of said Lewis as alleged, and therefore denies that said or any demand was made on him as alleged; that having no information whether or not plaintiff is the owner and holder of said instrument, he denies the alleged ownership, further answering, alleges that the said contract "is without any consideration," and denies that there is any sum due plaintiff thereunder.

The cause was tried without a jury, and the court made findings as follows: That defendant executed the promissory note and contract alleged in the complaint; that plaintiff made demand of payment on said Lewis, and his refusal to pay, as alleged in the complaint; that, since March 23, 1911, plaintiff has been the owner of said instrument, and that the whole amount specified therein, together with interest from April 21, 1912, is due and unpaid; that it is not true that said contract was without consideration. Conclusions of law followed, that there is due plaintiff from defendant the amount claimed and interest from April 1, 1912, and that plaintiff is entitled to judgment therefor. At the trial it was admitted by defendant that the demand was made on said Lewis as set forth in the complaint, also due execution and delivery of the instrument by defendant Holbrook, therein set forth.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "Mr. Sanderson (attorney for defendant): I have no testimony to advance in the case. It is merely a legal defense, as shown by the demurrer."

The day following the submission of the case the court rendered the following decision:

> "In the case of the Yellow Jacket Gold & Silver Mining Company v. C. H. Holbrook, Jr., submitted to the court yesterday, the court has examined the only question which was raised by the defendant in the action by demurrer, and is satisfied that the complaint sets forth a cause of action. As to the facts in the case, they were substantially agreed to by stipulation of the parties. It results that judgment must be rendered for the plaintiff for the amount prayed for in the complaint. Let findings and judgment be prepared and entered."

Defendant appeals from the judgment.

Appellant presents the following in support of his demurrer: That Lewis was a necessary party, and that there is no allegation that Lewis has received any money from the Sisson estate. The argument seems to be that Lewis is equally bound with Holbrook, and, in order to end all litigation in the matter, he should have been joined as a defendant; that:

> "There being no allegation that Lewis had not collected the money from the Sisson estate, the presumption prevails that he has collected it and was therefore equally liable under the contract with defendant, Holbrook."

Counsel further states:

> "It is true that the defendant, Holbrook, agreed to pay the money sued for on April 1, 1912, in case Lewis had not paid the same by that time, but that in no wise canceled or lessened the obligation of Lewis to pay same to plaintiff if any money was received by Lewis prior thereto for the account of Holbrook from the Sisson estate, and there is no allegation that such money was not received by Lewis."

[1, 2] We agree with counsel that defendant promised to pay the money sued for on April 1, 1912, in case Lewis had not paid it, but we think this promise was in no wise conditional upon Lewis having at that time collected the or any money from the Sisson estate. Holbrook entered into two obligations, first by giving an order on Lewis for any money the latter might receive on Holbrook's account from the Sisson estate, which order was accepted by Lewis, and Holbrook then executed what is a promise negotiable in form to pay to the order of plaintiff a specified sum of money. This meets the definition of a promissory note. Civ. Code, § 3244. The character of the instrument signed by Holbrook as a note was not affected by the provisions of the agreement. Joergenson v. Joergenson, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888.

[3, 4] Lewis did not sign the promissory note, and was not bound by it, and was therefore not a necessary party to its enforcement in the action. His liability was on the order, and if as is true Holbrook would have been liable on the order had any money been received by Lewis from the Sisson estate, still it was a joint and several liability, and either or both could have been sued on the obligation. Code Civ. Proc. § 383. In this view it was immaterial whether or not Lewis had received any money from the Sisson estate. Besides, we do not think there was, as claimed, any presumption that he had received any of said money, and if such presumption could be indulged, it would only follow, as counsel says, that Lewis "was equally liable under the contract with defendant Holbrook," and plaintiff would still have his action against one or both. The demurrer was properly overruled.

[5, 6] It is further contended that the findings are not supported by the evidence. It may be suggested as hardly fair to raise this question, in view of the position of counsel as taken at the trial, which was that he presented "merely a legal defense, as shown by the demurrer." However, we will examine the objections now made: First. That there is no support of the finding that plaintiff is the owner and holder of the obligation. It was denied in the answer for lack of information. It was held, in Bank of Shasta v. Boyd, 99 Cal. 604, 606, 34 Pac. 337, that where the obligation is made to the plaintiff, an allegation that the plaintiff is the owner is unnecessary and surplusage. Locke v. Klunker, 123 Cal. 231, 238, 55 Pac. 993. Second. The answer alleged want of consideration. This was made an affirmative defense, and it was incumbent on defendant to prove it. He offered no evidence whatever at the trial. The court, therefore, properly found the issue for plaintiff. "If there was no consideration the defendant should have filed an answer setting up a want of it as a defense to the action," and when alleged should have proved it. Winters v. Rush, 34 Cal. 136; Pastene v. Pardini, 135 Cal. 431, 434, 67 Pac. 681. "A written instrument is presumptive evidence of a consideration." Civ. Code, § 1614; Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 Pac. 1089.

We discover no error in the record and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

24 Cal. App. 713

CARR et al. v. KING et al. (Civ. 1240.)

(District Court of Appeal, Third District, California. June 5, 1914. Rehearing Denied by Supreme Court Aug. 4, 1914.)

1. Evidence (§ 461*) — Parol Evidence — Lease.

Extrinsic evidence was inadmissible to show that the intention of the parties to a lease was different from that fairly expressed therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

2. Landlord and Tenant (§ 44*) — Lease — Restriction—Covenant—Construction.

Where the owner of a large tract of land leased a portion thereof to be used by the lessees for conducting a hotel business and summer resort thereon, the subsequent sale of another portion of the tract to a person who used it for hotel and summer resort purposes was not a breach of a covenant of the lease providing that the lessors would "not demise or let any other part of their said premises to be used for like purposes as those herein let * * * and that they will not grant similar rights and privileges upon their said premises to any other persons as those granted * * * herein," though the lessors knew at the time of the sale what use the vendees would make of the property.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108–110, 732; Dec. Dig. § 44.*]

3. Landlord and Tenant (§ 37*)—Lease—Construction.

Where both parties to a lease voluntarily make their own terms and use their own words and phrases, they are bound by the ordinary meaning of the language used.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

4. Landlord and Tenant (§ 37*) — Lease — "Demise."

The word "demise," used as a noun, means a lease for a term of years; a conveyance in fee, for life or years; the conveyance of an estate, either in fee, or for life, or for years, most commonly the latter. As a verb, it means to lease for a term of years. In its primitive meaning, it was always used in reference to a lease, and, while it has been held that, where the context clearly justified such construction, it meant a conveyance or transfer, this is not its usual signification. Whether the term is to be given its technical or more liberal construction must be determined from an interpretation of the particular lease. [Citing Words and Phrases, vol. 2, p. 1978.]

[Ed. Note.—For other cases, see Landlord and Tenant, § 98; Dec. Dig. § 37.*]

5. Landlord and Tenant (§ 44*) — Lease — Covenants—Construction—Alienation of Realty.

Since contracts in restraint of alienation of realty are not favored by law, no presumption will be indulged in favor of a party seeking to enforce a restrictive covenant of a lease as a restraint on the alienation of realty.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108–110, 732; Dec. Dig. § 44.*]

6. Reformation of Instruments (§ 36*) — Lease—Complaint—Sufficiency.

A complaint in an action for damages for breach of a restrictive covenant of a lease failed to state a case justifying revision of the lease under Civ. Code, § 3399, authorizing revision of contracts in certain cases, where it alleged merely that the words employed in the covenant were by "mutual consent" distinctly "understood" and agreed to mean that defendants should not let or demise any part of their premises to another for carrying on the same business as plaintiffs were carrying on, and that by said contract defendants "covenanted and agreed that they would not * * * grant or convey" to any other the right to maintain such business on any part of the premises, and did not allege that through mistake or fraud the real intention of the parties was not expressed in the lease.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141–146; Dec. Dig. § 36.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by C. F. Carr and another against Thomas King and another. From judgment for defendants, plaintiffs appeal. Affirmed.

J. A. Barham and Phil Ware, both of Santa Rosa, and J. H. S. Bartholomew, of Guerneville, for appellants. Thomas J. Geary, of Santa Rosa, for respondents.

HART, J. The object of this action is to recover, as damages, the sum of $35,000 for two alleged breaches by the defendants of a certain covenant of a written lease executed by the latter and the plaintiff M. A. Carr.

The facts are: That, on the 17th day of May, 1901, the defendants, by writing, leased to the plaintiff M. A. Carr (wife of the plaintiff C. F. Carr) about 2 acres of a tract of land embracing about 1,000 acres, situate on Russian river, in Sonoma county, for the term of one year from the 1st day of January, 1902, at the yearly rental of $350, with an option in the lessee, upon the expiration of the term of the lease as above stated, to renew said lease from year to year thereafter for the period of nine years, at the same rental and upon the same conditions as are specified in said written lease.

The property so leased was to be used by the plaintiffs, and has been so used by them during all the time since the making of said lease, for the purpose of conducting the hotel business and a summer resort thereon. By the lease the plaintiffs were granted the privilege of cutting and removing from the premises of the defendants, during the continuance of the lease, all firewood necessary to conduct and run said business. It was also covenanted that the defendants "shall, during the term of this lease, furnish to the said party of the second part 5 rowboats, with their necessary oars and rowlocks; and that the said party of the second part shall have the right and privilege, during the continuance of this lease, of placing and using such other boats as she may see fit in the waters upon said premises." The right to use all rights of way over the premises of the defendants and over all other lands owned by them was granted by the lease, as was likewise the right to permit the guests and patrons of the plaintiffs to use the premises of the defendants, where not inclosed, for pleasure walks and recreation.

The lease further provided:

"It is further agreed and fully understood that the said parties of the first part will not demise or let any other part of their said premises to be used for like purposes as those herein let to the said party of the second part, and that they will not grant similar rights and privileges upon their said premises to any other persons as those granted to the said party of the second part herein."

The complaint is in two counts, and each alleges the breach by the defendants of the foregoing covenant of the lease as follows:

"That, on the 21st day of February, 1910, and while the said lease and agreement was in full force and effect as aforesaid, and while the said plaintiff, M. A. Carr, was in the occupancy of the premises, leased as aforesaid, and thereon conducting a hotel, saloon, summer resort, and like business, the defendants, in violation of the said covenant of their said contract, made, executed and delivered to F. M. Bent, C. W. Eckstein, M. T. Plant and M. Smyth, a grant, bargain and sale deed, which said deed was and is in the words and figures following, to-wit"

—following which is the deed, set out in full; the land so conveyed being a portion of the 1,000-acre tract owned by the defendants and of which the premises leased to the plaintiff M. A. Carr is a part. 2. A similar averment mutatis mutandis that, on the 23d day of April, 1908, the defendant conveyed to one R. C. Devereaux still another part of said 1,000-acre tract, the deed thereto being likewise set out in hæc verba.

The complaint alleges that the respective grantees named in the two deeds above referred to purchased the lands therein described from the defendants, and that the latter conveyed said lands to said grantees for the purpose of allowing the latter to erect and conduct on each of the tracts so conveyed a hotel, saloon, and summer resort, that said lands were purchased for no other purpose, "all of which was known to said defendants at the time they made and executed their said deeds aforesaid."

The complaint further alleges that the grantees named in the deed of February 21, 1910, have, since said date, conducted, carried on, and maintained at all times a hotel, summer resort, and saloon on the land conveyed to them as above stated, "in opposition to plaintiff M. A. Carr, and the hotel, summer resort, saloon, and like business conducted by her as aforesaid; that said grantees have kept their said hotel, summer resort, and saloon open and running during all of the summer months, and have solicited and had the patronage of the public, which otherwise, and but for such opposition, would have patronized plaintiffs' resort, hotel, and saloon." It is then alleged that the patronage so diverted from the plaintiffs and the profits thereof would have amounted to the sum of $20,000, in which sum they were damaged.

It is likewise charged that Devereaux, grantee named in the deed of April 23, 1908, erected and has conducted a hotel, saloon, and summer resort on the land so conveyed to him, and that by reason thereof and of the fact that he solicited and received the patronage of the public, which, but for the opposition so prosecuted by him to the business of the plaintiffs, the latter would have received and which had damaged them (plaintiffs) in the sum of $15,000; the total damages alleged and prayed for amounting to the sum of $35,000.

It is further alleged—in the fourth paragraph of the complaint—that the language of the restrictive covenant in the lease, above quoted, was, by mutual consent of all the parties to the lease, distinctly understood and agreed to mean, "and do mean, that defendants should not and would not let, demise, or grant to any other person during the life and existence of said lease * * * the right or privilege to carry on, conduct, or operate a summer resort, hotel, or saloon on said leased premises, or on said larger tract of one thousand acres, or any part of either. And it was fully understood and agreed by and between the said plaintiff and defendants, at the time of the making of the said contract, that the said plaintiff should, during the life of the said contract and lease, and its continuance, enjoy the exclusive right and privilege of maintaining a hotel, summer resort, and saloon and like business upon any of the said leased lands, and by said contract the said defendants covenanted and agreed that they would not, during the life of the said lease, or during its continuance, lease, demise, grant, or convey to any person or persons the right to maintain a summer resort, hotel, or saloon or like business upon any of their said larger tract."

A demurrer to the complaint on both general and special grounds was overruled. The defendants thereupon answered. At the close of the case on behalf of the plaintiffs the court ordered a nonsuit on the motion of the defendants and dismissed the cause.

This appeal is by the plaintiffs from the judgment entered upon the order granting the nonsuit and the order dismissing the cause, and is supported by a bill of exceptions.

The single question here is whether the defendants, by selling portions of their 1,000-acre tract to the grantees named in the two deeds above referred to, violated that covenant of the lease whereby they bound themselves, during the continuance of said lease, not to "demise or let any other part of their said premises to be used for like purposes as those herein let to said party of the second part," etc. The contention of the plaintiffs is that, while the defendants were not, under the terms of the lease, foreclosed of the right to sell, during the term and continuance of the lease, any part of their lands not affected by said lease, they nevertheless by said lease bound themselves not to convey or sell any part thereof with the purpose that the same should be used as a hotel, saloon and summer resort, and, as their primary proposition upon this question, they insist that the language of the restrictive clause of the lease, when considered by the light of the uses to which the property leased was to be put, is fairly and reasonably susceptible of that interpretation. In the second place, they say that, even if the language of said clause of the lease is not clear and certain upon that proposition, they were entitled, under their complaint, to show by parol that it was mutually intended and understood by and between the lessee and lessors, at and immediately before the time of the execution of the lease, that the effect of the restrictive covenant was to preclude the defendants from either demising or granting any part or parts of the tract not leased to the plaintiffs to other persons to be by them devoted to the purposes of a hotel and summer resort. In other words, as to the proposition last stated, the plaintiffs claim that, if the lease itself does not disclose the real intention and understanding of the parties thereto as to its scope, they were authorized, under their complaint, so to reform that instrument as that it would conform to such intention and understanding, and that the court erred in not permitting them to do so, or, having allowed them to introduce proof for that purpose, in striking it out and thereupon granting the motion of the defendants for a nonsuit.

We are of the opinion that neither of the propositions above stated and upon which the plaintiffs rely for a reversal of the judgment can legally be sustained.

Printed in the brief of the respondent is the opinion of the learned trial judge upon the question of the scope and effect of the written lease involved here. By the interpretation of the language of the lease and the construction of the whole instrument as therein given, he reaches a result contrary to that contended for by the plaintiffs, and one which, as well for the reasoning leading thereto as otherwise, is satisfactory to us.

[1] We therefore approve and adopt as a part of this opinion the following portions of the opinion filed by the trial judge in this cause:

"The intention of the parties must be gathered from the consideration of the lease and agreement itself, and no extrinsic evidence would be admissible to show their intention, inasmuch as it is fairly expressed in said document.

[2] "Does the word 'demise,' coupled by the disjunctive conjunction 'or' to the word 'let,' preclude defendants' right to convey or sell their property or any part thereof for any or all purposes whatsoever? Plaintiffs say it does restrict them, and defendants say no. The word 'demise,' as will hereafter appear, is the pivotal point upon which the issue turns. It will be observed that the lease is made for one year, with the annual option of renewal for a period of nine years. Plaintiff M. A. Carr, in connection with her hotel, is given certain privileges touching certain specified portions of said 1,000-acre tract; that is to say, she may use the river flowing over the land for boating purposes; she may also use certain roads laid upon said 1,000-acre tract for the recreation and pleasure of guests; take wood therefrom necessary to conduct and run said hotel business; occupy stable room for two horses, and pasturage for four cows. The defendants covenant that they will not defile the grounds or render less attractive the premises let to said plaintiff for hotel purposes (not the balance of their vast estate, however) during the continuance of said lease. It will be noted, too, that the grant or license to use the premises not included within the hotel and clubhouse grounds 'for pleasure walks and recreations' extends only to that part of the estate 'where not inclosed.' There is nothing in the lease that would grant plaintiff this right where said lands are inclosed, or that would hereafter prevent defendants from inclosing so much of the said estate, not specifically included within the hotel and clubhouse grounds, as they may elect.

"A study of the lease would indicate that it was not the intention of the parties to restrict defendants' right to sell or convey any part or portion of their estate by deed absolute for any and all purposes, reserving those privileges expressly excepted.

[3] "It will be noted—and in considering the intention of the parties all words used in the instrument must be given their usual and ordinary effect—that defendants by the lease in question 'doth *grant*, demise, and let unto the said party of the second part,' etc., the land and rights hereinbefore mentioned. Departing from the clause above quoted, the language of the restrictive clause against defendants is not quite as broad or comprehensive as the language above quoted. The restriction is that they will not 'demise or let any part of their said premises to be used for like purposes as those herein let to the said party of the second part,' etc. The word 'grant,' it would seem, is purposely omitted.

[4] "The word 'demise,' used as a noun, means a lease for a term of years; a conveyance in fee, for life or years; the conveyance of an estate, either in fee or for life or for years, most commonly the latter. As a verb, it means to lease for a term of years. 13 Cyc. 781. As to its primitive meaning, there can be no room for dispute. It was always used in reference to a lease, and the only controversy waged about it was whether it amounted to a covenant for quiet enjoyment. It is true that it has sometimes been held, when the context clearly justified such construction, to mean a conveyance or transfer, but this is not its usual signification. It meant more to the lessee than a mere letting by the landlord, or the mere taking by the lessee generally embraced in the terms 'to lease or to let.'

"Burrill's Law Dictionary is the only standard accessible. It defines demise as follows: 'A conveyance of an estate to another for life, for years, or at will; most commonly, for years—a lease; to convey or create an estate for years or life; to lease.' The usual and operative words in leases: 'Have granted, demised, and to farm let, and by these presents do grant, demise, and to farm let.' For further reference see 1 Bouvier, Law Dictionary; Merchon v. Williams, 63 N. J. Law, 398, 44 Atl. 212; Words and Phrases, under title of 'Demise'; Am. & Eng. Ency. of Law, under title of 'Leases'; Cyc., as above cited. See, also, numerous authorities under 'Landlord and Tenant' in this and other states. But whether the term be given its technical or more liberal construction must be determined from an interpretation of the lease, in special instances.

"The annual rental was but $350, and plaintiff M. A. Carr reserved the right annually to exercise her option as a continuing tenant. It would have been an easy matter for the parties to have restricted the sale or conveyance of any portion of the property herein mentioned for hotel or opposition purposes, if they so desired. It would hardly seem reasonable that the owners of a large body of land should have denied themselves the right to dispose of their property for its most advantageous purposes for a mere pittance of $30 a month. It is reasonable that the defendants should covenant so long as they owned said estate not to lease to any one else for similar purposes, but it is hardly reasonable to suppose that they would restrict themselves in the sale of their large estate. And may it not be that said plaintiff insisted upon the right to relinquish said premises at the end of any one year, having in view the contingency of a sale of the entire tract of land? The contract does not in words restrict the defendants from conducting a hotel or hotels.

"This is not a case in which it may be said that the court should construe the instrument most strictly against the party drawing it. Both parties having entered into the lease and contract voluntarily, and having made their own terms and used their own words and phrases, are bound by the ordinary uses or acceptation and meaning of said terms, words and phrases. The court cannot go beyond that which is expressed in said lease and contract. It can only draw from the entire instrument its meaning, and give it such effect as the intention of the parties is therein expressed.

[5] "No presumption in favor of the plaintiff can be indulged as restraint in alienation of realty is not favored by the law. Courts cannot read into contracts terms omitted therefrom, else it would be making a contract not agreeable to the parties thereto. It cannot be that the intention of the parties is different from what the language employed therein may import. As the parties have adopted the word 'demise,' and not the words 'sell,' 'convey,' 'transfer,' or 'grant' or some other similar terms, it will be presumed that by the selection of the word 'demise' they intentionally excluded the others."

But much stress is laid upon the language of the covenant in question, "and that they will not grant similar rights and privileges upon their said premises to any other person as those granted to the said party of the second part herein"; it being urged that the word "grant," as used therein, was so used with the intention of embracing within the operation of the restrictive clause the right to sell other portions of the lands, to be utilized for the purposes of a summer resort, etc. We are unable to coincide with that view of the language referred to.

There is nothing in the restrictive provision of the lease which has the effect of preventing the defendants from exercising the right, during the existence of the lease, to lease other portions of their said lands to other persons, provided that they are not so leased for the purpose of being used by the lessees as a summer resort, etc., in competition with the plaintiffs. The leasing of such lands for such purposes is expressly and clearly prohibited by the language of the first part of the restrictive clause. But, to protect the plaintiffs against any sort of interference with the purposes to which they intended to put the premises demised to them, the defendants further covenanted that, having granted to the plaintiffs certain rights and privileges appropriate and necessary to the full purposes of a summer resort, viz., the right to permit guests of the hotel to use other parts of their lands, where the same are uninclosed, for purposes of recreation and pleasure, the right to the use of the waters of the streams on said lands for boating purposes and other similar easements, enumerated in the lease, they would not, during the continuance of the lease, grant to other persons such (similar) "rights and privileges upon their said premises." This is the natural and the grammatical construction of the clause. The fact that the words "and that" immediately follow the inhibition against the leasing of any other portions of the large tract of land clearly shows that the parties to the lease had in mind two different and distinct propositions when they incorporated into the lease the restrictive provision, to wit: (1) A covenant against demising or leasing other portions of the land for the indicated purposes; (2) a covenant against granting to other persons other rights and privileges in the nature of easements appurtenant to portions of the lands of the defendants other than the demised premises; such rights and privileges being specifically named in the lease.

But the two deeds concerned here contain no provision whereby the grantees therein named are granted the right to or privilege of carrying on a hotel or a saloon or a summer resort; their effect being merely to pass the fee in the lands described therein. Indeed, the right to conduct a hotel and summer resort or to engage in other like occupation is not one that is dependent upon grant. The plaintiff, by the lease, merely acquired an estate for years in the premises described in said lease, but, while the right to maintain on the premises a hotel and summer resort is expressly mentioned as one of the rights of the lessee under the lease, it is a right which, in the absence of any reference thereto in the instrument, would have passed to the lessee as an incident of the estate created by the lease, and which, being personal as to the lessee, she could, under such circumstances, have exercised or not. So it is true as to the grantees of the defendants. The right to maintain a summer resort on their respective premises was not acquired by or through the grants of said premises to them. The fact, if it were a fact, that the defendants might have sold the lands to the grantees with the knowledge that said grantees intended to maintain summer resorts thereon is immaterial, since there is nothing in the lease which prevented the former from selling, and since, furthermore, having bought the lands or acquired title thereto by purchase, as they had the right to do, the grantees were entitled to devote them to any lawful uses. Of course, if there were burdens upon their lands at the time they acquired them, they took the title subject to such burdens, and, while the question does not arise here, it may with no impropriety be remarked that, if they should in any manner impair the integrity or interfere with the right in others to be benefit of such burdens, they alone would obviously be answerable therefor.

[6] We are satisfied that the complaint fails to state a case justifying the revision of the lease under section 3399 of the Civil Code. That section provides:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value."

Nowhere in the complaint is there an allegation that any of the terms of the lease were omitted from the instrument by or through fraud or the mistake of the parties or either of them. Counsel claim, however, that revision of the lease was permissible under certain allegations of the fourth paragraph of the complaint, above quoted. As shown, the important parts of said allegations read:

> "That said covenant [referring to the restrictive provision] * * * was, and the words therein employed and used were, by mutual consent of all the parties thereto, distinctly understood and agreed to mean, and do mean, that defendants should not and would not let, demise or grant to any other person * * * the right or privilege to carry on, conduct, or operate a summer resort, etc., on said larger tract, of one thousand acres, or any part thereof;" that "it was fully understood and agreed by and between the said plaintiffs and defendants, at the time of the making of the said contract, * * *" that by said contract the defendants "covenanted and agreed that they would not, during its continuance, lease, demise, grant, or convey to any person or persons the right to maintain a summer resort, etc., upon any of their said larger tract."

It will readily be noted that the foregoing allegations do not contain a statement that through the mistake of the parties or either of them, or through fraud, the real intention of the parties was not expressed in the written lease, but that they merely involve a construction by the plaintiffs themslves of the language of the lease; that is to say, the plaintiffs thus construe the lease as it was written and executed so as to extend its scope beyond that which its language clearly implies. The mere naked statement that the parties had a certain "understanding" as to the effect of the language of an instrument in writing is only to say that the parties so construe the instrument, while the mere naked statement that by "mutual consent" of the parties thereto the instrument was to have an effect different in material respects from that which its language plainly imports would call for evidence the effect of which would be to vary the terms of the written contract.

To state a case for the revision of a written instrument, under section 3399 of the Civil Code, it is incumbent upon the pleader to show, by direct averment, that, by reason of fraud practiced by one of the parties, or of the mutual mistake of the parties or of a mistake of one of them, which the other at the time knew or suspected, there were thus omitted from the instrument certain material terms and conditions, or, in other words, that the language of the writing failed, for some reason, to express the intention of the parties. The complaint in this case does not, as must readily be perceived upon reading it, measure up to this requirement. Hence the effect of the evidence stricken out by the court would have been to vary or modify the terms of a written instrument and the course taken by the court in striking it out was proper.

After said testimony was stricken from the record, nothing was left to support the claim of the plaintiffs to damages, and there was therefore no other course open to the court but to grant the defendants' motion for a nonsuit.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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24 Cal. App. 701

PARKINSON BROS. CO. v. FIGEL et al.

(Civ. 1214.)

(District Court of Appeal, Third District, California. June 4, 1914.)

1. Fraudulent Conveyances (§ 241*) — Assignment of Attached Fund—Right to Sue—Objections—Waiver.

Where, in a suit to determine the ownership of an attached fund, both parties without objection submitted to an inquiry as to the validity of the assignment of the fund by the debtor to cross-complainant, and the court made full findings on such issue without any objection being taken to the evidence touching the alleged fraudulent assignment, an objection that the attaching creditor had no standing to attack the assignment because no judgment had been recovered against the debtor was waived.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696–726; Dec. Dig. § 241.*]

2. Appeal and Error (§ 837*) — Issues — Scope of Review.

Where, in a suit to determine the validity of an alleged prior assignment of an attached fund, the assignee consented to a trial of the issue of the validity of the assignment, the attaching creditor, though not having recovered a judgment against his debtor, was entitled to a review on appeal of the question whether the evidence was sufficient to support findings sustaining the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262–3272, 3274–3277, 3289; Dec. Dig. § 837.*]

3. Fraudulent Conveyances (§ 272*)—Assignment — Fraud — Insolvency — Burden of Proof.

In a suit to invalidate an assignment by a debtor of attached funds as fraudulent as against creditors, the burden of establishing the debtor's insolvency at the time of the assignment, as well as the charge of fraud, is on the attaching creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 804; Dec. Dig. § 272.*]

4. FRAUDULENT CONVEYANCES (§ 77*)—ASSIGNMENT TO ATTORNEYS—VALIDITY.

An assignment of claims by a debtor to his attorneys prior to an attachment, to secure the attorneys for services past and future, and to provide funds to settle claims against the debtor, for which both he and an attaching creditor were liable, and to return any surplus to the debtor, which surplus, if any, would be subject to the attachment, was not fraudulent as against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 197–199, 202; Dec. Dig. § 77.*]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 11*)—VALIDITY—"GENERAL ASSIGNMENT."

Where a debtor, against whom many claims for damages were pending, but who was not insolvent, assigned some, but not all, of his outstanding accounts to his attorney to secure payment for his services past and present, and to use the proceeds to settle such claims, and return the balance, if any, to the assignor, the assignment was not a general one within Civ. Code, § 3449 et seq., relating to assignments for the benefit of creditors, but was valid under sections 3431, 3432, providing that in the absence of fraud every contract of a debtor, though preferring one creditor to another, is valid against all his creditors who have not acquired a lien on the property affected by the contract.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 14; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 4, pp. 3052–3054.]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Suit by the Parkinson Bros. Company against Fred H. Figel and the Henry Cowell Lime & Cement Company, cross-defendant, and Will M. Beggs, cross-plaintiff, adverse claimants to a fund seized under an attachment. From a judgment in favor of cross-complainant Beggs the Henry Cowell Lime & Cement Company appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. R. C. McComish, E. M. Ray, and A. A. Caldwell, all of San Jose, for respondent.

CHIPMAN, P. J. The action was brought by plaintiff to have the rights of the several defendants determined to certain money held by plaintiff. It is alleged that plaintiff (herein referred to as Parkinson Company) and defendant Henry Cowell Lime & Cement Company (herein referred to as the Cement Company) are corporations; that the Cement Company has commenced an action in the superior court of Santa Clara county against defendant Fred H. Figel, and in said action a writ of attachment has been issued and served by the sheriff of said county upon this plaintiff, with a notice that all goods, etc., in the hands of plaintiff belonging to said Figel are attached; that before the said attachment plaintiff purchased from said Figel certain cement and other building materials, for which plaintiff agreed to pay the sum of $304.20, no part of which has been paid; that said defendant Beggs claims to be entitled to receive said money from this plaintiff by virtue of a valid assignment from said Figel to him. Defendant Beggs filed an answer, denying the averments of the complaint respecting the said action of the Cement Company, and, further answering, by way of cross-complaint alleged: That the said money held by plaintiff belongs to cross-plaintiff; that, prior to the commencement of this action and prior to any claim upon said money by the Cement Company, and after the sale and delivery of said goods to Figel, he, the said Figel, for a valuable consideration, assigned to cross-plaintiff said demand against said Parkinson Company; that the Cement Company claims some interest therein, but without right. The Cement Company filed an amended answer to the cross-answer of Beggs: Denies that plaintiff has in its possession the said sum of $304.20, or any other sum belonging to cross-plaintiff; admits the sale of said goods to plaintiff; denies the assignment of said claim as alleged by cross-plaintiff; alleges that the writ of attachment was issued and served as alleged by plaintiff, and that it has never been released, and, upon information, alleges that it was served prior to any assignment by Figel to Beggs. As a further answer alleges: That prior to the commencement of this action, Figel was indebted to the Cement Company in the sum of about $30,000, for the recovery of which said company had commenced an action in said court; that at said time a writ of attachment was duly issued and was regularly served on said Parkinson Company; that by virtue of said writ the sheriff of said county "levied on all profits, assets, and things of value belonging to or standing in the name of said Fred H. Figel," and the said Cement Company, its agents and attorneys, made diligent search for any property belonging to said Figel, without avail, "except that property levied on by the said sheriff of said county under said writ and upon information alleges that said Figel had no property or assets save such as were levied upon" and certain accounts fraudulently assigned to the said Will M. Beggs, as hereinafter set forth more fully; that the total value of all money, property, assets, and things of value so levied upon, together with the accounts so assigned to said Will M. Beggs, is less than the debt due from said Fred H. Figel to the said Cement Company in the sum of $15,000, and that at the time of said assignment to said Beggs the said Figel was insolvent; that said Beggs is now and at all times herein mentioned he was the attorney of record for the said Figel, and was such attorney at the time of said alleged assignment. It is then alleged that, with intent to defraud the said Cement Company, Figel concealed, so far as he could, all of his assets, and, on information and belief, alleges that said Figel and Beggs conspired together to defraud said Cement Company, in pursuance of which Figel falsely pretended to make an assignment of the amount due from said Parkinson Company, and, furthermore, the said assignment was without consideration, "and was made after the levy of said attachment, and was dated prior thereto, in pursuance of said false and fraudulent conspiracy"; that at said time, in pursuance of said conspiracy, Figel executed assignments to said Beggs amounting to $8,516.20, all of which were made for the said fraudulent purposes. Defendant Figel answered plaintiff's complaint, admitting its averments and alleging that, prior to any levy of attachment, plaintiff was informed by defendant Figel that said account had been assigned to said Beggs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The court made findings that the averments of the complaint were true; that the sum of $304.20, in possession of the clerk, deposited by plaintiff, belongs to defendant Beggs; that prior to the commencement of this action, and after the sale and delivery of the goods, Figel, "for a valuable consideration, sold, set over, and assigned to Will M. Beggs, the said demand" and the money due thereunder, and that the claim of the Cement Company thereto is without right; that said assignment was made on March 28, 1911, and the said attachment was levied on March 31, 1911; that, prior to the commencement of this action said Cement Company claimed that Figel was indebted to it in the sum of about $30,000, and had commenced suit against him to recover said sum of money, but that Figel had filed a verified answer thereto, denying that he owed said sum, or any other sum, of money to said Cement Company; that at the time said complaint was filed attachment was served on said money in the hands of said Parkinson Company due from said Figel; that under said writ the sheriff levied upon all property, assets, and things of value, belonging to or standing in the name of Figel, but that Figel "did not have, and has not now, any money, property, assets or things of value belonging to him, or standing in his name, other than those levied upon by said writ, and certain accounts assigned to Will M. Beggs," all of which, so levied upon, amounted in value to less than the amount claimed to be due from the said Figel to said Cement Company; that at the time of said assignment Figel was solvent and able to pay his debts in the regular course of business, and that said Beggs is now and at all times in this action mentioned was the regular attorney and counselor of the said Figel; that said Figel "has not in any manner concealed any of his assets or things of value so as to render nugatory any judgment which may be given against him in favor of" the Cement Company, "nor for any other purpose; nor did the said Figel and said Beggs, or either of them, conspire or connive together, or with any other person, to defraud" the said Cement Company, "or at all, nor did the said Figel falsely pretend to make an assignment of the amount due from the said" Parkinson Company "to the said Will M. Beggs, nor did the said Beggs falsely or fraudulently agree to accept, nor did he accept, the said assignment for the purpose of deceiving the said" Cement Company; "but the fact is that there was a good and valuable and valid consideration for the assignment, and it was made before the commencement of the action of" the Cement Company, against Figel, "and was dated on the date it was made, and was, in all respects, a valid and bona fide transaction."

As conclusion of law the court found that defendant and cross-plaintiff Beggs was entitled to recover the money deposited by plaintiff, and rendered judgment accordingly. It is from this judgment defendant, the Cement Company, appeals on bill of exceptions. No motion for new trial was made. The sufficiency of the evidence to support the findings is challenged; that there was a good and valuable consideration for said assignment; that the assignment was not fraudulently made; that Figel was solvent at the time he made the assignment; that he made no concealment of his assets; and that neither he nor Beggs conspired to defraud the Cement Company.

The findings support the judgment, and we are only to inquire whether there is sufficient evidence to support the findings.

Appellant presents the following points: (1) That the circumstances all show that the assignment was fraudulent and a mere subterfuge to deprive the Cement Company of the money due it; (2) the assignment for future services was void against creditors; (3) a transfer to a creditor largely in excess of his demand, with an undertaking that the surplus is to be returned to the principal, is fraudulent and void; (4) that the evidence is that Figel assigned the accounts because he thought Beggs could collect them more readily than Figel could, and hence, being for the benefit of the assignor, is void as against creditors; (5) if any part of the assignment is for a consideration which the law does not permit, the whole assignment is void; (6) the assignments, if bona fide at all, are really for the benefit of creditors, and, as such, are void for failure to comply with the Code.

[1] Respondent Beggs makes the point, as conclusive of the controversy, that appellant has no standing in court to attack the conveyance from Figel to Beggs for the reason that it had no judgment, but only an attachment on a disputed claim, against Figel. The question has been many times considered by the courts of this country and not with harmonious results. In an extended note to Ziska v. Ziska, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1, many, but by no means all, of the cases are collated. Subject to some exceptions, the rule is undoubtedly as claimed by respondent. 3 Pom. Eq. Juris. § 1415.

The subject was quite fully considered in Aigeltinger v. Einstein, 143 Cal. 609, 77 Pac.

669, 101 Am. St. Rep. 131, and the cases decited by our Supreme Court up to that time (1904) were examined. Among the later cases is that of Lyden v. Spohn-Patrick Co., 155 Cal. 177, 183, 100 Pac. 236, in which the rule is reaffirmed.

[2] It appears, however, that all parties without objection submitted to an inquiry into the validity of the assignment to Beggs, and the court made full findings on the issues. Neither by demurrer to the answer of the Cement Company, alleging fraud, nor by objection to the evidence touching the alleged fraudulent conveyance to Beggs, was the question raised. Under such circumstances, we do not think the respondent Beggs should be permitted to rely solely on the point just discussed, nor need it be definitely decided. Having consented to an examination into the validity of the Figel assignment, appellant is entitled to a review of the question whether the evidence is sufficient to support the findings.

Figel is a dealer in lime, cement, and other building material at San Jose. The Cement Company is a manufacturer of lime and cement, and claimed that Figel was indebted to it in the sum of $30,000 for materials sold to him prior to March 28, 1911. The Cement Company guaranteed the lime against what is called "pitting" or "popping." This lime was for plastering purposes. Witness Dr. L. J. Belknap testified to serious damage suffered by him in using the lime purchased from Figel. Explaining the meaning of the term "popping," he testified:

> "There are little bits that pop out from the size of perhaps the head of a pin up to the size of a quarter, in some cases half an inch, that chip out by something in the slacking."

The effect of this "popping" was such that where it occurred the walls had to be scraped and replastered. A number of persons, who had used this lime, were making claims against Figel for damages, and among them some six or more contractors, amounting to more than $8,000. These claims were brought to the attention of the Cement Company by Figel. There was also a pending controversy about cement sold to the state by Figel, who had brought suit against the state for $5,386.06, and Figel informed the Cement Company that he would expect it to stand back of him in this suit. Figel did not deny that the Cement Company's claim amounted to $30,000, but he wrote them, and said, among other things:

> "I do not now, nor never did, recognize that I owed you this amount of money. You are well aware of the fact that many claims are being made by the contractors here growing out of the popping lime, and I will expect you to make me whole on any loss occasioned from that source."

The evidence shows that these controversies were pending before and at the time the Cement Company commenced its action against Figel, and that Figel was making an honest effort to meet its demands, but was seriously hampered by conditions chargeable, at least in considerable part, to the Cement Company.

Figel believed, and the evidence shows that he was justified in his belief, that it was necessary for him to employ attorneys, and he engaged Messrs. Beggs & McComish. They entered upon their employment and were rendering various services some time before the assignment. There was no definite understanding as to their fees, except that Figel was told the fee in the suit against the state would be at least $1,000 and expenses. Figel had on hand between $1,500, and $2,000, and, in reply to the question why he did not use this money to pay his attorneys, he testified that he needed it to carry on his business and to meet current obligations. He testified that he needed attorneys, not only to look after matters in litigation, but to assist in the collection of outstanding accounts, and that it was to secure his attorneys for their services performed and to be performed that he made the assignment to Mr. Beggs. This assignment embraced a number of claims aggregating $8,516.20, among them the one here involved against plaintiff for $304.20 and one involved in another case for $1,162.71, against Charles R. Parkinson Company, which, by stipulation, is to be considered on the transcript in the present case. Figel was called as a witness by defendant, Cement Company, and it is upon his testimony and upon the cross-examination of Mr. Beggs that the objections now urged to the judgment by appellant are chiefly based. Figel was examined at great length and with much minuteness as to the extent and character of his business, his relations to his assignee, Beggs, and his financial condition at the time of the assignment.

Mr. Beggs testified, on his cross-examination:

> "The consideration for that assignment is for several purposes; primarily to pay me for legal services, me and Mr. McComish for legal services already rendered and to be rendered for him, and costs and expenses of litigation."

He was asked what services he had rendered Figel prior to March 28th, and answered:

> "Considerable. I can't say the exact amount, but very many consultations; a suit had been brought in his favor against the state of California for some $6,000 in round figures, upon which nothing had been paid, for a fee; all of his affairs had been gone into, and they were considerable; had taken up both my time and Mr. McComish's for upwards of a month before this, or more, for quite a long time; I can't say the exact time, but quite a long time, and by this time they were getting very strenuous. Q. At that time did you expect an attachment by the Cowell Company? A. No, sir; not an attachment; we expected a suit but not an attachment."

When asked if he knew whether Figel had any money or property, he answered: "Oh, I knew he had large assets." As to his fee for services he testified:

"At the time of the assignment I did not have an agreement with Mr. Figel for a definite sum as to the amount of fees I was to receive. There was absolutely no definite sum agreed upon. I communicated to him approximately what it would be, about. In the state case that had already been filed, at least a thousand dollars, and whatever the expenses would be in addition to that; and there were a large number of other cases threatened that would be proportionately; the Engstrom Company was threatening to sue Mr. Figel for $4,000 or $5,-000 damages, and there were at least six other people outside of Cowell threatening to litigate certain claims that they had against Mr. Figel for considerable sums of money."

The suits last referred to were for damages caused by using this "popping" lime. He presented a list of the assigned claims and testified that they were all assigned to him on March 28, 1911. Being asked whether the assignment was for future services, he answered that it was not.

"Q. What did he give them to you for? A. For not only the services that I had rendered up to that time, or rather Mr. McComish and I had rendered, and for any other attorneys that would be necessary to employ in any of the litigation that was threatened in several directions and in several places, the expenses of that litigation, and damages that were claimed from various customers of Mr. Figel growing out of popping lime jobs. Q. Why was he turning money over to you to pay for damages that might result from suits brought against him by other people? A. I can't say; that is what was done; these claims had to be paid as soon as they were definitely settled, and I was authorized to settle them, and we proceeded to do so. I have settled some. The claim of the Engstrom Company, which as presented was some $4,000 or $5,000 was settled for between $2,100 and $2,200. What money was paid was money collected out of these assignments. * * * There was a hundred dollars paid to a man named Herman, paid out of money collected on these assignments. Q. What else? A. I think those are the only actual sums of money that I paid out of these collected. There are quite a number that are in dispute, and as soon as the amounts are definitely fixed, they are going to be paid; we are trying to get them down low. Q. Which ones are in dispute? A. Well, there is Dr. Belknap, in East San Jose, who is raising some new claims; there is the First National Bank in this city, raising some very large claims; it runs up into the thousands; there is Dr. Osborne, out at Santa Clara, also raising claims; there are several others that I just don't have in mind now. * * * Q. Well, now when you took these assignments did you agree to pay the damages that people might make for popping? A. The understanding, as I understood it, was this: That out of these moneys as they were collected the costs and expenses of any litigation that Mr. Figel might have should first be paid, including the attorney's fees; the surplus should be used so far as it could be to pay off any judgments for damages, or any claims that might be settled, growing out of these popping lime claims, and the surplus, if any, should be then paid Mr. Figel. Q. Some of these claims, you say, the bank, amounted to thousands of dollars? A. Yes. Q. More money than you got? A. Well, no; not more. I am in hopes that it will be cut down; that is why they have not yet been paid. The First National Bank wants a very large sum of money paid. Q. But supposing you have to pay the First National Bank, what do you get? A. I get mine first. Q. How much do you get first? A. I can tell you after it is collected and after the work is performed? Q. You cannot tell? A. I cannot tell."

It appears from Beggs' testimony that he had collected of these assigned accounts $3,-667.66, and had paid out in settlement of three of the "popping" claims $2,580, leaving in his hands $1,087.66 and the uncollected claims amounting to $4,848.54. Several contractors and others were called as witnesses who had claims for damages, from whose testimony it appears at least problematical whether any surplus will remain to come back to Figel after claims for damages are paid and his attorneys settled with, even if Mr. Beggs should succeed in collecting the balance of the accounts assigned to him, and whatever that balance may be is secured to the Cement Company by its attachment. In fact, except as to what may be the attorney's fees, the Cement Company is getting the benefit of all these assigned claims by the money being used to discharge liabilities for which it is answerable. Figel explained at some length why he found it necessary to employ attorneys, and his explanation seems reasonable. Speaking of the assignment to Beggs, he testified:

"I went through my books, and I picked out those accounts that were kind of long-winded coming in. I did not give them any nice, good accounts because I needed that money to pay your client with, you see [addressing the Cement Company's attorney, interrogator]; I kept paying your client all my ready cash, and I depended upon Mr. Beggs and Mr. McComish to make good on those popping lime jobs. I did not expect them to work for nothing; and that is how I came to make the assignment."

He testified that he had paid the Cement Company $10,000 on its account, reducing it to about $30,000. We cannot undertake to give even an epitome of the succeeding hundred folios of Figel's testimony. He was required to bring his books into court and explain in detail everything pertaining to his accounts and to explain over and over again why he found it necessary to employ attorneys and to assign to Beggs the accounts mentioned. We have failed to discover in his answers and explanations any sound reason for holding that the conclusions reached by the learned trial judge as to the bona fides of the transaction were unsupported by sufficient evidence. Figel made no concealment of what he was doing, but gave notice of the assignment to the several persons concerned before the Cement Company commenced its action. Nor can we say that evidence was wanting to justify the finding that Figel and Beggs did not conspire to defraud the Cement Company. Figel's troubles arose out of defective material purchased from that company, which it had guaranteed, and his efforts to settle the claims arising from its use by Figel's customers was a duty placed upon him the discharge of which the Cement Company should have encouraged rather than retarded.

[3] In its finding that Figel was solvent at the time said assignment was made, the court

doubtless took into consideration, as it very properly could, the amount of offsets to the Cement Company's claim which the evidence showed would, in all probability, be successfully urged. Figel testified that he owed no debts except this claim of the Cement Company, and none were disclosed by his books. He had an established business, which had some value, though no price was put upon it. Aside from any good will, he showed visible assets in excess of the amount which would be due the Cement Company after it made good the losses claimed by Figel to be justly chargeable to the Cement Company. The burden of establishing his insolvency at the time of the assignment was on the Cement Company, as was the charge of fraud, and both should have been shown by clear and satisfactory evidence to have warranted a finding favorable to defendant's contention. Although the offsets to the Cement Company's claim were in some degree contingent and uncertain as to their amount, we do not think the trial court would have been justified in disregarding them in order to find Figel insolvent.

[4] It is urged that because the assignee was Figel's attorney and the assignment was for future services it is void against creditors. Some of the services were rendered before the assignment, and the assignor had a right to secure the services rendered and to be rendered. Morrel v. Miller, 28 Or. 354, 43 Pac. 490, 493, 45 Pac. 246; In re Luce, 83 Cal. 303, 23 Pac. 350. Figel's principal object by the assignment was: First, to secure his attorneys for their services, which he had a right to do; and, second, to have the proceeds used to settle the "popping" claims, as to which both Figel and the Cement Company were liable. That any surplus should come to him would be implied had it not been so understood. The fact that Figel thought Beggs a better collector than himself was not the motive for the assignment. Incidentally he may have so thought, but we cannot see that this element in the transaction is of serious consequence.

Nor does it appear to us that any part of the assignment was void, and thus, had it been true, making applicable the rule, if it is the rule, contended for, that the entire assignment is void. Figel could, as we have seen, secure his attorneys, and he had a right to make some provision to settle those harassing "popping" claims. Respondent cannot complain should there be a surplus, for it is secured to respondent by its attachment.

[5] No attempt was made to assign these claims for the benefit of all creditors, nor was there an assignment of all of Figel's property, not even all his outstanding accounts. It was not a general assignment such as in Sabichi v. Chase, 108 Cal. 86,† cited by appellant. At most it was an assignment for the benefit of his attorneys and to pay certain creditors by way of compromising, where possible, their claims for damages. Such an assignment the law permits. In the Matter of Muller v. Kennedy, 118 Cal. 432, 50 Pac. 660; Heath v. Wilson, 139 Cal. 362, 73 Pac. 182. It seems to us that the evidence shows that Figel was proceeding under sections 3431 and 3432 of the Civil Code, if he had the Code in mind at all, and not, as claimed by appellant, under section 3449 et seq., and that the assignment, though preferring a creditor, was therefore valid. See cases last above cited; also, Lawrence v. Neff, 41 Cal. 566, approved in Wood v. Franks, 67 Cal. 32, 7 Pac. 50; Saunderson v. Broadwell, 82 Cal. 132, 23 Pac. 36, and in Heath v. Wilson, supra. See, also, Roberts v. Burr, 135 Cal. 156, 67 Pac. 46; Crane Co. v. Dryer, 9 Cal. App. 290, 98 Pac. 1072.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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24 Cal. App. 805

CHARLES R. PARKINSON CO. v. FIGEL et al. (Civ. 1215.)

(District Court of Appeal, Third District, California. June 4, 1914.)

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by the Charles R. Parkinson Company against Fred H. Figel and Henry Cowell Lime & Cement Company, cross-defendant, and Will M. Beggs, cross-complainant. From a judgment awarding a fund in controversy to cross-complainant Beggs, the Henry Cowell Lime & Cement Company appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. Rogers, Bloomingdale & Free and R. C. McComish, all of San Jose, for respondents.

CHIPMAN, P. J. By stipulation, this case was to be heard and decided on the same transcript as in the case of Parkinson Bros. Co. against the same parties (No. 1214) 142 Pac. 135, this day decided. Upon the authority of the judgment in that case, the judgment in this case is affirmed.

We concur: HART, J.; BURNETT, J.

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24 Cal. App. 615

POLKINGHORN v. RIVERSIDE PORTLAND CEMENT CO. (Civ. 1478.)

(District Court of Appeal, Second District, California. May 28, 1914.)

1. APPEAL AND ERROR (§ 1031*) — PRESUMPTIONS.

The party proposing the bill of exceptions is only required to set forth those proceedings illustrating the error claimed, and it is for the opposite party to propose any amendments showing that the errors were cured or nonprejudicial; and hence there is no presumption that evidence not included would show errors complained of to be nonprejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038–4046; Dec. Dig. § 1031.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† 41 Pac. 29.

2. Appeal and Error (§ 1059*)—Review—Harmless Error.

In an action for the wrongful death of a servant killed between bins maintained by the master adjacent to railway tracks and a moving car, the exclusion of evidence that a car had struck the bin, offered to show knowledge on the part of the master that accidents were likely, is harmless, in view of an instruction that the master was chargeable with knowledge of any danger owing to the proximity of the bins to the tracks, or the excessive width of the cars; there being no showing that deceased was killed by a car similar to the one which struck the bins.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4208; Dec. Dig. § 1059.*]

3. Evidence (§ 471*) — Opinion Evidence — Conclusion of Witness.

A statement by a witness that planks were placed on a bin so that men could go from one part to the other is a statement of facts, and not a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

4. Evidence (§ 471*)—Opinion Evidence.

A statement by a witness that he never noticed the dust to be thick enough in a certain locality that "you could not see 150 feet" is not a statement of opinion, but must be accepted as a statement of fact concerning his own ability to see in that locality.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

5. Appeal and Error (§ 714*) — Review — Questions Presented by the Record.

The denial of instructions cannot be reviewed, where they do not appear in the record outside of the specifications of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958–2963; Dec. Dig. § 714.*]

6. Master and Servant (§ 270*)—Injuries to Servant—Actions—Evidence.

Where the complaint, in an action for the death of a servant, alleged that there was not sufficient space for a human being between the cars and bins adjacent to the tracks, testimony that the witness had stood there is admissible, without a showing that he and deceased were of similar size.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

7. Master and Servant (§ 295*)—Injuries to Servant—Liability of Master.

Under Civ. Code, § 1970, providing that an employer is not bound to indemnify his employé for injuries occasioned by the ordinary risks of the business, nor in consequence of the negligence of another person employed by the same employer, unless the employer failed to use due care in the selection of the negligent employé, the exception as to negligence of fellow servants does not affect the general provision, that the employer is not liable for injuries occasioned by the risk of the business; hence an instruction as to the ordinary risks of the business, in the terms of the statute, need not include the exception.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168–1179; Dec. Dig. § 295.*]

8. Trial (§ 295*)—Review—Harmless Error.

The giving of an instruction which alone might have misled the jury is not erroneous, where they could not have been misled by the instructions as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

9. Trial (§ 260*)—Instructions—Refusal.

A refusal of requested instructions covered by those given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by William H. Polkinghorn, as administrator of Nick Shannas, deceased, against the Riverside Portland Cement Company. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

M. Estudillo and Geo. A. French, both of Riverside, for appellant. Gurney E. Newlin, of Los Angeles, and H. L. Carnahan, of Riverside, for respondent.

JAMES, J. Decision was heretofore made in this cause and a rehearing thereafter granted. The rehearing was ordered because of the contention of appellant that certain of the points relied upon for reversal were not treated of in the opinion. Upon a re-examination of the record and briefs the court is satisfied that the judgment heretofore ordered is the correct one to be entered, and the opinion, as filed on February 26, 1914, is, as to its main text, readopted as follows:

"This action was brought to recover damages occasioned by the death of one Nick Shannas, which was alleged to have been caused through the negligent acts of defendant. Verdict was in favor of the defendant, and plaintiff has appealed from an order denying his motion for a new trial.

"Nick Shannas, the deceased, was employed in July, 1910, as a day laborer at the cement manufacturing plant of defendant. In the carrying on of its business at its factory the defendant made use of a railroad track along which cars were propelled to and fro. Close beside this track in the yard of the factory was a rock crusher and certain rock bins. It was necessary for the convenient handling of the business of defendant that the rock crusher and bins should be placed, and they were so placed, close enough to the railroad track to enable material to be quickly handled to and from the cars and the bins and crusher. On the 27th day of July, in the year mentioned, Shannas was engaged at his work about the plant, when, as was a common occurrence, several cars were backed in upon the railroad track toward the point where the bins and rock crusher were located. As the cars came opposite the structures mentioned, Shannas was caught between a car and the planking and killed. It was alleged that no warning was given of the approach of the cars, and, further, that the rock crusher and planking were negligently located close to the track so as to render the place dangerous and unsafe for the employés to perform the labor required of them.

[1] "Appellant first assigns as error rulings of the court made respecting the admission of testimony. Respondent's counsel suggest that these alleged errors are not the subject of review, for the reason that the bill of exceptions does not purport to contain all of the evidence, and that in such case the presumption will be that the rulings, even though apparently erroneous, may have been rendered nonprejudicial by other evidence introduced, citing Brown v. Casey, 80 Cal. 504, 22 Pac. 257. From the very short opinion rendered in that case it might

seem that some color of authority is given to support respondent's point, but reference to an earlier decision of the Supreme Court, as well as to later ones, and also to decisions of the District Courts of Appeal, will clear the question of any doubt and settle it against respondent's contention. The correct rule, as established by those cases, is that the party proposing a bill of exceptions is only required to set forth therein a record of so much of the proceedings as will illustrate the error claimed, and that it is the duty of the opposite party to propose, if he is able to, such amendments as will show that the alleged errors were cured or rendered nonprejudicial. It will not be presumed that if omitted evidence had been supplied a different case would be shown, but the presumption will be that the record does exhibit all matters material to a consideration of the points presented. Abbey Homestead Ass'n v. Willard, 48 Cal. 614; Judson v. Lyford, 84 Cal. 505, 24 Pac. 286; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Couson v. Wilson, 2 Cal. App. 181, 83 Pac. 262; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907.

[2] "Error is assigned because the court refused to allow a witness for the plaintiff to answer the following question: 'Do you know of a steel car being run in there on that track at or near the time of the accident, which was so wide that it hit the sides of the timbers?' The announced purpose in the asking of this question was to show knowledge on the part of respondent of the dangerous condition at the place where the accident occurred. The court suggested that the question would be allowed if it was shown that a car of similar dimensions and kind to that used at the time of the accident was being used at any time when a collision happened between a car and the timbers. Appellant failed to qualify the question as suggested, and did not promise to follow up the answer with proof of similar conditions as those which were present at the time of the accident. It may also be noted that in the question asked the time to which the attention of the witness was directed was not fixed as being at or before, but 'at or near' the time of the accident. This might have meant either at, before, or after the accident. But assuming that the time indicated by the question was that pertinent to the case, it does not appear that error was committed. Counsel for appellant in their brief say: 'We contend that it is immaterial whether the car which hit the sides of the bins was of the exact size of the car which killed Nick Shannas or not, if it was a car ordinarily used on standard tracks, for in that case defendant would have knowledge of the proximity of the bins to the track and that there was not enough room betwen the bins and the sides of certain cars ordinarily used on railroads for a man to stand in safety.' The conditions as to the location of the bins and timbers were fixed, and respondent would be presumed to have had knowledge of those conditions as they then existed. There was no contention made that appellant did not have such knowledge, and on this subject the court, at the request of appellant, instructed the jury as follows: 'You are further instructed that in this case the plaintiff is not required to prove that the defendant had actual notice or knowledge of the dangerous condition of the premises, if any, of its tracks or any structures near the same, provided it appears from the evidence that said company in the exercise of ordinary care of inspection and supervision thereof would have discovered such condition.' Under this instruction the jury must have understood that the fixed conditions as to the size and width of cars used, as well as the proximity of the bins and timbers, were matters of which respondent must have had knowledge, for casual observation would have fully disclosed it.

[3] "It was not improper as suggesting a conclusion to allow a witness to say that certain planks were placed 'so the men could go from this half of the bin across there.' The purpose for which the planks were so placed was a matter of fact; as to whether they were sufficient for that purpose, or whether in the exercise of ordinary care for his safety Shannas might have used them, was a question for the jury.

[4] "One witness testified, in describing conditions which might have affected the ability of the deceased to observe his danger: 'I never noticed dust thick enough there that you could not see a distance of 150 feet.' The objection to this answer rests upon very slight foundation. It is argued that because the witness used the personal pronoun in the second person, he was not giving testimony of his own knowledge, but an opinion as to what persons then addressed might have been able to do. The phrase was couched in words of common habit that could not reasonably have been misunderstood by the jury.

[5] "Among the specifications of error are some which set forth that the court refused to give certain instructions asked for by appellant. The text of such instructions does not appear in the record outside of the specifications, and therefore this court has no means of determining the merits of the points made under those assignments."

[6] The particular matters adverted to in the petition for rehearing are now to be considered: It was objected that testimony given by two witnesses, Parker and Kindred, was incompetent. These witnesses testified that they had stood beside the "pit" when cars of similar size and dimensions to that which crushed the Greek passed them without coming in contact with their persons. The point where these witnesses stated they had stood was within 11 to 23 feet from where Shannas was killed and was at the place where Shannas performed his work. Plaintiff had alleged in his complaint that the only outlet from the point where Shannas was engaged in shoveling rock on the morning of the accident "was along the track upon which said cars were approaching; that said rock pile and planking and said rock crusher and pit were so close to the track that there was not space sufficient for a human being to stand between said box cars and the same, and by reason of said facts that said premises were dangerous, inadequate in size, and unsafe to work upon." By this allegation plaintiff asserted that there was not sufficient space for any human being to stand between the cars and any of the structures described, including the "pit." The testimony of the two witnesses mentioned was pertinent as furnishing some evidence in contradiction of the facts alleged and relied upon by plaintiff to show the unsafe condition of the place where Shannas was employed on the day he was killed.

[7] The court gave to the jury the following instruction:

"You are instructed that an employer is not bound or under obligation to indemnify his employés for losses suffered by said employés in consequence of the ordinary risks of the business in which they are employed; and that if you believe from the evidence that the injuries sustained by said Nick Shannas were sustained in consequence of the ordinary risks of the business in which he was employed at the time of his injuries, there is no obligation on the part of the defendant to indemnify said Nick Shannas or his heirs at law for the injuries sustained by said Nick Shannas, and your verdict must be for the defendant."

It is contended that this instruction was erroneous in that it did not make a complete statement of certain provisions of section 1970 of the Civil Code. That portion of the instruction which was taken literally from the Code embodied that sentence appearing in the instruction and ending with the semicolon after the word "employed." The omitted part of that portion of the Code section claimed to be important for consideration followed immediately after the portion that was quoted, and is as follows:

"Nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé. * * *"

It does not appear that the omitted provisions, as is contended by appellant, are to be taken as in qualification of the general statement that an employer is not liable for damages occurring in consequence of the ordinary risks of the business in which the injured employé is engaged. If this construction be the correct one, then the instruction as given was free from error in that it presented clearly and definitely the one proposition to the jury which is set forth in the opening sentence of the section referred to.

[8] Another instruction is referred to, and is made the subject of the criticism that its statement of the law was prejudicially erroneous. It is numbered 23, and is as follows

"You are instructed that if you believe that the business of working on and about a railroad track is a dangerous and hazardous employment, and if you further believe that the injuries sustained by said Nick Shannas were on account of one of the dangers or hazards ordinarily incidental to such business of working on or about railroad tracks, then your verdict must be for the defendant."

[9] It is first argued that the instruction required the jury, where they formed any belief or opinion that the business of working on or about a railroad track is a dangerous one, the other facts stated concurring, to find in favor of the defendant, and did not tell them that such belief so engendered in their minds must be a reasonable belief and conclusion drawn from the evidence; secondly, that the instruction was erroneous in that it eliminated the application of the "last clear chance doctrine." It is difficult to understand how the jury could have been misled so far as to assume that any conclusion that they might arrive at, whether drawn from the evidence or not, in regard to the dangerous and hazardous character of the business of working on or about a railroad track, or as to the injuries of Shannas having been sustained on account of one of such dangers, would be sufficient to require a verdict in favor of the defendant. The instructions as a whole were quite complete, and when this instruction is considered in connection with the whole charge, it is not misleading in terms or effect. Furthermore, at the request of plaintiff, the jury were fully charged as to the responsibility of defendant to answer in damages if the facts were such as to show a liability under the "last chance doctrine."

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

24 Cal. App. 781

PEOPLE v. BOWMAN. (Cr. 232.)

(District Court of Appeal, Third District, California. June 13, 1914. Rehearing Denied by Supreme Court Aug. 12, 1914.)

1. Criminal Law (§ 881*)—Obtaining Note by False Pretenses—Special Verdict.

Where defendant was charged with obtaining a note from complainant by false pretenses on which defendant obtained the proceeds by discount, a verdict finding defendant guilty of obtaining the signature of complainant on a certain note by false pretenses, but with no intention to defraud complainant of the amount, was not a valid, special verdict, not being responsive to the charge of "obtaining the note" from complainant as distinguished from his "signature," and in that the finding that he did not intend to deprive complainant of the amount was immaterial, since, if he intended to obtain the note by false representations, the offense was complete, though he might have intended to save complainant harmless from liability to repay the money.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

2. False Pretenses (§ 4*)—Elements of Offense—Fraud.

One is defrauded of his property when he is induced to part with it by reason of the false or fraudulent pretenses and representations of another, the offense being complete when, by means of such false pretenses, the fraud intended is consummated by the accused obtaining possession of the property sought, so that if the false pretense is among the means by which accused obtained the property, he has committed the full crime as though no other influence was combined therewith.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. CRIMINAL LAW (§ 893*)—TRIAL—VERDICT—ENTRY.

Where an insufficient verdict is legally declared and entered, it is binding on the court and defendant is entitled to discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2527; Dec. Dig. § 893.*]

4. CRIMINAL LAW (§ 881*)—TRIAL—DEFECTIVE VERDICT—SUBSEQUENT PROCEDURE.

Pen. Code, § 1161, provides that if the jury renders a verdict which is neither general nor special, the court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form, from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and leave the judgment to the court. In a prosecution for obtaining a note by false pretenses the jury returned two verdicts, the first finding defendant guilty of obtaining the signature of complainant to a certain note by false pretenses, but with no intention to defraud complainant of the amount, and the second finding defendant guilty of the crime charged and leaving him to the mercy of the court. *Held*, that, since the first verdict was neither general nor special and was fatally defective, the court was not required to send the jury back to return a proper verdict, but was justified in rejecting it and receiving the second as the lawful verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

5. CRIMINAL LAW (§ 563*)—FALSE PRETENSES—CORPUS DELICTI—EXTRAJUDICIAL STATEMENTS AND ADMISSIONS.

Where, in a prosecution for obtaining a note by false pretenses, the implied findings of the jury did not rest on accused's admissions as testified to by witnesses, but on false statements made by accused as an inducement for the delivery of the note, the rule that the corpus delicti cannot be proved by the extrajudicial statements and admissions of accused was inapplicable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

6. FALSE PRETENSES (§ 49*)—FINDINGS—EVIDENCE.

In a prosecution for obtaining a note by false pretenses, evidence *held* to support an implied finding of the jury that accused procured the note by means of a false representation that he had at the time in a local bank bonds of a Chicago bank of the cash value of $3,800, which he would sell and with the proceeds pay the note, and that his offer of shares in a corporation formed by him to operate a drug store, to the maker of the note for his accommodation, formed no part of the inducing cause of the maker's signing the same.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

7. FALSE PRETENSES (§ 41*)—OBTAINING NEGOTIABLE PAPER—DEFENSES—EVIDENCE.

In a prosecution for obtaining a note by false pretenses, it appearing that accused took the note to the county treasurer, with whom he had some unexplained relation affecting county funds, and that the treasurer delivered the note to the payee, who indorsed a certificate of deposit for the amount of the note and gave it to the treasurer, who cashed it and paid the money into the county treasury, evidence that such transaction was to make good money improperly loaned by the treasurer from the county treasury was inadmissible as furnishing no defense for obtaining the note from the maker, who knew nothing of accused's relations with the county treasurer, by false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 55; Dec. Dig. § 41.*]

8. FALSE PRETENSES (§ 49*)—INTENT—EVIDENCE.

Where accused obtained a note from G. on the false pretense that he had certain bank bonds which he would sell and pay the note with the proceeds, the question of fraudulent intent was for the jury, to be determined from all the circumstances of the case; and hence the fact that accused, after securing the note, turned over to G. as security certain shares in a corporation did not conclusively show that accused did not intend to cheat or defraud G. when he obtained the note.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

9. FALSE PRETENSES (§ 49*)—FALSITY OF PRETENSE—ESTABLISHING NEGATIVE.

Where accused induced G. to execute a note for his accommodation on the alleged false representation that accused had bonds of an unnamed Chicago bank in a local bank, which he would send to Chicago and sell and use the proceeds to pay the note, it was not necessary for the state, in order to prove the falsity of such representation, to examine the officers of every Chicago bank, but proof of an examination of accused's deposit box in the local bank that it contained no such bonds, and that the local banker, whom accused had stated had refused to cash the bonds, never saw them or had any knowledge concerning them, was sufficient, in the absence of evidence to the contrary, to justify a finding that the representation was false.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

10. FALSE PRETENSES (§ 49*)—FALSE REPRESENTATIONS—PROMISE TO ACT IN FUTURE.

Where accused procured G.'s signature to a note by a false representation that accused owned certained bonds deposited in a local bank, the fact that he promised that he would have the bonds cashed and use the proceeds to pay the note did not conclusively show that G. relied on the promise to do something in the future so as to defeat a prosecution for false pretenses; the promise being impossible of fulfillment because he had no such bonds.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

11. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in a prosecution for obtaining a note by false pretenses, accused proved that he delivered certain shares in a drug corporation to prosecutor as security, but there was no evidence that the corporation owned the drug store it was organized to carry on, or that it owned any other property of value, the admission of the state, Compiled Statements of Domestic Corporations, showing that the charter of the corporation in question had been forfeited for nonpayment of a license tax, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

12. CRIMINAL LAW (§ 1169*)—APPEAL—REVIEW—ADMISSION OF EVIDENCE—PREJUDICE.

Where accused, in a prosecution for obtaining a note by false pretenses, proved the delivery of certain corporate stock to prosecutor as collateral security, but the stock was shown to have been valueless, accused was not prejudiced by the admission of evidence of the secretary of the corporation that in June or July, 1912, and about the time accused obtained the note, he stated to witness that the corporation "had fallen through."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

13. False Pretenses (§ 52*)—Instructions.

Where the first part of an instruction stated that every person who knowingly and designedly, by any false or fraudulent representations or pretenses, defrauds any person of property, and thereby obtains possession thereof, etc., a subsequent clause thereof, declaring that any pretense sufficient to impose on the person to whom it is made, if made with intent to cheat or defraud him, if property is obtained thereby, is sufficient to sustain a conviction, was not objectionable as omitting to charge that the pretense must be false or fraudulent.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. § 52.*]

14. Criminal Law (§ 823*)—Instructions—Proof—Reasonable Doubt.

An instruction that an intention to defraud is inferable from all the facts of the case, and need not be substantially proved, was not defective as misleading the jury to believe that any degree of proof, however slight, would be sufficient, the court having subsequently further charged that accused's intent to cheat and defraud might be inferred from all the facts and circumstances bearing thereon, in evidence in the case, provided they were sufficient to satisfy the jury of such intent beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

15. Criminal Law (§§ 763, 764*)—Instructions on Facts—False Pretenses.

An instruction that it was not necessary that the prosecuting witness expressly testify that an alleged false pretense induced him to act as he did, but, if the jury were satisfied beyond a reasonable doubt, from the testimony of other witnesses and from all the facts and circumstances in the case, that the pretense induced the prosecutor to part with his property to accused, that was sufficient to that extent, meant only that the fact was capable of proof by testimony of other witnesses and from all the facts and circumstances in the case, and was not objectionable as a charge on a question of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

16. Criminal Law (§ 815*)—Instructions Ignoring Evidence—False Pretenses.

In a prosecution for obtaining a note from G. by false pretenses, an instruction that when the pretense made by accused was false and known to be so by him it was no defense that accused intended or expected to pay for the property obtained when he was able to do so, and it was no defense that he himself received no money personally from the note if the jury believed beyond a reasonable doubt that he intended to and did defraud G. of the same by the use and means of the false pretense, was not objectionable as in fact instructing the jury to disregard all the testimony concerning certain stock of a drug store corporation that accused offered the prosecutor as security.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.*]

17. False Pretenses (§ 52*)—"Fraud"—Instructions.

In a prosecution for obtaining a note by false pretenses, an instruction that deception, deliberately practiced to secure an unfair advantage of another, is "fraud," and property obtained by such practice is property obtained by fraud, the person deprived of his property by such means being defrauded, was proper.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. § 52.*

For other definitions, see Words and Phrases, vol. 3, pp. 2942, 2954; vol. 8, p. 7666.]

18. Criminal Law (§ 1171*)—Trial—Misconduct of Attorney—Prejudice.

In a prosecution for false pretenses, the special prosecutor in his address to the jury stated that he knew accused was guilty of the crime, that he had defrauded a brother Mason (prosecutor) fraudulently and intentionally, and also that he knew accused, "according to this evidence," was guilty. *Held*, that such statements were not in the nature of testimony, and, there being ample evidence to establish accused's guilt, they were not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

19. Criminal Law (§ 236*)—Stenographers' Notes—Correction.

Where a court reporter, in transcribing her notes, substituted "on" for "in" in the phrase "on a bank in Chicago," referring to certain bonds, the court was authorized to accept the stenographer's explanation that she made a mistake in her notes, which she corrected in transcribing, that there was no intention to change the testimony as given, and that there was in fact no change.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489–491; Dec. Dig. § 236.*]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

J. P. Bowman was convicted of obtaining a note by false and fraudulent pretenses, and he appeals, on rehearing.

Former opinion withdrawn and judgment and order denying defendant's motion for a new trial affirmed.

James N. Gillett and F. A. Cutler, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. A rehearing was granted that we might give consideration to an alleged special verdict that now appears in the corrected transcript, but which was not before us at the former hearing. In relation to the said verdict the account presented by the record is as follows:

"The jury returned into court.

"Judge Childs: Have you reached a verdict, gentlemen?

"Foreman: We have two verdicts, and if the one is not legal, we have another.

"The Court: You will pass it over. The foreman passed to the court a document which read as follows: 'We, the jury, find the defendant guilty of obtaining the signature of N. Giacomini on a certain promissory note under false pretenses, but with no intention to defraud said N. Giacomini of the amount. Wm. McAdoo, Foreman.'

"The Court: This does not find him guilty of anything.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Foreman: Then we have this verdict: 'We, the jury, find the defendant guilty of the crime charged and leave to the mercy of the court.' The jury was then polled."

Appellant claims that the first of the foregoing constituted a special verdict within the contemplation of the following sections of the Penal Code:

"The jury may * * * when they are in doubt as to the legal effect of the facts proved, * * * find a special verdict." Section 1150.

"A special verdict is that by which the jury find the facts only, leaving the judgment to the court." Section 1152.

"The special verdict must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged." Section 1153.

"A special verdict need not be in any particular form, but is sufficient if it present inteligently the facts found by the jury." Section 1154.

[1] It is argued by appellant that:

"This verdict contained all of the facts necessary to be found in an action for obtaining money or property by false pretenses. In such an action two material facts must appear, namely, false and fraudulent representations or pretenses whereby one defrauds another person of money, labor, or property, and that there was an intent at the time to defraud. This verdict finds the fact that the defendant obtained the signature of N. Giacomini to a promissory note under false pretenses, and it also further finds that the defendant had no intention to defraud N. Giacomini."

The foregoing is not altogether accurate, and contains only a partial truth, as an analysis of the information and of said verdict will clearly demonstrate. In the information it appears that by false representations the defendant induced said Giacomini to perform two separate acts, namely, to execute or sign the note and to deliver it to said Bowman. It is manifest that if either one of these was superinduced by said fraudulent pretenses and thus appellant was enabled to obtain possession of said note to the prejudice of Giacomini, the offense would be complete. It might be true that the signature was obtained without fraud, but if the delivery was caused by false representations, a verdict of guilty might follow. Thus it appears that no judgment could be based upon the mere finding of the jury that the signature was obtained without any intention to defraud, because it leaves undetermined the character of the other vital element, the delivery of possession of the note.

The latter part of section 1152 of the Penal Code adds a degree of certainty to what is implied in the first sentence of said section. It is that the special verdict "must present the conclusions of fact as established by the evidence * * * and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them." If the finding of fact be consistent with either a verdict of guilty or of not guilty, as it was in this case, it is apparent that it does not constitute a special verdict as that term is used in the statute. In other words, if the finding does not embrace all the material facts charged in the information, it is not sufficient of itself to support any judgment, and no conclusion of law can be by the court based thereupon.

If the fraud, as alleged in the information, related only to the act of securing the signature of Giacomini, or if it was averred that by means of these false and fraudulent statements defendant had *obtained* the note and the jury had found that he *obtained* it without any intention to defraud, in either of these contingencies, of course, the case would be different.

But the so-called special verdict is radically defective in another respect. The jury found, not that Bowman had no intention to defraud Giacomini, or that he did not *knowingly* make the false statements, but that he had no intention to defraud the latter "of the amount." While the expression is not very clear, the jury probably meant that Bowman had no intention of defrauding Giacomini of the amount of money that the latter might be called upon to pay by reason of the note. But Bowman, at the time he secured the signature of Giacomini, might fully have intended to pay the note himself and to save Giacomini harmless, and yet this would not affect a single element of the crime. If defendant made the said false representations knowingly and with the intention of obtaining said note, and he did thereby obtain the note to the prejudice of Giacomini, he committed the crime whatever might have been his intentions as to his repayment of the money. The fraudulent *intent* contemplated by section 532 of the Penal Code is the *intent*, by means of the false representations, to secure the property which is sought by the party charged.

Manifestly no defense would be found in the claim that he fully intended at the time to make the aggrieved party whole if a defendant, by means of false representations, knowingly secures the promissory note of another and thereby obtains credit to the prejudice of the maker.

In People v. Wieger, 100 Cal. 356, 34 Pac. 827, it is said:

"In the assumption that it must be held that defendant did not intend to defraud the Sharpless firm, if he intended at the time to pay for the goods according to the contract of sale, and truly believed that he was able to do so, I think counsel is in error. Deception, deliberately practiced for the purpose of gaining an unfair advantage of another, is fraud. Goods obtained by such practices are obtained by fraud. One deprived of his property by such means is defrauded."

And among the cases cited by Judge Temple is Commonwealth v. Coe, 115 Mass. 481, wherein it is said:

"The intent to defraud is the intent, by the use of such false means, to induce another to part with his possession and confide it to the defendant, when he would not otherwise have done so. Neither the promise to pay, nor the intention to do so, will deprive the false and fraudulent act in obtaining it of its criminality."

[2] One is defrauded of his property "when he is induced to part with it by reason of the

false or fraudulent pretenses and representations, and the offense is complete when by means of such false pretenses the fraud thereby intended is consummated by obtaining possession of the property sought." People v. Bryant, 119 Cal. 597, 51 Pac. 961.

"If the false pretense was among the means by which he obtains the valuable thing, he has committed the full crime the same as though no other influence combined therewith." 2 Bishop's Criminal Law, 424.

From the foregoing it follows that if the jury in said verdict had found specifically that the defendant was guilty as charged in the information, it might have been properly entered as a verdict of conviction notwithstanding the concluding clause. Under the decisions, however, it must be held that the finding, "guilty of obtaining the signature of N. Giacomini on a certain promissory note under false pretenses," is not a sufficiently certain and definite response to the general issue to meet the requirement of the law.

In People v. Small, 1 Cal. App. 320, 82 Pac. 87, the defendant was charged with defrauding a person of $100 in money, and it was held that a verdict finding the defendant "guilty of the crime of felony, to wit, obtaining money by false pretenses," was insufficient to support a judgment of conviction. Therein are cited People v. Cummings, 117 Cal. 497, 49 Pac. 476, and People v. Tilley, 135 Cal. 62, 67 Pac. 42. In the former the defendant was charged with obtaining the promissory note of C. Schnelle for the value of $175 by certain false and fraudulent pretenses, and the verdict found that "the defendant is guilty of defrauding C. Schnelle of the note of $175 in the indictment mentioned." The verdict was held to be insufficient for the reason that it did not find as to the false and fraudulent representations alleged in the indictment.

In the Tilley Case the verdict was:

"We, the jury in the above entitled case, find the defendant, Chas. H. Tilley, guilty of receiving stolen property."

It was held insufficient, principally for the reason that it did not appear in said verdict that he had *knowledge* that the property was stolen. So, in the said verdict here, in addition to other objections, there is no finding that the false pretenses were knowingly made, and the said verdict is uncertain as to *what were* the false pretenses, and the note is not indentified as the one set out in the information.

[3] Notwithstanding the foregoing infirmities, if said verdict had been legally declared and entered it would have been binding upon the court and defendant would have been entitled to his discharge. People v. Small, supra. The judge, however, seasonably recognized the insufficiency of the said verdict and made the declaration as aforesaid.

[4] The said verdict having been neither general nor special the duty of the court is prescribed in section 1161 of the Penal Code as follow:

"If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it, and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict or to find the facts specially and to leave the judgment to the court."

It seems, though, that the jury had anticipated the action of the court and had already agreed upon another verdict proper in form, and which they immediately declared to be their true verdict. Of course, it was not necessary for the jury to retire again to reconsider their verdict, since they had already accomplished the purpose of such reconsideration. It is equally apparent that the defendant was not prejudiced by the peculiar phraseology of the said remark of the trial judge. It is as plain as anything can be that the only effect of said remark upon the jury was to confirm them in their apprehension or belief that the first verdict was insufficient. The said statement did not influence the second verdict for the very obvious reason that it had already been agreed upon. It follows that as to said proceeding there is nothing of which appellant can justly complain.

One other point strongly insisted upon by appellant on the rehearing is that the evidence is insufficient to justify the inference that defendant was not the owner of the bonds, and he criticizes the following statement in our former opinion herein: "There were no bonds on a Chicago bank or elsewhere in defendant's box," and "he had a deposit box in which he kept his corporation shares, but it contained no bonds." We are satisfied, however, after a re-examination of the record, that the foregoing is not only a reasonable, but the only rational, inference from the testimony of the witnesses Rice and Lauff, and we adopt, with slight modification, the views expressed in the original opinion as follows:

"At the close of the trial defendant moved the court to advise the jury to acquit defendant, which motion was denied. The point urged that the corpus delicti had not been proven was predicated of a failure to prove the falsity of the statements made by defendant with regard to the Chicago bank bonds. It is claimed that it was incumbent on the prosecution to prove that defendant did not own such bonds, of which, it is contended, there was no proof, citing People v. Simonsen, 107 Cal. 345, 40 Pac. 440; that the ruling on defendant's motion 'clearly involved the whole merits of the case, which included proof of the corpus delicti.' People v. Ward, 145 Cal. 736, 79 Pac. 448, is cited, where it was said: 'The elements of this crime necessary to the establishment of the corpus delicti are false statements adapted to the fraudulent purpose, and money parted with upon the faith of such statements.' And it was further said: 'In this case there was no substantial evidence of the falsity of the statements alleged to have been made by the defendant aside from the testimony of witnesses as to his admissions.'

[5] "The principle of the two cases cited is the same—that the extrajudicial statements and admissions of the defendant are not alone sufficient. In the present case the implied findings of the jury do not rest upon the admissions of defendant as testified to by witnesses. The find-

ings rest upon the false statements made to Giacomini by defendant as an inducement for the delivery to him of said note.

[6] "Defendant was engaged in selling drugs, his store being in Crescent City. Giacomini was a man of advanced years, and was engaged in farming some miles in the country. They were friends, and on previous occasions Giacomini had assisted defendant financially in a small way. On July 28 or 29, 1912, defendant, being in earnest need of money for immediate use, went to his old friend at his farm to obtain relief. What occurred there was in the presence of Giacomini, his wife, his son, and a farm hand, and was testified to by them. The testimony was that Giacomini, when first requested to sign the note, refused to do so; defendant urged upon him the importance of his signing so that he could get the money the next day on the note and, to aid him in his attempt to persuade Giacomini to sign, defendant called Mrs. Giacomini out of their house and urged her to have her husband execute the note; she promptly refused, and said he must not sign, that they were old, their farm mortgaged, that their son was not in good health and had a large family, and positively refused to consent. 'Q. What did Mr. Bowman say then? A. He told me to let him sign that note, that he had to have the money at Hegler's Bank, and that he had bonds that he got from Chicago that was worth $3,800. Q. What did he say that he had? A. Bonds that were worth $3,800. He said that Hegler said that he would not accept the bonds, and that he had to have some money, there at the bank. And I said that, "It is funny that he won't accept them" I said, "It is funny that Mr. Hegler won't do it if you have got them bonds there and they are good. It is funny to me." Q. What else did you say, to Mr. Bowman about the bonds? A. He said that Hegler won't cash, or accept them bonds for cash. He said that they had to be sent back to Chicago to get them cashed. And I said that "It is funny if them bonds are good that he won't cash them," and he said that Hegler didn't know much about the bank business. Q. Mrs. Giacomini, did Mr. Bowman say to you, or in your presence, anything about whose bonds those were? A. Yes, he said that they were his own bonds he had deposited there at Hegler's Bank, and that it was more than $3,800, and that when he got the money back from Chicago it would pay the note. Then he said when the money was back that my husband would be out of the note. Then I said, "No," again, that I don't want him to have anything to do with it. Q. When you speak of Mr. Hegler's Bank what bank do you mean? A. The Crescent City Bank. Q. What Hegler is it? A. We always call it Hegler's Bank. * * * Q. After that did your husband sign the note? A. He made him believe that there was going to be no trouble and my husband signed the note. Q. What did your husband do with it? A. Then he handed it to Mr. Bowman. Q. To this man here (pointing to defendant)? A. Yes. Q. You saw that with your own eyes? A. Yes. Then he saw that I was mad. Because I didn't want to let him sign the note and Bowman said, "Don't be afraid, I tell you another thing, Mrs. Giacomini," he says, "if anything should happen inside of those two weeks until the money is back, I will give you security in the drug store." Q. That was after the note was given? A. Yes, after the note was given, because I kicked against it all the time to sign the note.'

"Giacomini testified that he was induced to sign the note by defendant's representations; that he had in the Crescent City Bank bonds of a Chicago bank of the cash value of $3,800; that he 'depended on the bonds'; that after he had signed and delivered the note defendant said that he had shares in a drug store that he would give him as security.

[7] "There was, we think, sufficient evidence to support the implied finding of the jury that defendant procured the note by means of the representation that he had at the time in the Crescent City Bank Chicago bank bonds of the cash value of $3,800, and that the offered shares in defendant's drug store formed no part of the inducing cause to sign the note. Giacomini testified: 'Q. Did you believe the story that he told you about the Chicago bank bonds? A. That is the reason that I signed my name to the note because I believed him. I believed that he had the bonds. * * * Q. Do you remember whether Mr. Bowman said anything about O. B. Lauff going on the note? A. He mentioned Mr. Lauff and another man, but I didn't think of anything but the Chicago bonds; that is what I depended upon. * * * Q. Did you sign the note because Mr. Lauff was going on it? A. No.' Lauff did in fact sign the note, and after Giacomini had paid it secured him to the extent of one-half its face. Defendant took the note to S. W. Rice, county treasurer, with whom defendant had some unexplained relation affecting the county funds. Rice delivered the note to Gamboni, the payee, who indorsed a certificate of deposit on the Crescent City Bank for the amount of the note and gave it to Rice, who cashed it and paid the money into the county treasury. Defendant was not permitted to show that this was a transaction to make good the money improperly loaned by Rice from the county treasury; the court correctly holding that it furnished no defense for having obtained the note from Giacomini, who knew nothing of defendant's financial relations with Rice. Indeed, defendant's representation was that he needed the money to pay to the bank. Rice testified that when defendant handed him the note he did not tell him 'how he came to get it; nor did he say anything about his promising to give Giacomini stock in his drug store as security. He gave me a key to his deposit box and told me to take bonds or stock or something out of it and give it to Mr. Giacomini when he called for it, but the nature of it I didn't know.' He testified that he took the package out of defendant's box and secured a box in Lauff's name, deposited the package in the box and gave him the two keys, and this ended Rice's connection with the matter. A week or more later Giacomini received one of the keys from Lauff. The package referred to was shares in a corporation formed by defendant to carry on the business of selling drugs and other merchandise. This package of shares remained in the box and was produced at the trial by Lauff. There were no bonds of a bank in Chicago or elsewhere in defendant's box. Mr. Hegler, cashier of the Crescent City Bank, testified that defendant left with him no bonds; that he had never spoken to him about cashing any bonds, and he 'didn't know he had any,' and did not know that he ever had any bonds in the bank on deposit, but what he had in his deposit box he did not know.

"There was evidence that defendant formed a corporation, in February, 1912, with a capital stock of $15,000 divided into 150 shares of the par value of $100 each, 98 shares of which were issued to defendant and 1 share each to two other persons to qualify them as directors; that the object of the corporation was to carry on the drug business, and probably it was defendant's intention to transfer his stock of drugs to this corporation. Mr. Parsons, secretary of the corporation, testified that it was the understanding that these shares were 'in payment for the drug store and the merchandise in it which he (defendant) then owned, and which the corporation was then taking over.' There was no evidence other than this that there had been any transfer of the stock of drugs to the corporation, or that the shares had any value; there was no evidence that it had transacted any business, other than to issue these shares, or that the drug store was thereafter conducted by the corpora tion. It was shown by the certificate of the Secretary of State that the charter of the corporation was declared forfeited, November 30, 1912, for nonpayment of license tax for the fiscal year ending June 30, 1913. An inventory of defendant's stock of goods was taken for his creditors, in December, 1912, showing a value of about $5,000, but whether these were creditors of the corporation or of defendant individually does not appear. This evidence as to these corporation shares and defendant's offer to give them to Giacomini as security was introduced as tending to rebut any evidence of an intention to cheat him.

[8] "It is urged that defendant's offer to turn over his corporation shares as security is inconsistent with any intention to cheat or defraud his friend. Assuming that these shares in fact had some value, which is not shown, the placing of them in the hands of Giacomini and Lauff would tend in some degree to negative evidence of fraudulent intent in the transaction and thus eliminate one of the elements necessary to constitute the crime involved. But the question of fraudulent intent was with the jury, and was to be determined from all the circumstances in the case. The turning over of these shares as security after he had secured the note signed by Giacomini was not conclusive of the question of intent when he made the representations which induced Giacomini to sign and deliver the note.

[9] "Nor does it seem to us that there was a failure to establish the falsity of the representations on which Giacomini acted. It is true there is no direct evidence that defendant did not own and have in the bank at Crescent City the bonds he claimed to have there. It was shown that the cashier of the bank had no knowledge of his having any bonds there. He had a deposit box in which he kept his corporation shares, but it contained no bonds. He represented that the cashier had refused to cash them, from which it must be inferred that, if true, the cashier had some knowledge of them. But he testified that he had none. There was left, then, no source of proof to the prosecution but to examine the officers of every bank in Chicago. In establishing a negative, do the rules of law require more than was here shown? We think not. It is not always possible—indeed, it is generally impossible—to prove an absolute negative, and such proof as is available is generally circumstantial and inferential. Defendant did not testify, nor did he offer any evidence tending to show, that he ever owned the bonds or any bonds such as represented by him. Upon this point, see Wharton's Crim. Ev. (10th Ed.) vol. 1, pp. 693, 694; Wharton's Crim. Law (11th Ed.) vol. 2, pp. 1615, 1631. We have no hesitancy in holding that the proofs submitted by the prosecution were sufficient to support the inference that defendant had no such bonds.

[10] "Defendant cites 19 Cyc. 395, Commonwealth v. Stevenson, 127 Mass. 446, and Cook v. State, 71 Neb. 243, 98 N. W. 810, to the proposition that 'a mere promise to do something, relating as it does to a future event, is not within the statute.' The proposition as stated may be conceded to be the rule. Defendant claims that Giacomini 'signed the note upon the promise made by the defendant that he would get some money in Chicago upon some bonds which he owned, and in two or three weeks he would be able to pay it.' The evidence, in our opinion, when fully considered, justified the inference that the persuading fact inducing Giacomini to sign the note was his belief, founded on defendant's representations, that he had in his possession these valuable bonds sufficient to convince him that he would not lose by accommodating defendant. The evidence shows that Giacomini's relations with defendant were of so friendly a character as would justify him in believing that there was no risk so long as defendant had bonds capable of being turned into cash. The fact that defendant said he would send them to Chicago, and that he would have the money in two or three weeks to take up the note, does not conclusively show that the note was signed under a promise to do something relating to a future event. The jury were justified, from all the evidence before them, in finding that Giacomini's reliance, as a moving cause for signing the note, rested on the representation that defendant had these bonds in his possession. In the case here there was a false statement, as found by the jury, to which was added the false promise, a false statement by defendant that he had the bonds, to which he added the false promise that he would have them cashed, a promise impossible of fulfillment because he had no bonds. Such a concurrent promise does not overcome the force of the false pretense. Wharton's Crim. Law (11th Ed.) vol. 2, § 1438; State v. Briggs, 7 L. R. A. (N. S.) note at page 278.

[11] "It is urged that the court erred in admitting the certified copy of Compiled Statements of Domestic Corporations showing that, on November 30, 1912, the charter of the Bowman Pharmacy, the corporation above referred to, had been forfeited for nonpayment of a license tax; that this evidence was offered to show that the shares of the corporation were valueless, and was error because 'it bore directly upon the question of the intent of defendant in securing the complaining witness' signature to the promissory note he was afterwards compelled to pay.' It is true that the forfeiture declared by the Secretary of State, under the statute, did not have the effect to destroy the assets of the corporation or deprive the stockholders of their interest in such assets; it went no farther than to prevent the corporation from transacting business in the state. The directors, however, still retained the power, as we understand the statute, to settle the affairs of the corporation. It seems to us that, conceding error, it was without prejudice for the reason that there is no evidence that the corporation owned the drug store theretofore carried on by defendant, or that it owned any property or that the shares had any value.

[12] "Witness Parsons, secretary of the corporation, was called by the prosecution and, over defendant's objection, was permitted to testify that, some time in June or July, 1912, defendant told witness the corporation 'had fallen through.' The objection was that 'it did not lie in the mouth of any person to dissolve a corporation,' which could be accomplished only by methods pointed out by statute. Defendant made no explanation of what he meant by the rather vague expression, 'fallen through.' For the reasons given respecting the certificate of the Secretary of State, we cannot see that the evidence was prejudicial. If the stock had no value, a fact which if true must have been known to defendant, it is not apparent that offering it as security would go very far towards showing that he did not intend to cheat or defraud the person misled by him.

[13] "Error is claimed of the first instruction given by the court for the reason that it states that 'any pretense sufficient to impose upon the person to whom it was made, if made with the intent to cheat or defraud him, if property is obtained thereby from such person, is sufficient.' The point made is that it omits the essential element that the pretense must be false or fraudulent. The first part of the instruction states 'that every person who knowingly and designedly by any false or fraudulent representations or pretenses defrauds any person of property, and thereby obtains possession of the property,' etc. Reading the entire instruction, as we must to get its meaning, we discover no merit in the point.

[14] "The court gave the following instruction of which error is predicated: 'You are instructed that an intention to defraud is infer-

able from all the facts of the case, and need not be substantially proven.' There is force in the criticism that 'a fact in criminal law which is not substantially proven is not sufficiently proven. The testimony to prove this intention must be material and substantial and not slight.' If the instruction stood alone and unaided as indicative of the meaning of the court, there might be ground for assuming that it misled the jury into the belief that any degree of proof, however slight, would be sufficient. When read in connection with the instruction which follows the otherwise misleading feature is removed: 'The question of intent to cheat and defraud is one of fact for you to determine from all the evidence in the case. This intention need not be proven by direct and positive evidence, but it may be lawfully and properly inferred by you from all the facts and circumstances in evidence having reference to and bearing upon and tending to prove such intent, provided such evidence is sufficient to satisfy you of such intent beyond a reasonable doubt.'

"Full instructions were given upon the question of reasonable doubt, also as to all the elements entering into the alleged crime and the necessity or proof as to them beyond all reasonable doubt.

[15] "The court instructed the jury as follows: 'You are instructed that it is not necessary that the prosecuting witness, N. Giacomini, should expressly testify that the false pretenses induced him to act as he did. If you are fully satisfied beyond a reasonable doubt from the testimony of other witnesses in the case and from all the facts and circumstances in the case that the pretense induced the prosecuting witness to part with his property to defendant, that is sufficient to that extent.' It is objected that this is an instruction on a question of fact. The prosecuting witness testified expressly that the false pretense induced him to act as he did. The instruction simply means that this fact was capable of proof by testimony of other witnesses and from all the facts and circumstances in the case, which, we think, might properly be stated to the jury.

[16] "Error is predicated of the following instruction: 'You are instructed that when the pretense made by the defendant is false, and known to be so by him, it is no defense that the defendant intended or expected to pay for the property obtained when he was able to do so; and it is no defense that defendant J. P. Bowman himself received no money personally from the promissory note that he obtained from N. Giacomini, if you believe beyond a reasonable doubt that J. P. Bowman intended to and did defraud N. Giacomini of same by the use and means of the false pretenses.' Defendant claims that the jury were thus told to disregard all testimony concerning the stock of the drug store and its offer by defendant to the prosecuting witness as security. We do not think that the jury could have understood from this instruction that they were to disregard any testimony. They were told many times in the course of the charge that they were to consider all the facts and circumstances. This instruction was designed to meet the phase of the case which showed that county treasurer Rice received the money for the note and placed it in the county treasury. Whether this amount had been borrowed by defendant from county funds does not clearly appear, but whatever the reason for his turning the note over to Rice the court very properly told the jury that it was no defense that defendant did not personally receive the money.

[17] "Complaint is made of the following instruction: 'You are instructed that deception deliberately practiced for the purpose of securing an unfair advantage of another is fraud. Property obtained by such practice is obtained by fraud. A person deprived of his property by such means is defrauded.' It will not, of course, be contended that this instruction answers the requirement of section 532 of the Penal Code. Other instructions, however, did this very fully. We can see no error in this instruction, nor prejudice, if it was error.

"We may remark of the instructions that defendant offered 16 carefully prepared and covering the case quite fully and presumably, as favorable to defendant as counsel felt justified in asking. They were all given with the exception of an unimportant amendment to one. The instructions given at request of the people have been examined. We feel quite convinced that defendant's rights were in no degree prejudiced by any instructions given, and that he had the benefit of full, clear, and correct directions for their guidance.

[18] "In the course of his address to the jury the special prosecutor stated: 'I know that J. P. Bowman is guilty of this crime. I know that he has defrauded a brother Mason, done it fraudulently and intentionally. And his brother Mason, N. Giacomini, has lost $1,900 on this account.' And again: 'When a man breaks a law against his brother in the lodge—ah, gentlemen, does not that add something to it, too? Does not that add cruelty to crime?' It is contended that this was misconduct prejudicial to defendant's rights. There were some other statements, not mentioned in defendant's brief, to which objection was made at the time. There was no evidence that defendant and Giacomini were brother Masons or belonged to the same lodge of any society. The remarks of the prosecuting attorney were unwarranted and highly reprehensible. It does not appear that any one of the jurors belonged to a Masonic or any other lodge. In stating that he knew that the defendant was guilty, the prosecuting attorney said: 'I want to say this, gentlemen, that according to this evidence I know that J. P. Bowman is guilty,' etc. We do not think this statement presents the question of misconduct in the form condemned by the Supreme Court in People v. Valliere, 127 Cal. 65, 59 Pac. 295, where the district attorney, in speaking of another theft, of which evidence was excluded, states what the Supreme Court considered 'as in the nature of testimony.' In view of the evidence in the case bearing upon defendant's guilt, and after an examination of the entire record, we cannot say that this misconduct has brought about a miscarriage of justice. Const. art. 6, § 4½.

[19] "Complaint is made that the reporter at the trial, in transcribing her notes taken at the preliminary examination, changed them by substituting the word 'on' for 'in' so that the testimony would read 'on a bank in Chicago,' referring to defendant's representation at the time he obtained the note. The matter was gone into at the trial with a view to correct the testimony and have it go to the jury thus corrected. We do not think defendant's claim was sustained. At any rate, the court had the right to accept the reporter's explanation and other facts tending to sustain her statement that she made a mistake in her notes which she corrected when transcribing them, and that there was no intention to change the testimony as given, nor in fact any change."

The judgment and order are affirmed.

24 Cal. App. 760

DILLON v. SUPERIOR COURT OF NEVADA COUNTY et al. (Civ. 1265.)

(District Court of Appeal, Third District, California. June 10, 1914.)

1. JUSTICES OF THE PEACE (§ 159*)—APPEAL—BOND—FILING.

Code Civ. Proc. § 978a, provides that the undertaking on appeal from a justice must be filed within five days after filing notice of appeal and notice of the filing of the undertaking given to respondent. Judgment having been rendered for plaintiff, defendant brought husband and the sureties to the justice, and he took their justification, but by mistake marked the bond filed as of that date, and made an entry thereof in his docket. The bond, however, he returned to defendant, whose attorney returned it to the justice thereafter with the notice of appeal, but no further filing of the bond was noted, after which a motion to dismiss the appeal was made because no bond had been filed after notice of appeal. *Held*, that when defendant's attorney returned the bond and notice to the justice with directions to file them, it was his duty to comply, though it required him to refile the bond, and, this being done within the time allowed to take the appeal, the bond served every purpose of the new one, and it was immaterial that the justice did not mark the bond "filed" as of that date.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550–578; Dec. Dig. § 159.*]

2. RECORDS (§ 7*) — "FILE" — WHAT CONSTITUTES.

A paper is deemed to be filed when presented at the proper office and deposited with the other papers in the office, and especially so when so deposited with directions to "file" it.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 6; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 3, pp. 2764–2770.]

Petition by Frank Dillon for writ of prohibition directed to the superior court of Nevada county. Denied.

J. M. Walling, of Nevada City, for plaintiff. Fred Searls and Nilon & Arbogast, all of Nevada City, for defendant.

PER CURIAM. Writ of prohibition to restrain the defendant from proceeding to hear and determine a certain cause. There is no substantial dispute as to the facts. It appears that, on September 16, 1913, plaintiff obtained a judgment against one Cooley, in the justice's court of Washington township, Nevada county; that on October 11, 1913, an undertaking on appeal in due form was filed in said justice's court and said justice indorsed the same, "Filed Oct. 11, 1913, A. W. McGagin, Justice of the Peace, Said Township," and, on the same date, made the following entry in his docket in said cause: "October 11. Undertaking on appeal filed with A. Scwartz and N. M. Melrose as sureties." It appeared by the affidavit of the justice that, on October 11, 1913:

> "Cooley, the defendant in said cause, brought to affiant an undertaking on appeal, now on file in said cause, and requested affiant to take the affidavit of the sureties thereon. That affiant thereafter took the affidavits of the sureties on said undertaking and indorsed a filing mark on said undertaking as of the date of October 11, 1913, the date that said undertaking was verified by the said sureties. That he was not requested to file said undertaking by the said M. D. Cooley or by any other person, and that after taking the affidavits of the said sureties he returned the said undertaking to said M. D. Cooley, who, as affiant is informed and believes, returned the same to Fred Searls, one of his attorneys at Nevada City. That the said undertaking was not placed in the files of the said justice court, but was delivered to the said M. D. Cooley to be returned to Nevada City, and said undertaking was not placed among the papers and files in said cause until October 14, 1913."

As it was, on October 11th, returned to Cooley it, of course, could not then have been placed among the papers. Affiant further deposed that, on October 14, 1913, he received from Mr. Searls, by letter, "the said undertaking on appeal, together with notice of appeal and request that said notice of appeal and said undertaking be filed in said action," and that, "upon the receipt of said notice on appeal and undertaking on appeal affiant filed the notice of appeal and placed the undertaking on appeal without any additional filing mark thereon among the papers in the said cause, and thereafter affiant transmitted said papers to the county clerk of the county of Nevada." Mr. Searls' letter was directed to the justice of the peace and contained the following directions:

> "Herewith find notice of appeal and undertaking on appeal in the matter of F. Dillon, plaintiff, v. M. D. Cooley, defendant. File the notice of appeal and undertaking and send down transcript of your docket to George Coughlin, clerk of the superior court, Nevada county."

The justice's docket as transcribed, with all the papers, was sent to the clerk, on October 17, 1913, and contains no entry after entry of the judgment, except the following:

> "October 11: Undertaking on appeal filed with A. Scwartz and N. M. Melrose as sureties. October 14. Notice of appeal received and placed on file."

Attorney Searls' clerk, J. W. O'Neill, deposed:

> "That on or about the 10th day of October, 1913, he forwarded to M. D. Cooley, the defendant in said cause, an undertaking on appeal with instruction to the said M. D. Cooley to have the same executed at once by two good and sufficient sureties; to have said sureties verify the undertaking before A. W. McGagin, justice of the peace in and for Washington township, * * * and then return the said undertaking to Fred Searls, Esq., at Nevada City, Cal., to be by him forwarded for filing to the said justice of the peace."

That it was received on October 12th and on the 13th was sent back to the justice by mail, together with notice of appeal, and, as above stated, was received by the justice on the 14th, at which date the notice of appeal was filed, but there was no further filing of the bond noted either on the bond or in the docket.

On December 19, 1913, plaintiff's attorney filed a motion in the superior court to dismiss the appeal on the ground "that no bond for costs on appeal has been given or filed in said action by appellant as required by the provisions of the statute in such case provided." Thereafter, on January 12, 1914, the motion came on to be heard and, in opposition thereto, appellant filed the foregoing affidavits of the justice of the peace and Mr. O'Neill and the letter of Mr. Searls. The court made the following order:

> "It is therefore ordered that appellant be and he is hereby given permission to supply the omissions, if any exist, of the marking as filed on October 14th, 1913, of an undertaking on appeal and of the making of the entry of filing such undertaking in the docket of the justice of the peace of Washington township by applying to said justice to so mark such undertaking and to make such entry, and if such application is granted by said justice, then said justice shall certify said entry to this court. Permission to withdraw said undertaking on appeal in this matter from the files of this court is granted appellant for presentation of the same to the said justice of the peace, said undertaking to be returned to said files of this court, with the certificate of such entry on the docket, if any is made by said justice, within 15 days from the date of this order. And in the meantime, respondent's motion to dismiss said appeal is hereby ordered continued until the further order of this court."

Pursuant to said order and on notice given by defendant to plaintiff, the matter came before the justice on February 23, 1914, who, as is alleged and not denied, "changed the original filing mark on said undertaking by simply changing the figure 11th to 14th by converting the unit 1, in the date 11th, to a figure 4, but did not in any other manner whatever refile said undertaking or place any other filing marks thereon. Thereafter, and on February 27, 1914, said so-called amended copy of docket and amended filing of said undertaking, was filed in said cause in said superior court," and, on April 6, 1914, said court denied said motion to dismiss said appeal.

The demurrer of respondent to the petition presents the question to be determined.

Section 978a of the Code of Civil Procedure provides as follows:

> "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

It was held, in Goodman v. Superior Court, 19 Cal. App. 457, 126 Pac. 185:

> "Upon appeal from a justice's court to the superior court, where the undertaking on appeal was prematurely filed before the filing of the notice of appeal, the superior court acquired no jurisdiction of the appeal."

It appears from the exhibits to the petition that Attorney Searls sent the bond to the defendant in the action with instructions to have the same executed by the sureties before the justice of the peace who tried the case, "and then return the said undertaking to Fred Searls * * * to be by him forwarded for filing to the said justice of the peace." The latter deposed that at the time the sureties signed the undertaking "he was not requested by the defendant or any other person to file said undertaking." He, however, marked it filed as of October 11th and handed it back to defendant who, according to his instructions, returned it to Attorney Searls. The latter then prepared his notice of appeal which, together with the undertaking, was sent back to the justice of the peace with instructions to file both the notice of appeal and the undertaking and forward the record to the clerk of the superior court. The justice of the peace received the papers on October 14th, indorsed the notice of appeal filed as of that date, but made no indorsement on the undertaking other than that as above explained and made no entry in his docket as to the filing of the undertaking other than that made October 11th. The matter rested in that shape until later, when the plaintiff in the action moved, in the superior court, to dismiss the appeal. Pending the hearing of the motion, the judge of the superior court made the order above quoted. When the matter was presented to the justice he, upon the hearing, changed the date in his docket of the filing of the undertaking from October 11th to October 14th and sent up a corrected transcript showing that both the notice of appeal and the undertaking were filed on October 14th.

[1] Petitioner's contention is that the bond was in fact prematurely filed October 11th, and the fact cannot now be disputed; that when defendant Cooley took the bond to the justice of the peace he was acting, as he had a right to do, in his own behalf, and if he be treated as acting for his attorney, being himself the principal, he is bound by whatever took place; that he knew the justice marked the bond filed October 11th, and that the attorney also must have known the fact; that with knowledge of this fact and that the transcript of the docket had been sent up to the superior court showing that the bond was filed of that date, he rested for some time, and the appellant ought not now to be permitted to question the verity of the docket transcript as originally sent up. Furthermore, that the justice of the peace had no power to make the corrections asked, and the superior court had no power to order that he be permitted to do so, or to receive and act upon a corrected docket. It is also claimed that the plaintiff in the action had five days from the date of filing in which to object to the sureties, under section 978a, and had he gone to the justice's office on October 16th he would have found the bond there marked filed October 11th and the same entry in the docket, and would have had a right to act upon the assumption that the filing and docket entry were properly made. He was not required to watch the office of the justice

after that date. Nor would he have found any necessity for objecting to the sureties, inasmuch as no notice of appeal was filed until the 14th which rendered the appeal ineffectual. He could thus rest upon the belief that the attempt to appeal had failed. It is also urged that the correction now sought to be made effectual deprives plaintiff of the right to object to the sureties, and that the effect of the correction is to make a filing of the bond as of the date of the correction, and hence too late, since the filing of the notice of appeal must precede the undertaking. Section 978a, Code Civ. Proc.

We do not think it necessary to decide whether the justice had the power to correct his docket or the filing upon the papers. Nor do we think it necessary to decide whether the court had the power to refer the matter back to the justice for correction.

There is a feature of the case which, in our opinion, should save the appeal. When Mr. Searls returned the bond and the notice of appeal and directed the justice to file them, it became his duty to do so, though requiring him to refile the bond. We do not think that appellant was precluded from filing a new bond within five days after filing his notice of appeal, where this was done within the time allowed to take the appeal, and we see no reason why the bond already marked filed might not have been refiled and have served the purpose of a new bond. Appellant should not suffer because the justice did not mark the bond filed at that time as of October 14th. Had the bond gone up with the papers in the case without any filing mark, the fact that it was presented to the justice with a request to file it could have been shown in the superior court, and would have been sufficient.

[2] A paper is deemed to be filed when presented at the proper office and deposited with the papers (Tregambo v. Comanche M. & M. Co., 57 Cal. 501; Howell v. Slauson, 83 Cal. 539, 23 Pac. 692); especially so when deposited in the proper office with directions to file the paper. Edwards v. Grand, 121 Cal. 254, 256, 53 Pac. 796. In Hoyt v. Stark, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246, the question as to when a paper is to be deemed filed was quite fully considered. The court said:

> "Nor do we mean to be understood * * * when a proper filing or offer of filing has been made by a party, that he shall suffer for the remissness of the clerk in the performance of his duty. But the proper offer means more than a mere presentation to the officer. It means a presentation to him at the proper place, and within the proper time. When this has been done, the party is required to do no more, and he will not be endangered in any of his rights by the failure of the clerk, in turn, to perform his duty."

In the case here the officer received the undertaking and notice of appeal in time, and was requested to file both. He marked the notice of appeal filed, and placed both papers in his files with the other papers, but neglected to mark the undertaking filed. Appellant, we think, had a right to rely upon the presumption that the officer performed his duty, which was to file both papers. We think, also, that appellant's attorney was not required to go in person with the papers, but that it was sufficient to send them by mail, as they were received in due time and dealt with by the officer in his official capacity as duly received. In contemplation of law the documents were filed, and the failure so to mark one of them does not affect the fact nor prove that it was not filed.

That the justice's docket was silent as to the fact would be immaterial and needed no correction. Naturally the docket was silent because the bond was not marked filed on the 14th. It may be true that the bond was first filed prematurely and, had there been no request to file it again within the time given by the statute, the first filing would have stood as the only filing and would have been fatal to the appeal.

In our opinion the superior court had authority, on the showing made on the motion to dismiss the appeal, to treat the undertaking as filed of date October 14th, and that it was unnecessary to refer the matter back to the justice of the peace for correction or for any action on his part. The superior court had all the facts before it and could act upon them.

The writ must therefore be denied.

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24 Cal. App. 767

LASSEN v. BOARD OF DENTAL EXAMINERS et al. (Civ. 1479.)

(District Court of Appeal, First District, California. June 13, 1914. Rehearing Denied by Supreme Court Aug. 12, 1914.)

1. PHYSICIANS AND SURGEONS (§ 11*) — SUSPENSION FROM PRACTICE — VERIFICATION — AFFIDAVITS—INFORMATION AND BELIEF.

Where charges against a dentist before board of examiners were verified by an affidavit alleging that affiant knew the contents of the complaint and that the facts therein stated were true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believed it to be true, the complaint would be construed as positively verified on complainant's own knowledge; there being no fact therein stated on information and belief.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.*]

2. PHYSICIANS AND SURGEONS (§ 2*)—DENTISTS—DENTAL ACT—VALIDITY.

So much of the dental act (Gen. Laws 1910, Act 922) as makes aiding and abetting an unlicensed person to practice dentistry unlawfully ground for canceling the certificate of a licensed dentist is not invalid as leaving to the dental board or to the individual making the accusation the determination as to what constitutes aiding and abetting.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. PHYSICIANS AND SURGEONS (§ 11*)—DENTISTS—UNLAWFUL PRACTICE—"AIDING AND ABETTING."

Aiding and abetting one to practice dentistry unlawfully, as used in the dental act (Gen. Laws 1910, Act 922), making such act ground for cancellation of the certificate of a licensed dentist, means being present, either actually or constructively, at the time and place of the offense and doing some act which renders aid to the perpetrator, so that, where a licensed dentist supplied an unlicensed person with tools necessary to practice dentistry, employed him for that purpose, and received money from patients therefor, he was guilty of aiding and abetting.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 15; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, vol. 1, pp. 293, 294.]

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Petition for writ of review by J. P. Lassen against the Board of Dental Examiners. Petition denied, and on appeal judgment affirmed.

J. G. Reisner, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for respondent.

KERRIGAN, J. In this proceeding the petitioner prayed for a writ of review directed against the board of dental examiners, upon its action in suspending the petitioner's license to practice dentistry in this state, for the reason that he had aided and abetted a person to practice dentistry unlawfully. The writ was issued out of the superior court, and after a hearing that court rendered judgment affirming the proceedings of the board of dental examiners. This appeal is from such judgment.

The transcript consists of the writ, the return, and the judgment. In the return to the writ the proceedings of the court upon the hearing of the charges preferred against the petitioner and appellant are set forth, together with a certificate of its secretary as to what proceedings were taken upon said hearing. From this certificate it appears that when the charges were called for hearing petitioner appeared with his counsel; and, upon the swearing of a stenographer to take down the testimony, the board proceeded to take testimony in support of the written charges made by a party familiar with the facts. Thereupon petitioner entered an oral demurrer to the charges contained in the written accusation, which, upon being overruled, and upon a reading of the charges, a plea of not guilty was entered by the appellant. Witnesses were then called on behalf of the prosecution. While an opportunity was given to the petitioner to present testimony in his own behalf, he offered no evidence in denial of, or in opposition to, any of the charges. The certificate further recites that the evidence was then closed, and after a full consideration of the matter the board found the facts stated in the written charges to be true, and determined that petitioner was guilty as charged, and suspended his license to practice dentistry for the period of one year. The evidence taken by the board is not certified in the return.

Two points are relied upon by petitioner for a reversal of the judgment: First, it is claimed that the accusation upon which the judgment of the board is based is not verified by a person "familiar with the facts" alleged in the accusation, as required by the dental act, and that, as no evidence is incorporated in the return, showing that the accuser was so acquainted, the accusation, standing alone, is insufficient to show that the board ever acquired jurisdiction to render judgment, and that such judgment is therefore void; second, it is further claimed that the provisions of the dental act leave the power within the board to determine what is meant by aiding and abetting, and for that reason this provision of the act is null and void.

From the accusation contained in the return it appears that J. P. Lassen, petitioner herein, is charged with unprofessional conduct; and, as the basis of such charge, certain facts are specified, the substance of which is as follows: That on or about the 8th day of February, 1913, petitioner maintained a dental office in the city and county of San Francisco, and on the said day directly and knowingly employed one Harry E. Keck, an unlicensed dentist, for the purpose of performing operations of all kinds, including the treating and correction of lesions and malimposed formations of the human teeth and jaws, and that on or about said day, and pursuant to his employment by petitioner. said Harry E. Keck did perform an operation upon the teeth of one Arthur Barrons for a fee, and that such fee was retained by petitioner.

A second allegation charges petitioner with permitting said Keck to have the use of petitioner's office and certain dental implements and paraphernalia, for the purpose of practicing dentistry, as the same is defined by section 15 of the dental act, and charges that by said acts he aided and abetted a nonlicensed person to practice dentistry unlawfully. This accusation, upon which the board based its judgment, was made and verified by one Carrie E. Doolittle; the verification being in the usual form provided by section 446, Code of Civil Procedure. The contention of appellant that the accusation upon which the judgment of the board is based was not verified by a person familiar with the facts alleged in the accusation cannot be maintained. Section 21½ of Act No. 922, General Laws, p. 300, provides that:

> "All accusations must be in writing, verified by some party familiar with the facts therein charged."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The accusation upon which the board based its judgment was verified as follows:

> "Carrie E. Doolittle, being first duly sworn, says that she is the petitioner in the above and foregoing petition; that she has read and signed the same and knows the contents thereof; that the facts therein stated are true of her own knowledge, except as to the matters therein alleged on information and belief; and, as to those matters, that she believes it to be true."

[1] In support of the contention that the verification is insufficient, it is argued that, under such a verification, all of the facts charged in the accusation might have been made on information and belief, and that this does not satisfy the mandate of the statute. But every allegation of fact contained in the accusation is stated positively as of the accuser's own knowledge. There is no fact alleged upon information and belief. An affidavit that all the facts alleged are true to the knowledge of the affiant, except such as are stated on information and belief, where no facts are so alleged, is equivalent to an affidavit that all the facts alleged are true to the knowledge of the affiant, notwithstanding the usual words, "except as to those matters therein stated on information and belief," etc.

Where no fact is stated on information or belief, a verification is regarded as a positive affirmance of the truth of the allegation. Christopher v. Condogeorge, 128 Cal. 581, 61 Pac. 174; Benepe v. Scheidegger, 32 Mont. 424, 80 Pac. 1024, 1026. If an averment is made positively, the verification is sufficient if the affidavit states that the facts are true of the pleader's own knowledge. As was said in Patterson v. Ely, 19 Cal. pages 28, 40:

> "To require anything further would be to sink the evident spirit and object of the statute into a mere observance of form."

See 31 Cyc. 541–543; Conolly v. Schroeder, 121 App. Div. 634, 106 N. Y. Supp. 304; In re Curtiss, 134 App. Div. 547, 119 N. Y. Supp. 556; Kieley v. Barron, 87 App. Div. 317, 84 N. Y. Supp. 306; Muirhead v. Sands, 111 Mich. 487, 69 N. W. 826. The cases of In re Hotchkiss, 58 Cal. 39, and In re Hudson, 102 Cal. 467, 36 Pac. 812, cited by appellant in support of his contention, are not in point. In both of those cases, which were disbarment proceedings, the accusation and verification were expressly stated to be made on information and belief; while the statute (section 291, Code Civ. Proc.) requires the accusation to be verified by positive affirmation. As above stated, the accusation in this particular case was made in direct and positive language of matters alleged to be within the knowledge of the informant, and none were made upon information and belief. The words in the verification "except as to such matters therein stated on information and belief" were mere surplusage. We conclude, therefore, that the verification, taken in connection with the accusation, is sufficient to satisfy the requirement of the act.

[2] Equally untenable is the appellant's second contention that the dental act is void for the reason, as claimed, that it leaves the decision as to what constitutes aiding and abetting to the board or to the individual making the accusation. We are cited to the case of Hewitt v. Board of Supervisors, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, as supporting appellant's claim. The case is not parallel. It was decided under the medical act, which provides that one who advertised the cure of diseases by printing "grossly improbable" statements is liable to a revocation of his license; and it was held that the provisions of the statute that all advertising of medical business in which "grossly improbable" statements are made shall constitute unprofessional conduct, for which the board may revoke the certificate, without defining what statements shall be deemed "grossly improbable," and which leaves it to the whim or caprice of the medical examiners, without any standard for their guidance, is too indefinite and uncertain to be enforced.

[3] No such situation is here presented. In the case at bar the charges are direct and positive to the effect that appellant actually aided and abetted said Keck in the commission of his offense by supplying him with the tools necessary therefor; that he was employed by appellant, and was supplied with dental paraphernalia for the purpose of practicing dentistry, as defined by section 15 of the dental act. Said section clearly declares what is meant by the practice of dentistry; and the appellant is charged in the accusation with aiding and abetting an unlicensed person, known to him to be such, to so practice dentistry unlawfully, and of receiving the reward of such unlawful practice. Certainly the act of employing a person, providing him with an office and dental instruments for the purpose of practicing dentistry, and receiving the reward of his illegal practice is aiding and abetting such person to commit the offense of practicing dentistry without a license.

There is no doubt or uncertainty as to what is meant by the words "aiding and abetting" one to practice unlawfully, as used in the dental act, as claimed by respondent. This is a pure question of fact, which is subject to proof in the ordinary manner that proof is taken of such offenses in criminal courts.

The expression "to aid and abet," as used in criminal law, means being present either actually or constructively at the time and place of the offense and doing some act which renders aid to the perpetrator. The Legislature certainly has the power to vest the determination of this question in the dental board.

We therefore conclude that the return to the writ shows jurisdictional facts sufficient to justify the assumption of jurisdiction by the board, and that it had the power to determine that the act charged constituted aiding and abetting within the meaning of the statute.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

24 Cal. App. 739

PEOPLE v. COSTA. (Cr. 315.)

(District Court of Appeal, Second District, California. June 10, 1914.)

1. Rape (§ 49*)—Evidence—Admissibility—Credibility.

Where accused was prosecuted for having committed rape on prosecutrix June 3d, and she made no complaint until July 31st, when she was arrested, when she voluntarily or by reason of threats, intimidation, or promise of immunity told the arresting officers that she had had sexual intercourse with accused, he was entitled to prove by her what induced her to then disclose the charge to them and show whether she did so voluntarily or by reason of threats, etc., as affecting the weight of her testimony.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 70; Dec. Dig. § 49.*]

2. Rape (§ 49*) — Motive of Prosecutrix — Complaint—Reason for Delay.

Where, in a prosecution for rape on a female under 16 years of age, it appeared that she made no complaint for nearly two months, when she told her story to officers arresting her, the court should have permitted the fullest investigation of the circumstances, motive, and reasons for withholding the statement and then making the complaint to officers.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 70; Dec. Dig. § 49.*]

3. Criminal Law (§ 683*)—Evidence Admissible by Reason of the Admission of Other Evidence.

Where, in a prosecution for rape on a female under 16 years of age, a physician testified to an examination made of prosecutrix and that he found her suffering from gonorrhœa, accused was entitled to show by the testimony of another physician who had examined him that he was free from the disease, and that it was impossible for prosecutrix to have contracted it from him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615–1617; Dec. Dig. § 683.*]

4. Criminal Law (§ 696*)—Trial—Rulings on Testimony—Duty to Rule.

Where, in a prosecution for rape on a female under 16, a witness testified to statements by accused concerning his relations with prosecutrix, but on cross-examination the witness showed that he did not know that prosecutrix was the girl referred to in accused's statements, whereupon motion was made to strike out the witness' testimony, the court should have sustained the motion at once, and it was improper to withhold a ruling until the argument was begun, and then state, "I think the testimony * * * should be stricken out."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639–1644; Dec. Dig. § 696.*]

5. Criminal Law (§ 696*)—Trial—Acts of Judge.

Where a motion was made to strike out an answer of a witness, it was improper for the court, on sustaining the motion, to direct the reporter to read the answer because one of the jurors had not heard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639–1644; Dec. Dig. § 696.*]

6. Criminal Law (§ 655*)—Trial—Misconduct of Judge.

That the trial judge was hasty, unreasonably arbitrary, and humiliating to accused's counsel was not alone sufficient to justify a reversal of a conviction, but might be properly considered to accentuate the effect of other errors, if any.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520–1523, 1527, 1535; Dec. Dig. § 655.*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Louis Costa was convicted of rape, and he appeals. Reversed.

Ernest M. Torchia, of Los Angeles, and Henry E. Carter, of Wilmington, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of rape alleged to have been committed June 3, 1913, upon a female under the age of 16 years. He appeals from the judgment and an order denying his motion for a new trial.

Defendant was a night watchman for a machine shop alongside of which was a lumber yard, both located adjoining the beach at San Pedro. According to the prosecutrix, who was 14 years of age, she had been wading along the beach, and at about 6 o'clock p. m. the defendant, whom she had known for some time, approached and spoke to her, when they walked into the lumber yard, and upon reaching a certain point defendant took hold of her and pulled her a few feet around a pile of lumber and committed the act charged. On cross-examination she was questioned as to whether she at the time said anything to her mother about the matter, when she first told her mother of what defendant had done, and whether she told any one about the matter, to all of which questions objections were sustained upon the ground that the evidence sought to be elicited was immaterial and not cross-examination. It appears that on July 31st the girl was arrested by two officers—upon what ground is not shown. After taking her home, the same officers went immediately in search of defendant and placed him under arrest. Referring to her arrest and being taken to court, she was, on cross-examination, asked, among other similar questions, whether the officers said anything to her, whether that was the time she made complaint against defendant, to which objection was sustained. She was then asked the following questions: "When was the first time you made complaint against the defendant?" "Did you have a talk with the officers when they were taking you down to court?" to which objections based upon the ground

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that they were immaterial and not cross-examination, were sustained. Thereafter defendant called the prosecutrix as his own witness and, after proving by her that on July 31st she first told of the circumstance and then to the officers arresting her, the following proceedings occurred:

"Q. Now, what did those officers say to you when they arrested you? I will ask you if they arrested you?

"Mr. Blair: I object to that as immaterial, irrelevant, and incompetent, and no foundation laid what they said. It is hearsay. I put it on that ground.

"The Court: The objection is sustained.

"Mr. Carter: Now, your honor—

"The Court: I have ruled on that, Mr. Carter. Proceed.

"Mr. Carter: I have authority—

"The Court: Mr. Carter, would you mind going on with the case?

"Mr. Carter: I think this is very material.

"The Court: I intend to be polite. You take your seat, Mr. Carter.

"Mr. Carter: I will ask—

"The Court: Mr. Bailiff, you will seat Mr. Carter, if he does not seat himself.

"Mr. Carter: I bow to the court, but I insist on this.

"The Court: All right.

"Mr. Carter: Q. Did the police officers make any threat to you to induce you to tell what had happened between you and Louis?

"Mr. Blair: Just a minute. I object to that as leading, immaterial, irrelevant, and incompetent, and hearsay, and no foundation laid.

"The Court: I sustain it on the last ground.

"Mr. Carter: Q. Were any threats made to you when you made this complaint to the police officers?

"Mr. Blair: Object to that as immaterial, irrelevant, and incompetent, and no foundation laid.

"The Court: I sustain it on the last ground.

"Mr. Carter: Q. State what the police officers said to you when they took you under arrest, or put you under arrest at the lumber yard on the 31st day of July of this year?

"Mr. Blair: I object to that as calling for hearsay evidence, and no foundation laid.

"The Court: The objection is sustained.

"Mr. Carter: Q. Was there anything said by the officers to you in reference to any transaction between you and Louis Costa at the time of your arrest?

"Mr. Blair: I object to that as hearsay evidence and as immaterial, irrelevant, and incompetent, and no foundation laid.

"The Court: The same ruling, the objection is sustained."

[1] Notwithstanding the fact that the alleged offense was committed on June 3d, the prosecutrix made no complaint prior to July 31st, on which date she was placed under arrest, when she voluntarily, or by reason of threats, intimidation, or promise of immunity, told the officers arresting her that she had had sexual intercourse with defendant. If the statement was obtained by threats, or she was induced to make the complaint by promise of immunity from prosecution, it was highly important to defendant that the jury be informed of such fact as affecting the weight to be given her testimony upon which, with little or no corroborative circumstances, he was convicted. The mere charge of an offense so heinous in nature is well calculated to arouse the feelings of the jury against the accused and excite its sympathy for the prosecutrix, particularly when the latter is a child of 14 years of age, thus placing the defendant, however innocent, at the mercy of her evidence. Said the Supreme Court in People v. Benson, 6 Cal. 223, 65 Am. Dec. 506, in discussing a like case:

> "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenseless, and courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."

And in People v. Baldwin, 117 Cal. 249, 49 Pac. 187, it is said:

> "It will be sufficient to say, in a general way, that in a case of this character the very widest latitude compatible with our somewhat technical and restricted rules of evidence should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness. In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right in an endeavor to maintain his innocence."

See, also, People v. Christy, 65 Hun, 352, 20 N. Y. Supp. 278; People v. Mitchell, 5 Cal. App. 45, 89 Pac. 853; People v. Howard, 143 Cal. 316, 76 Pac. 1116.

[2] The rulings of the court in excluding the evidence were not only error, but highly prejudicial to the substantial rights of defendant. The court should have permitted the fullest investigation as to the circumstances, motive, and reasons for withholding any statement of the offense for a period of two months and then telling the officers who had her in custody under arrest. As said in People v. Howard, supra:

> "If she was testifying to the truth, such investigation would not have injured the cause of the prosecution. If she was testifying to a falsehood, the defendant should have been allowed in every reasonable way to show it."

[3] A physician was called as a witness on the part of the people, who testified that she made a physical examination of the prosecutrix a few days before the trial and found that she had gonorrhœa. The prosecutrix had testified to having had but one act of sexual intercourse in her life, and that was with the defendant on June 3d, from which fact, if true, it naturally followed that the disease was contracted from him. For the purpose of showing the improbability of such conclusion defendant called as a witness a physician who had made a physical examination of him, and by questions sought to elicit evidence to the effect that he was not afflicted with gonorrhœa. Objection was made thereto upon the ground that it was too remote, whereupon defendant's attorney said to the court: "I may state to the court in that relation that this defendant was examined by some of the city physicians in the

city jail—" but was interrupted by the court, saying: "That has not anything to do with this witness' testimony." The witness was then permitted to state that he examined the defendant for the purpose of ascertaining whether or not there was any gonorrhœal infection, to which evidence, notwithstanding it had been given, an objection was sustained. With reference to this alleged error, the language of the court in People v. Fong Chung, 5 Cal. App. 587, 91 Pac. 105, is particularly applicable:

> "The district attorney in his zeal desired the case to be presented to the jury upon evidence as to the one act with defendant, and the corroborating fact of the girl having a venereal disease. Such facts alone would give him a beautiful theory as to the defendant's outrage upon an innocent girl of tender years, and his giving her a venereal disease; but the defendant had some rights."

If the testimony to the effect that the girl at the time of the trial had a venereal disease which, according to her testimony, could only have been contracted from the defendant, then certainly testimony of physicians to the effect that defendant was not suffering from such disease, and perhaps had never had it, was competent as tending to contradict the inference which might be drawn from the people's testimony. He should have been allowed in every reasonable way to prove the impossibility of the girl contracting the disease from him.

[4] Witness Corbett was called on behalf of the people and permitted to give evidence as to statements made in his presence by defendant concerning his relations with the girl. On cross-examination, however, the fact was brought out that there were several girls who frequented the vicinity, and the witness did not know what girl was referred to, and it was made apparent that the direct evidence of the witness did not tend in any way to connect defendant's statements with the prosecutrix. Whereupon, after such fact was disclosed on cross-examination, defendant moved that all evidence of the witness as to admissions of defendant be stricken out for the reason that it was not shown that such admissions had any reference to the prosecuting witness, or were in any wise connected with the crime charged. The court refused to rule upon the motion, stating that it would do so before the case was over. No ruling was made until the argument to the jury was begun, when the court remarked: "I think the testimony of Mr. Corbett should be stricken out." Whether such thought was expressed to the jury is not made to appear. The testimony of this witness was of a character which, under the circumstances, rendered it highly prejudicial to defendant and should have been stricken out and withdrawn from the jury immediately upon the close of the cross-examination when the motion was made. The casual soliloquy of the court after the argument to the jury had begun was in no wise calculated to remove from the minds of the jurors the poisonous effect of the incompetent testimony.

[5] At another point in the proceedings a motion was made by defendant's counsel to strike out an answer given by the witness, which motion was granted, the court, however, stating:

> "One of the jurors did not hear that last answer. Will the reporter read it?"

Aside from the fact that, so far as shown by the record, no juror indicated his failure to hear the answer which was stricken out as incompetent, we are at a loss to perceive any reason for having it read to the jury.

[6] Appellant complains that, throughout the trial, the action of the trial judge was hasty, unreasonably arbitrary and humiliating to his counsel. Such fact, if true, standing alone in the absence of prejudicial error, would not justify a reversal of the case, but merely accentuate the effect of other errors disclosed by the record.

The record discloses other errors, some of which are likewise prejudicial, but as the judgment and order appealed from must be reversed for the reasons above stated, it is unnecessary to discuss them, since a recurrence thereof is improbable in a retrial of the case.

The judgment and order are reversed.

We concur: CONREY, P. J.; JAMES, J.

24 Cal. App. 659

PEOPLE v. BARTOL. (Cr. 244.)

(District Court of Appeal, Third District, California. June 1, 1914. Rehearing Denied by Supreme Court July 30, 1914.)

1. Indictment and Information (§ 83*) — Sufficiency—Accessories.

An information charging defendant with rape in that she aided and abetted T. in accomplishing sexual intercourse with M., a female under the age of 16 years, and not his wife, *held* unobjectionable.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 226; Dec. Dig. § 83.*]

2 Rape (§ 51*)—Sufficiency of Evidence.

A conviction of rape *held* supported by substantial evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

3. Criminal Law (§ 742*)—Credibility of Witnesses—Question for Jury.

It is a question for the jury whether prosecutrix, when, after testifying to a thing, she testified to the contrary, explaining that she made a mistake when she first testified, was telling the truth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. § 742.*]

4. Criminal Law (§ 1036*) — Appeal — Failure to Object to Order.

No objection having been made to an order that there should be no further cross-examination of prosecutrix, and it not appearing defendant desired to ask any further questions, there can be no complaint thereof on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639–2641; Dec. Dig. § 1036.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. Criminal Law (§ 693*)—Objections to Questions.

Defendant's objection to a question to an impeaching witness, on the ground that the orderly course of impeachment had not been followed, should be made before the question is answered, and she not then making it, but requesting that the impeaching witness give the conversation, and making it only after the answer is practically completed, it is too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

6. Witnesses (§§ 388, 391*)—Impeachment — Inconsistent Statements.

The proper and orderly course for impeachment by evidence of an inconsistent statement is to ask the impeaching witness, as well as the witness to be impeached, whether certain statements were made by the latter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242, 1246, 1248; Dec. Dig. §§ 388, 391.*]

7. Criminal Law (§ 1137*) — Appeal — Invited Error.

Defendant may not complain of an instruction given at her request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

8. Criminal Law (§ 1172*)—Appeal—Harmless Error.

It being undisputed that prosecutrix in rape was under the age of 16, defendant was not prejudiced by mistake of the court in assuming the age of consent was 18 instead of 16.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

9. Criminal Law (§ 811*) — Instructions — Credibility of Witnesses.

The vice of an instruction that it is proper to consider whether the position and interest of defendant may not affect her credibility and color her statement is in calling particular attention to her testimony; the principle should be given in general terms, and the jury left without suggestion of its application to any particular witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969–1972; Dec. Dig. § 811.*]

10. Criminal Law (§ 1186*)—Appeal—Harmless Error—Instructions.

The statement, in an instruction, of the truism that it is proper to consider whether the position and interest of defendant may not affect her credibility and color her statement is not ground for reversal of her conviction; Const. art. 6, § 4½, requiring an affirmance, unless, after a review of the whole record, the appellate court is of the "opinion"—that is, of the belief or conviction—that error resulted in miscarriage of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Ruby E. Bartol was convicted, and appeals. Affirmed.

W. A. Wood, of Gold Beach, Or., and E. M. Frost and Henry L. Ford, both of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] We can see no valid objection to the information in this case, which, in its charging part, is as follows:

> "Ruby E. Bartol is accused by the district attorney of the said county of Del Norte by this information of the crime of rape, committed as follows: That said Ruby E. Bartol did on or about the 8th day of February, A. D. 1913, at and in said county of Del Norte, state of California, and before the filing of this information, then and there willfully and unlawfully and feloniously help, aid, and assist and abet one Orville Taggart in the perpetration and accomplishment of an act of sexual intercourse, then and there committed and accomplished by the said Orville Taggart with and upon one May Bartol, who was then and there a female under the age of 16 years, to wit, of the age of 11 years, and not then and there the wife of the said Orville Taggart."

The offense of the actual principal, one Orville Taggart, is set out substantially in the language of the statute defining the crime (section 261, Pen. Code), and this has frequently been held to be sufficient. To charge that the defendant did "help, aid, and assist and abet" said Taggart in the perpetration and accomplishment of said act brings her clearly within the contemplation of section 31, Penal Code. Of course she could not be the principal, as commonly understood, in the perpetration of the crime, but, as in the case of any other offense, she might "aid and abet in its commission," or, not being present, advise and encourage its commission.

[2] We cannot say that there is no substantial evidence to support the verdict. While the testimony of the little girl seems almost unbelievable, and she contradicts herself in material points, she did testify that her mother, the defendant, threw her upon the bed and held her hands while said Taggart committed the offense charged. She explained the occurrence so that, giving full credit to her testimony against appellant, the inference of guilt necessarily follows. Strange and startling as her testimony may be, we cannot say that it is inherently improbable or that the jury had no right to accept it as true. In addition we may state that she is substantially corroborated by the testimony of her younger brother. It may be added that some time after the event she was examined by a physician, but, for some reason not disclosed, the physician was not called as a witness. It seems unfortunate that evidence obtained from a physical examination was not produced. This might have constituted an important circumstance in corroboration or refutation of the girl's statements.

[3] We cannot hold that there was a variance between the evidence and the allegations of the information, as contended for by appellant. It is true that in one part of her testimony the prosecutrix testified that her mother was not present when Taggart had intercourse with her, but that she was present and held her hands when one Otto Creitzer perpetrated a similar outrage. But thereafter the record shows the following:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Q. Did some one take hold of you? A. Yes, sir. Q. Who? A. Mamma. Q. What did she do with you? A. She slung me on the bed. Q. What did they do after your mother threw you on the bed, May? A. Josie Horn took hold of me. Q. And did some one else take hold of you? A. Orville Taggart. Q. Did they do anything to you? Court (to witness): Go on and tell if they did anything. A. Otto Creitzer done business with me. Q. And then what happened after that? A. Then Taggart did it."

She afterward explained that she made a mistake when she said that her mother was not present when Taggart was there, as she misunderstood the question. It was, of course, for the jury to determine whether she was telling the truth.

[4] On cross-examination the witness testified that she never told any one about the occurrence except that she said to Alice Overton, her cousin, that "Creitzer done business with me," and that she did not say anything about Orville Taggart, and her examination as a witness was brought to a close as follows:

"Now, May, at the time you told Alice about this, didn't you tell her your mother didn't know anything about it? A. Yes, sir; I did. Court: I don't think I will allow any further questions of this child; if you have any other evidence put it on."

No objection to this order was made by appellant, nor does it appear that she desired to ask any further questions. The cross-examination seems to have been conducted with the utmost courtesy to all and with unfailing consideration for the feelings of the witness, and it certainly was not unduly protracted. Particularly in a case of this kind should ample opportunity be offered, through the efficacious method of cross-examination, to test the veracity of the prosecutrix; and, if appellant had manifested a desire to proceed further, we should be inclined to hold that the said order of the court operated as an improper restriction of her right.

[5, 6] One A. J. Huffman was called as a witness by the people to impeach Mrs. Violet, who had testified for the defendant. The purpose was to show that Mrs. Violet had made a statement to Mr. Huffman inconsistent with the former's testimony. The proper foundation had been laid when Mrs. Violet was on the stand, and the record shows the examination of Mr. Huffman as follows:

"District Attorney: Mr. Huffman, you some time within the last few weeks had a conversation with Mrs. Violet in the presence of Mr. Jenkins? A. Yes, sir. Q. And in that conversation did Mrs. Violet make a statement as to Mrs. Horn having lived at her house? A. Yes, sir. Q. And did you ask her with reference to Mrs. Horn? Attorney for Defendant: Now let him state what the conversation was."

The witness then proceeded to state a part of the conversation, and the attorney for defendant said:

"It seems that this is all out of place. Mrs. Violet was not under oath at that time. Same objection."

The objection was overruled, and the witness continued with the conversation. After Mr. Huffman had apparently completed the recital, the attorney for defendant said:

"To impeach a witness by contradictory statement, the witness when on the witness stand must be informed of the time, place, and circumstances and the conversation that took place between the parties. Therefore this is incompetent for the purpose of impeaching the witness, under the rules provided by the Codes of this state. I move to strike out all of the last part of the evidence of this witness upon the ground that it is incompetent, irrelevant, and immaterial and does not conform with the requirements of the Code for the purpose for which it is offered."

The motion was denied. The objection, of course, should have been made before the question was answered. On the contrary, the appellant had requested the witness to state the conversation, and the only objection of any merit whatever was made after the answer had been practically completed, and it may be said also that the attention of the witness Violet was called to the conversation with Mr. Huffman with sufficient particularity to justify her contradiction. The proper method of impeachment was not pursued, but of this appellant cannot complain, because she requested the whole conversation to be given. When a witness is sought to be discredited in this way, his attention must be called to the statements inconsistent with his present testimony with the circumstances of times, places, and persons present, and he must be asked whether he made such statements. Section 2052, Code Civ. Proc. If he denies having made them, the statements with the aforesaid circumstances should be related to the impeaching witness, and he should be asked if those statements were made. In other words, the proper and orderly course is to ask each witness whether certain statements were made by the witness who is sought to be discredited.

Accordingly, after his attention had been called to the time, place, and persons present, as in the question to Mrs. Violet, Mr. Huffman should have been asked if she stated that "she woke up some nights and found Mrs. Horn gone," as that was the question to which Mrs Violet responded: "I never did tell Mr. Huffman no such thing." But appellant preferred to pursue the other course indicated, so no error was committed of which she can complain.

[7] Upon the question of "alibi," an instruction was given by the court concluding with this direction:

"But it is sufficient if the defendant prove the alibi by a preponderance of the evidence, and is not required to prove the same to a moral certainty and beyond a reasonable doubt."

Of this appellant says:

"We submit that the giving of the foregoing instruction was gross error, and thereby deprived the defendant of her substantial rights to have the jury correctly instructed as to the law."

But, when we turn to the record, we find the instruction was given at the request of defendant, and of course she cannot find fault with the court in complying with her request.

Another instruction which is seriously challenged by appellant, we may state, is in the same category, since it was given at her request.

[8] It is clear that defendant was not prejudiced by the mistake of the court in assuming that the age of consent was 18 instead of 16 at the time of the alleged commission of the offense. Since the prosecutrix was not over 12 years of age, she was within the rule as it was before as well as after the amendment, and the erroneous construction could not possibly have done any harm. It seems that the offense was committed February 8th, and the amendment in question did not take effect until August, but, in view of the undisputed age of the prosecutrix, the circumstance is of no material consequence here.

[9] The only serious controversy that can arise is suggested by the following instruction:

> "The jury are instructed that they are the exclusive judges of the evidence and of the credibility of the witnesses and of the weight to be given to their testimony; and they may consider the character and appearance of the witnesses, the consistency and reasonableness of their statement, the interest, if any, they may have in the outcome of the case, and from these may judge and determine as to the credibility, weight, effect, and sufficiency of such testimony. The testimony of an accomplice ought to be viewed with distrust, and, in weighing the evidence of the defendant, it is proper for the jury to consider whether the position and interest of such defendant may not affect her credibility and color her testimony, but you are to weigh it fairly in the light of all the surrounding circumstances and give it such credit as you think it ought to receive."

We have set out the whole of the instruction, but the portion to which appellant particularly objects, as may readily be surmised, is that referring the jury to "the position and interest of such defendant."

As sensible men, the jurors would take that circumstance into consideration in weighing the testimony of defendant, and they needed no such admonition from the court. And it is perfectly apparent that they had a legal and moral right to consider "the position and interest of the defendant" in determining her credibility. That is one of the tests that must be applied to all witnesses. And, of course, without any intimation from the court, the jury understood the "position" of defendant and knew her "interest" in the outcome of the case. The vice of the instruction is, though, manifestly, in calling particular attention to the testimony of the defendant. The danger of such practice lies in the possibility that the jury may infer that the judge of the court intends to discredit the testimony of the defendant. The principle covered by the instruction should be given in general terms, and the jury should be left entirely without suggestion of its application to any particular witness.

A somewhat similar instruction was given in People v. Maughs, 149 Cal. 262, 86 Pac. 191, as follows:

> "Where the defendant offers himself as a witness, in determining his credibility, it is proper to take into consideration the consequences, inducements, and temptations which would ordinarily influence a person in his situation."

After some discussion of the instruction, the court, through Mr. Justice Henshaw, concludes:

> "For this reason, therefore, we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him."

In People v. Borrego, 7 Cal. App. 613, 95 Pac. 381, also, it was held that:

> "It was prejudicial error to instruct the jury that they should consider the situation of the defendant and the manner in which he would be affected by the verdict, in determining the weight of his testimony, as being in effect an argument against the defendant upon a matter of fact."

It is true that in People v. Ryan, 152 Cal. 364, 92 Pac. 853, a similar instruction was given, and it was held by the Supreme Court insufficient to justify a reversal of the judgment; the case having been tried before the said opinion in the Maughs Case was handed down. The distinction seems to have been based upon the consideration that, since the trial judge gave the instruction before it was positively condemned by the Supreme Court, his action was no evidence of a desire on his part to be unfair. We respectfully submit, however, that the important question is not whether the trial judge desires to be unfair, but whether, as a matter of fact, he has been unfair, and whether, by reason of his conduct, the defendant has been prejudiced.

It is to be observed that the instruction here is much less objectionable than the one considered in the Maughs Case. There the court referred to the "inducements, consequences, and temptations" of the defendant. Here it is more nearly a mere commonplace, the "position and interest" of the defendant.

[10] Moreover, the situation must be viewed in a different light from that which obtained when the Maughs decision was rendered. Under the recent amendment (No. 4½) to article 6 of the Constitution, it is not sufficient to warrant a reversal to show that error was committed, but, after a review of the whole record, the error must be disregarded and the judgment affirmed, unless the appellate court is of the opinion that the error resulted in a miscarriage of justice. People v. O'Bryan, 165 Cal.63, 130 Pac. 1042. "Opinion" is probably used in said amendment in the sense of belief or conviction.

Assuming, then, that error was committed in the giving of said instruction, after considering the entire record we do not see how it can be held that an appellate court could or should be convinced that a miscarriage of justice resulted. There is ample evidence to support the verdict. The jury must have believed it to be true. We must accept the verdict, therefore, as just. The conclusion is that there was no miscarriage of justice. Nor have we any reason to believe that the jury would have had a different belief as to that evidence if said instruction had not been given, or that they would have reached a different result.

It is entirely clear that we cannot say, with any degree of certitude or assurance or even confidence, that said conduct of the court resulted in any injustice. There may be a suspicion to that effect. This will always exist when error is committed, but the provision of the Constitution requires more than that before a reversal is warranted.

The jury must have been satisfied that the atrocious offense, charged in the information, reaching an almost unparalleled limit of infamy, was committed by the defendant, and, far from holding an opinion that the statement by the court of a truism resulted in a miscarriage of justice, we must believe that the result was not thereby prejudicially affected, and that the conclusion of the jury was entirely just.

We think a sufficient showing has not been made to justify an interference with the verdict, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 746

PEOPLE v. HOOSIER. (Cr. 245.)

(District Court of Appeal, Third District, California. June 10, 1914. Rehearing Denied by Supreme Court Aug. 8, 1914.)

1. RAPE (§ 52*)—EVIDENCE—SUFFICIENCY.

In a prosecution for rape on a female 11 years of age, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–74, 76; Dec. Dig. § 52.*]

2. CRIMINAL LAW (§ 741*)—EVIDENCE—TRIAL—QUESTIONS FOR COURT OR JURY.

Where, in a prosecution for rape on a female 11 years of age, prosecutrix and defendant's accomplice testified for the state, the fact that their testimony did not agree in minor particulars did not justify the court in directing an acquittal or setting aside a conviction; the weight of the testimony being exclusively for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

3. CRIMINAL LAW (§ 511*)—EVIDENCE—ACCOMPLICE'S TESTIMONY—CORROBORATION.

That a conviction cannot be sustained on the testimony of an accomplice, as provided by Pen. Code, § 1111, does not mean that the testimony of an accomplice may not be believed, since, if there is other evidence which tends to connect defendant with the commission of the crime charged, the accomplice's testimony is to be considered as any other evidence, and given such weight as the jury conclude it is entitled to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. § 511.*]

4. CRIMINAL LAW (§ 1159*)—TRIAL—ALIBI—CREDIBILITY OF WITNESSES.

Where accused offered evidence to establish an alibi, which was necessarily in conflict with the testimony of the state's witnesses tending to connect him with the offense charged, it was the jury's province to determine which they would believe, and their finding that the alibi was not established was not reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

5. CRIMINAL LAW (§ 494*) — OPINION EVIDENCE—EFFECT.

In a prosecution for rape on a child of 11, evidence of a physician, who examined her some 8 or 9 months after the assault, *held* not to conclusively show that she had never been subjected to the treatment complained of, but instead was consistent with a finding that the rape was committed as charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1081; Dec. Dig. § 494.*]

6. CRIMINAL LAW (§ 531*)—EVIDENCE—CONFESSIONS—PRELIMINARY PROOF.

A sheriff testified that defendant sent for him and stated that he wanted to make a statement or confession. The sheriff told him he would see if the prosecuting attorney would "stand for it," and on returning told defendant "that there is nothing doing," whereupon defendant stated that he wanted to make a confession and relieve his mind, when the sheriff told him to go ahead and do it, but that any statement he might make would be used against him. *Held*, that such proof was sufficient to establish prima facie that the confession was voluntary, so as to justify its admission, in the absence of any proof to the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212–1217; Dec. Dig. § 531.*]

7. INDICTMENT AND INFORMATION (§ 176*)—ISSUES AND PROOF—ELEMENTS OF OFFENSE—TIME.

Where the circumstances of the crime charged were such as to definitely mark and identify it so as to make a conviction available as a plea of former conviction in case accused was again tried on the same charge, it was not material that the state failed to show that the offense was committed at the precise time fixed in the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.*]

8. INDICTMENT AND INFORMATION (§ 176*)—ISSUES AND PROOF—ELEMENTS OF OFFENSE—TIME.

That an information was filed within the statutory period of time, the lapse of which, before the filing of the same, would have barred a prosecution, is sufficient in criminal cases, in which time is not of the essence to support a verdict, though time of the offense has been definitely fixed in the information and not definitely proved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. § 176.*]

9. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

In a prosecution for rape, the court properly omitted to charge the jury to carefully scrutinize the testimony of prosecutrix and defendant's accomplice, testifying for the state, and to warn the jury of the danger of a conviction on such testimony, since such an instruction would have been objectionable as invading the jury's province to determine the weight of the evidence for themselves.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772–1785; Dec. Dig. § 757.*]

10. CRIMINAL LAW (§ 824*)—TRIAL—INSTRUCTIONS—REQUESTED CHARGE—NECESSITY OF REQUEST.

Accused could not successfully object to the court's omission to charge with reference to the testimony of prosecutrix and defendant's accomplice, who testified for the state, where no request for such an instruction was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.*]

11. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—ALIBI—BURDEN OF PROOF.

Instructions assuming that an alibi is a special defense, and charging that the burden was on defendant to establish the same by a preponderance of the evidence and not beyond a reasonable doubt, were erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880–1882, 1906, 1907, 1909–1911, 1960, 1966, 1967; Dec. Dig. § 782.*]

12. CRIMINAL LAW (§ 1137*)—APPEAL—RIGHT TO ALLEGE ERROR — INSTRUCTIONS REQUESTED.

Accused may not successfully complain on appeal of erroneous instructions which he himself requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

13. CRIMINAL LAW (§ 1172*) — APPEAL — INSTRUCTIONS.

Where there was strong and convincing proof of defendant's guilt, an instruction that, in weighing defendant's evidence, it was proper to consider whether his position and interest had not affected his credibility and colored his testimony, etc., though objectionable, was not so prejudicial as to establish a miscarriage of justice and authorize a reversal of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Fred Hoosier was convicted of assault on a female about 11 years of age, and he appeals. Affirmed.

W. A. Wood, of Gold Beach, Or., and E. M. Frost and Henry L. Ford, both of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of statutory rape upon one May Bartol, a female of the age of about 11 years, and brings the case to this court on an appeal from the judgment and the order denying him a new trial.

This case contains the final chapters of the story of a veritable saturnalia of lechery which was carried on, during the month of February, 1913, at Crescent City, Del Norte county. The initial chapter of the series of malodorous transactions is given in the case of People v. Bartol, 142 Pac. 510 (Crim. No. 244), the opinion in which was filed in this court on June 1, 1914. From the beginning to the end, the story is replete with details which are revolting in the extreme and shockingly illustrate the degree of perverseness to which human nature can descend. Indeed, so monstrously diabolical are the circumstances of the series of transactions leading to this and the Bartol Cases that justly it may be declared that truly they have discovered and so added to the criminal annals of California proof of the very Ultima Thule of human depravity. It is, indeed, a heavy tax on human credulity to believe that anywhere within the zone of civilized society a mother could so far descend into the depths of depravity as to suffer herself to assist in forcing her daughter, even where the latter is of the age of consent and of judgment matured to some extent, to submit to acts of sexual intercourse with the opposite sex, and infinitely more difficult is it to conceive, and even much more to believe, that a mother would coerce her 11 year old child, a mere infant, to submit to such monstrous acts of immorality. Yet such is the story told in the Bartol Case, and which story was found by the jury who heard it to be true.

The child upon whom the outrage was committed in the Bartol Case, is the same child upon whom the defendant in this case was charged with and convicted of perpetrating a similar outrage.

It was on or about the 8th day of February, 1913, at a cottage situated in the suburbs of Crescent City, that Ruby E. Bartol, the defendant in the other case referred to, forced her daughter, May Bartol, then 11 years of age, to submit to an act of sexual intercourse with one Orville Taggart. According to the record before us, a few nights after said act by Taggart, May Bartol was similarly outraged, at her mother's home, by said Taggart, one Otto Creitzer, and the defendant.

The story, as told by the little girl and as corroborated by Otto Creitzer and by the confession of the defendant himself, is briefly as follows: That, on or about the 12th day of February, 1913, the defendant, Taggart, and Creitzer visited the Bartol home shortly after nightfall. There was also present at the house at the time a divorced woman by the name of Josie Horn. A short while after the defendant arrived at the house, Mrs. Bartol, mother of May, left her home, accompanied by a brother of Otto Creitzer, for the purpose of visiting a neighbor, to whom she had previously sold a cow, and collecting some money due her on that transaction. Besides the parties above named, there remained at the house the prosecutrix and three other children of the Bartol woman, each younger than May. Mrs. Bartol and her husband, it seems, had previously separated and were then not living together.

After Mrs. Bartol's departure, as above explained, the defendant, Creitzer, and Taggart each (one immediately after the other) had intercourse with the said Josie Horn. These acts took place in the house and were carried on with such reckless indifference that the little girl either actually witnessed them, or, from the circumstances, could not but know that they were taking place. In fact, Creitzer testified that the child threatened to make a disclosure of the whole nasty transaction, and, in the hope that its consummation would prevent the child from carrying out the threat, the horrible idea was conceived and suggested by Josie Horn that the young men have sexual relations with May. This proposition, bestial as it was, was readily assented to by the three men, and thereupon Josie Horn, assisted by the defendant, forcibly threw the little girl upon a bed and raised up her clothes. Creitzer was the first to have connection with the child. He was immediately followed by Taggart, and the latter by the defendant. While these acts were being perpetrated, Mrs. Horn held the child down, and, after it was all over, addressed the victim of the infamy as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "Now, I guess you haven't got anything on me. You wouldn't like to tell your father or Mr. Cousins that this was done to you. If you tell him that, I will tell on you."

Not many days after the outrageous occurrences above related, May Bartol went to the home of her grandfather, in Oregon, and only a short time thereafter, whether, in mere childish innocence, having no appreciation of the infamy fastened upon her character before she had hardly reached the threshold of her life, or whether from a keen consciousness of the enormity of the wrong committed upon her, divulged to a girl companion, of approximately her own age, some of the details of the shocking licentiousness occurring at her mother's home during the month of the preceding February, and to which she was an unwilling party. Thus the particulars of the terrible crimes of the defendant, his male companions, and the Bartol and Horn women finally reached the ears of the authorities of Del Norte county, who immediately instituted a searching investigation, with the result that the culprits were brought before the bar of justice. As already shown, Mrs. Bartol, the mother of the child victim of the outrages, was tried and convicted, Creitzer pleaded guilty, and the defendant, upon a trial before a jury, adjudged guilty, as before stated.

[1] The first point to which attention is directed and which constitutes one of the grounds upon which a reversal is asked is that the evidence does not support the verdict. The above statement of the facts which were brought out at the trial is sufficient to demonstrate that there is no merit to this proposition. The jury were, as is universally understood, the exclusive judges of the credibility of all the witnesses, and if, as this verdict implies that they did, they believed the testimony given by the witnesses called by the people to support the charge in the information, then this court can justly say that the evidence is conclusive of the defendant's guilt. The testimony of the prosecutrix is not unreasonable upon its face. It does not, so far as we are able to pass judgment upon it, involve the narration of an improbable story, unless it may be announced to be true, as an abstract proposition, that no civilized human can be found so foul and depraved as to commit acts of such heinousness as those which constitute the subject-matter of her testimony, and this we cannot say. She apparently told her story in a straightforward manner, hesitating at times, it is true, but only because, we have the right to assume from her immature years and innate female modesty, of the extremely embarrassing situation by which she was surrounded—compelled, as she was, to relate, in the presence of the court, the jury, lawyers, and spectators, the shameful circumstances of as flagitious an affair as ever received an airing in a court of justice. She was not shown to have any reason or motive for wrongfully charging the defendant with so egregious a crime, and while there are some apparent inconsistencies in her testimony, and it was also made to appear that the several statements she made concerning the affair were not harmonious in all particulars, still, as a whole, her story appears to be reasonable and is clearly one which it was within the legal right of the jury to believe, if convinced that it was truthful. In other words, her testimony was of such character as that it became peculiarly a function of the jury to decide whether, notwithstanding the inconsistencies and contradictions pointed out therein, her story was, in the main, entitled to such credit and weight as to persuade the conviction that the defendant was guilty.

[2] But much is made of the fact that, in certain respects, the testimony of the defendant's accomplice, Creitzer, and that of the child do not agree. In some minor particulars, the testimony of the said witnesses varied, but obviously this was a matter entirely for the jury's consideration and decision. Where two witnesses introduced by the same side disagree even upon important points of a controversy, the effect thereof is to produce a conflict in the evidence, and in such case the conclusion of the jury upon such conflict is as conclusive upon the courts of review as if the conflict had been produced by the testimony of two witnesses, introduced the one by one side and the other by the opposing side of the controversy. If, therefore, Creitzer, who was a witness for the people, contradicted the prosecutrix even upon important and vital matters of fact, it was for the jury to determine which of the two was to be believed as to those matters, and their decision thereon is the end of the proposition. But it is to be remarked that as a matter of fact, on all important points, Creitzer corroborated the prosecutrix; the

points of divergence in their testimony merely involving, as stated, matters of no special significance, such, for instance, as the position of the child on the bed when she was outraged, whether sidewise or lengthwise of the bed.

[3] Nor were the jury compelled to entirely repudiate the testimony of Creitzer merely because he was an accomplice in the crime committed by the defendant, as is the contention. The law, as a matter of policy, based upon the probability that the guilty, to relieve themselves to some extent from the consequences of their crimes, may be tempted to bear false witness against the innocent, has wisely provided that no conviction can be sustained on the testimony of an accomplice, "unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense," and that "the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof." Pen. Code, § 1111. But this does not mean that an accomplice may not be believed. If there is other evidence which measures up to the requirement of said section tending to connect the defendant with the commission of the crime charged, then the testimony of the accomplice is to be considered by the jury as is any other testimony and given such weight as they may conclude that it is entitled to.

[4] The defendant attempted to establish an alibi by the presentation of evidence tending to show that, on the evening of the day upon which the offense is charged by the information to have been committed, and on several evenings thereabouts, he, as well as Josie Horn and Orville Taggart, were at places other than the Bartol house. It is argued here that the testimony thus produced made it impossible for the testimony given by the prosecutrix and Otto Creitzer to be true, and it appears to be the position of counsel for the defendant that it is within the province of this court so to hold. Of course, this position follows from the palpably erroneous assumption that it is within the power and the duty of this court to pass upon the credibility of witnesses and to determine the weight to be accorded their testimony. It may be conceded that there is an irreconcilable conflict between the testimony produced by the people and that produced by the defendant, and that the one or the other is necessarily false. This necessarily follows, of course, from the fact, common to all criminal cases, where the charge is denied and the questions of fact are contested, that the two sides proceed upon entirely different and diametrically opposite theories. With singular propriety, therefore, has the Constitution not only committed to the jury the exclusive province of deciding the questions of fact in all cases, but has declared that their decision of those questions shall be final or, as questions of fact, not subject to review by the courts of appeal. A better illustration of the wisdom of this rule than in the present case could hardly be found. The testimony was in sharp conflict, and, as before suggested, one or the other of the two sets of opposing witnesses were either mistaken or told untruths. Who could be in a better situation to determine this all-important question than the jury or the court in whose presence the testimony was given? They heard and saw all the witnesses as they testified, and observed and noted the manner in which they answered the direct and cross questions, and thus were enabled to consider, compare, and weigh, with at least approximate accuracy, all the evidence and so reach a just conclusion upon the facts. Evidently the jury regarded the testimony addressed to the alibi theory as not worthy of their belief, and there is nothing in the record which tends to show that their repudiation of that theory was the result of an arbitrary consideration thereof or of the testimony offered in its support. Hence their decision of that issue is binding upon us.

[5] It is vigorously contended, however, that the testimony of Dr. Fine, a physician, conclusively shows that the child had never been subjected to such treatment as she declared that she received at the hands of the defendant and his male companions. Some eight or nine months after the outrages were perpetrated, Dr. Fine, at the request of the sheriff and under an order of the court, made an examination of the sexual organs of the prosecutrix. He testified, on direct examination, that he discovered the existence of no unusual conditions in the private parts; that they appeared to be normal in all respects for a female of her age; that there were no indications of approaching puberty, and he found only a rudimentary hymen, a condition not unusual to girls of the age of the prosecutrix. But, on cross-examination, he declared that it was possible "for the privates of a man to have penetrated her private parts to the extent of an inch and a half or two inches eight or nine months ago and left no marks of identification at this time." (The little girl testified that the defendant penetrated her private parts with his privates to the extent of an inch and a half or two inches.) Apparently the testimony of Dr. Fine, considered in its entirety, is not necessarily inconsistent with the child's story. The jury could consistently have believed the testimony of both. In other words, if, as the doctor said, it was possible that an act of that kind could be done and leave no physical traces thereof discernible nine months thereafter, the jury, without disbelieving other parts of the doctor's testimony, could have consistently believed, as obviously they did believe, the prosecutrix and Creitzer when they declared that the act was actually done.

[6] The ruling whereby the confession of the defendant was admitted in evidence is

assigned as erroneous and prejudicial. The objection interposed by the defendant to the allowance of the confession in evidence was on the general ground that the proper foundation for its admission had not been preliminarily laid. We assume that what counsel meant by this objection was that the alleged confession was not shown to have been the voluntary confession of the accused. We think the court was justified in overruling the objection and so admitting the confession. The defendant was a prisoner in the county jail, and therefore in the custody of the sheriff, awaiting trial upon the charge set forth in the information, when the statement objected to was made. The sheriff testified that:

> "Some time after his arrest, Fred Hoosier sent for me. I had my deputy * * * bring him over to my office. He said that he wanted to make a statement or confession. * * * No one was present but I and Mr. Hoosier, in the first part of the time. 'Well,' I said, 'Wait here,' and I locked the door 'and I will go and see if the prosecuting attorney will stand for it.' I saw Mr. Hersch"—the district attorney.

The sheriff saw and talked with the district attorney regarding the proposition and then returned to his office and said to the defendant "that there is nothing doing." The sheriff then called into his office one Breen, tax collector of Del Norte county, introduced him to Hoosier, saying:

> "This young fellow, Mr. Hoosier, wants to make a confession, and I informed Mr. Hoosier of his rights. I told Mr. Hoosier that any statement that he might make before me and Mr. Breen would be used against him. Well, he said he wanted to make a confession and relieve his mind. I told him all right, go ahead and do it, and he did."

Breen's testimony as to what occurred after he was brought into the presence of the defendant is substantially the same as the testimony of the sheriff.

The foregoing involves a statement of all that was shown, prior to the ruling admitting the confession in evidence, of the circumstances under which the statement to the sheriff and Breen was made by the accused.

We can perceive no sound reason for holding that the confession was not a voluntary one and freely given by the defendant. Before the court ruled on the admissibility of the confession, the uncontradicted testimony was that Hoosier of his own volition sent for the sheriff and stated that he desired to tell all he knew about the crime with which he was charged and his connection therewith. Before listening to Hoosier, the sheriff desired first to interview the district attorney and, having interviewed that official, was evidently told by him (we judge from what the sheriff said to Hoosier on his return, "that there is nothing doing") that he (the sheriff) would not be authorized to hold out to the accused, in consideration of a confession, any hope of leniency, as far as punishment was concerned. The defendant undoubtedly so understood the remark of the sheriff, for, after the latter had said to him, "there is nothing doing," and informed him that any statement that he might then make concerning his connection with the affair leading to the charge against him would be used against him at the trial of his case, the defendant said that "he wanted to make a confession and relieve his mind." If a statement under such circumstances is not a free and voluntary one, then it would be difficult to form a conception of such a statement. It is true that the sheriff and Breen do not expressly say that the prisoner was not threatened or promised some immunity and thus induced to tell his story, but it of necessity follows from the circumstances under which the confession was given, as detailed by the sheriff and Breen, that neither the sheriff nor Breen, for the purpose of forcing an admission of guilt from the defendant, made any threats or resorted to other acts of intimidation, or held out any hope of immunity or clemency to the prisoner. In other words, if the confession came about and was made as the sheriff and Breen describe, then there can be no reason for saying or supposing that it was either given under duress or influenced by hope of immunity held out by those to whom he confessed.

The defendant, it is true, testified, in support of his denial of having carnal connection with May Bartol, that, prior to making the statement above considered, the sheriff said to him that, if he contested the case, he would, if convicted of the crime, receive a life sentence, but that, if he would enter a plea of guilty, he would receive a less severe punishment; but this testimony was given after the confession was admitted into the record, and it cannot, therefore, be considered as an element entering into the determination of the question whether the court, by receiving the confession as evidence, did or did not commit error. If the defendant, upon the preliminary issue involving the question of the admissibility of his confession, had thus given his version of the circumstances under which his statement was made to the sheriff, the court, as would have been its duty to do, would doubtless have considered it in reaching a conclusion upon that issue; and, even in that case, the conclusion of the trial court upon the question would have concluded its review here under the rule applicable to conflicting evidence upon disputed questions of fact.

[7] The contention that the failure of the district attorney to show that the crime charged was committed at the precise time fixed in the information is fatal to the integrity of the verdict possesses no merit. The argument is that, from the fact that the testimony does not, as is the claim, definitely fix the precise time as alleged, the defendant could not protect himself against a second prosecution and judgment for the same identical offense as the one charged here. But the circumstances of the crime are such as to clearly and definitely mark and identify it and so make his conviction thereof available

as a plea of former conviction and once in jeopardy in case, after such conviction, an attempt should be made to proceed against him on precisely the same charge.

[8] The information was filed within the statutory period of time, the lapse of which, before the filing of the same, would have barred a prosecution of the charge, and this has always been held sufficient in criminal cases, in which time is not of the essence of the charge, to support a verdict, even where the time has been definitely fixed in the information and the evidence not clear and definite as to the exact date of the crime. We can see no reason why the rule should be applied with any more rigor or exactitude to cases of rape than to other criminal cases.

The remaining assignments involve attacks upon the action of the court in the matter of its charge to the jury.

[9] It is said that the court seriously erred by failing to instruct the jury carefully to scrutinize and scan the testimony of the prosecutrix and Otto Creitzer and to warn them of the danger of a conviction on such testimony. In the first place, such an instruction would involve an invasion of the constitutional province of the jury to determine for themselves the weight and effect of evidence. Such an instruction has often been given in rape cases, and just as often has the constitutional inhibition against instructions by trial courts upon questions of fact been ignored. If the trial judge entertains a doubt of the truthfulness of the testimony of the prosecutrix in a rape case, serious enough to give such an instruction, and there is no other testimony supporting the charge, then he ought to take the case from the jury, lest, in such cases in particular, public sentiment in the community or the natural prejudices of men against crimes of that nature may influence a verdict against the accused upon testimony of exceedingly doubtful verity.

[10] In the second place, the court was not requested to give any such instruction, and it is not conceived, even if the instruction were legally a proper one, that it rested upon the court to give the instruction upon its own motion or in the absence of a request for it.

[11] The defendant severely arraigns the court for giving the following instructions:

> "The defendant has offered evidence for the purpose to prove that, at the time the alleged crime was committed, he was not present, but, on the contrary, was at some other place at the time the alleged crime was committed. In other words, tending to prove an alibi, and in that behalf you are instructed that, when the defense offers evidence for the purpose of proving an alibi, the law does not require that degree of evidence to support that fact as is required to prove the guilt of the defendant; but it is sufficient if the defendant prove the alibi by the preponderance of evidence, and is not required to prove the same to a moral certainty and beyond a reasonable doubt. I therefore charge you that, if you believe from the evidence that at the time the said alleged crime was committed, the defendant was not present, then you are instructed that it is your duty to find the defendant not guilty. When a defendant, charged with a crime, produces evidence in support of an alibi, the law does not require that degree of proof as excludes the possibility of error, but only that degree of proof which produces conviction in an unprejudiced mind. And, if the evidence presented by the defendant in this case is sufficient and does produce such a conviction in your mind, he is entitled to the benefit of such proof, and, if it is sufficient within itself to prove an alibi, it is your duty to find the defendant not guilty."

Obviously the foregoing instructions are erroneous. They assume that an alibi, like insanity, is a special defense, the proof of which, by a preponderance of the evidence upon that issue, was a burden resting upon the defendant, whereas an alibi merely means or involves the negative of an element in the proof of the offense charged which it is essential for the people to establish beyond a reasonable doubt, to wit, that the accused was present at the scene of the crime at the time of its commission, and that therefore the opportunity for its commission by him was present. In other words, an alibi means that the defendant was elsewhere than at the place where the crime charged was committed at the time of its commission, and that therefore he could not have committed it. And the rule is that, if the testimony addressed to the alibi is sufficient to raise a reasonable doubt of the defendant's presence at the scene of the crime at the time it was committed, then a reasonable doubt of his guilt arises, and he is entitled to an acquittal.

[12] But the defendant is in no position to complain of the action of the court for the giving of said instructions, for the record shows that they were given and read to the jury by the court at his request. The same instructions, in exactly the same language, were given to the jury in the Bartol Case on the motion of the defendant herself, and it is there said that "she cannot find fault with the court in complying with her request."

[13] The following instruction is complained of:

> "The testimony of an accomplice ought to be viewed with distrust, and, in weighing the evidence of the defendant, it is proper for the jury to consider whether the position and interest of such defendant may not affect his credibility and color his testimony; but you are to weigh it fairly, in the light of all the surrounding circumstances, and give it such credit as you think it ought to receive."

The part of the foregoing instruction to which the defendant objects reads:

> "And, in weighing the evidence of the defendant, it is proper for the jury to consider whether the position and interest of such defendant may not affect his credibility and color his testimony," etc.

A similar instruction, given in the case of the People v. Bartol, supra, was condemned by the defendant as having prejudiced her rights in said case, and, as is said there, so it is equally, of course, true here, that, while a similar instruction had been disapproved by the Supreme Court (People v. Maughs, 149 Cal. 262, 86 Pac. 187), it cannot be said, in view of the strong and convincing proof of the defendant's guilt, the giving of it resulted in a miscarriage of justice. Const. art. 6, § 4½; People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042.

We have now examined all the important points raised on this appeal, and, as is manifest, have discovered no just reason for disturbing the verdict.

The judgment and the order appealed from are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 30

DORRIS v. ALTURAS SCHOOL DIST. OF MODOC COUNTY. (Civ. 1217.)

(District Court of Appeal, Third District, California. June 23, 1914.)

MECHANICS' LIENS (§ 113*)—NOTICE TO OWNER—EFFECT.

Under Code Civ. Proc. § 1184, as amended by St. 1911, p. 1315, providing that on one giving notice to the owner of a building not subject to lien that he has furnished material to the building contractor, the owner shall withhold from the contractor sufficient money due, or that may become due, to the contractor to answer such claim, such notice gives the claimant no right against the owner, the contractor having abandoned the work, and the owner having, as permitted by the contract, completed it, the expense thereof, permitted by the contract to be deducted from the amount of the contract price, exceeding the unpaid part of such price.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by E. A. Dorris against the Alturas School District of Modoc County. Judgment for plaintiff, and defendant appeals. Reversed.

C. S. Baldwin, of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BURNETT, J. The action was to recover the value of certain materials furnished by plaintiff to the contractor to be used in the construction of a school building for the defendant district. There is no controversy as to the facts, and the decisive question is whether under the findings plaintiff is entitled to judgment. The contract for the building was executed on June 6, 1911, and it is set out in the answer herein. It provided that the contractor, Pearson—

> "shall and will for the consideration hereinafter mentioned, on or before the fifteenth day of November, 1911, well and sufficiently construct, erect and finish the stone and brick two story school building * * * conformable with and according to the plans, specifications and drawings signed by the said A. E. Pearson and filed * * * and approved by the board of trustees of said School District; * * * that he [Pearson] will, at his own expense and cost find and provide all such good, proper and sufficient materials of all kinds whatsoever, as shall be necessary and sufficient for completing and finishing the said school building according to said plans, specifications and drawings and will provide and furnish all necessary labor thereon * * * for the sum of twenty thousand three hundred and fifty dollars, said sum to be paid to the said party of the second part in monthly installments as follows, to wit: Seventy-five per cent. of the value of the material and the work upon said building to be paid to the said party of the second part on the first day of each month during the term of this contract, said value to be based upon the superintendent of construction's estimate. And the remainder of the said twenty thousand three hundred and fifty dollars after the full completion of said school building and upon its acceptance by the said board of trustees of the Alturas School District."

The contract further provided:

> "Should the said contractor at any time during the progress of said work, refuse or neglect to supply a sufficiency of materials or workmen, the said first party shall have the right to provide materials and workmen to finish the said works, and the expense thereby incurred by said first party shall be deducted from the amount of said contract price."

The findings of the court inviting attention are as follows:

> "That pursuant to said contract said A. E. Pearson commenced the construction of said school building, and continued to supply work and materials for the same up to about January 1, 1912, at which time he reached the end of his resources, ceased work upon the building, and abandoned his contract, and defendant thereupon took possession of said uncompleted building and supplied labor and materials necessary for its completion, according to the terms of the Pearson contract"; that said Pearson, while engaged in the work, received certain payments aggregating the sum of $14,895. "The total value of all labor and materials furnished by said Pearson as estimated by the superintendent of construction, amounts to $19,860. After the abandonment of the contract by said Pearson as aforesaid, defendant completed the building in accordance with the Pearson contract, and necessarily expended in so doing the sum of $5,848.38 for labor and materials. At the time of the abandonment of the contract by said Pearson, on or about January 1, 1912, there was in the building fund of defendant school district the sum of $5,455, the unpaid portion of the contract price of said school building, all of which money defendant expended in completing said building, in the manner provided by the Pearson contract."

By other findings it appears that, during the months of September, October, November, and December, 1911, while Pearson was in charge of the work, respondent furnished certain quantities of brick to Pearson and to subcontractors under Pearson, all of which were used in the construction of said building. On the 3d day of January, 1912, and after the abandonment of the contract by Pearson, respondent served notice upon the trustees of the district that there was a balance of $686.40 due him on account of brick furnished to Pearson and his subcontractors for use in said building, and required them to pay said sum out of any money due or to become due said Pearson.

It is thus made entirely plain that the service of said notice constitutes the only possible ground for any liability on the part of said district. This notice was given in pursuance of section 1184 of the Code of Civil Procedure as amended by St. 1911, p. 1315, and its legal effect is exposed in the following quotation from said section:

> "Upon such notice being given, it shall be lawful for the owner to withhold and in the case of property, which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor shall withhold from his contractor sufficient money due or that may become due to such contractor, to answer to such claim."

But it is entirely clear that at the time said notice was served and at all times thereafter there was nothing due from said district to said Pearson. He was to be paid the balance when he completed the building, but he *never* completed it. After he abandoned the undertaking it was finished by the district at an expense greater than the amount that would have been due Pearson if he had fully carried out his contract. Under the express terms of the agreement, therefore—to say nothing of legal and equitable implications—there was nothing owing from the district to Pearson.

The said notice had the effect of a garnishment of any money coming to the contractor which was in the hands of the owner, the school district, and the extent of the latter's liability to plaintiff is measured by its liability to the contractor. That is to say, there was and is no liability at all.

Of course, if respondent had served his notice before the district paid Pearson all that he earned under the contract, a different situation would be presented. The governing principle of the case is covered by the decision in Bates v. Santa Barbara Co., 90 Cal. 546, 27 Pac. 438; Denison v. Burrell, 119 Cal. 180, 51 Pac. 1; Bianchi v. Hughes, 124 Cal. 27, 56 Pac. 610; Butler v. Ng Chung, 160 Cal. 438, 117 Pac. 512, Ann. Cas. 1913A, 940; Suisun L. Co. v. Fairfield School Dist., 19 Cal. App. 595, 127 Pac. 349; and we can see no good reason for offering any additional suggestions upon the subject.

Apparently the only pretense of justification for holding the defendant liable is found in the language of section 1200 of the Code of Civil Procedure, as it formerly existed, as follows:

> "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor, shall be fixed as follows," etc.

We need not inquire, however, whether this could be given effect to control the said contract of the parties, as this section was repealed May 1, 1911 (Stats. of 1911, p. 1319), and hence was not in force when plaintiff furnished said material.

It is to be deplored if plaintiff must lose his claim, but we see no legal ground upon which he can enforce it against appellant. His contract was not with the latter, and he failed to comply with the statutory condition necessary to create a liability against the district. He is presumed to have had notice of the contract between Pearson and the district, and through his want of diligence he must suffer the consequences of his misplaced confidence in the contractor. It may be, also, that the building cost appellant less than it was really worth but, there being no claim of fraud, the district had the moral and legal right to stand upon the contract with Pearson, though respondent should go uncompensated for his materials that went into the construction of said building.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

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24 Cal. App. 799

PEOPLE v. DILLER. (Cr. 330.)

(District Court of Appeal, Second District, California. June 17, 1914. Rehearing Denied by Supreme Court Aug. 15, 1914.)

1. WITNESSES (§ 293*) — PRIVILEGE — TESTIMONY AGAINST HIMSELF—STATUTES—VALIDITY.

Pen. Code, § 367c, as amended by St. 1913, p. 218, provides that whenever an automobile strikes a person or collides with another vehicle the driver or a person assuming authority over the driver shall cause the automobile to stop, and render the person in the other vehicle assistance, and shall give him the number of the colliding automobile, with the name and address of the driver and owner and the names of the passengers. It also provides that its violation shall be punishable by fine and imprisonment. *Held*, that such provision is not unconstitutional as compelling a person who has committed an act which might be the basis of a prosecution for criminal negligence to furnish evidence against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1009–1014; Dec. Dig. § 293.*]

2. HIGHWAYS (§ 166*) — USE—REGULATION—AUTOMOBILE.

The state being authorized to prohibit altogether the operation of automobiles and power vehicles on the public highways, Pen. Code, § 367c, as amended by St. 1913, p. 218, providing that if an automobile comes into collision with another vehicle the driver or owner must stop, render aid, and disclose name and number, etc., is valid as a mere police regulation of the use of the highways by such machines.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 457; Dec. Dig. § 166.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

O. A. Diller was convicted of failing to stop his automobile and give the occupants of another automobile with which he had collided the number of his car, his name and address, etc., and he appeals. Affirmed.

Rodgers & Davis, of San Diego, and Davis & McCoy, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the offense defined in section 367c of the Penal Code, it being charged that while driving an automobile a collision occurred between the one operated by him and another automobile, and that he did not stop his car, nor give the occupants of the other automobile the number of his car, his name and address, nor the name of the owner of the machine which he was driving when the collision occurred.

[1] On appeal he attacks the validity of the statute upon the ground that it is obnoxious to section 13, article I, of the Constitution, which provides that "no person shall be compelled, in any criminal case, to be a witness against himself." Section 367c, Penal Code, as amended by St. 1913, p. 218, provides:

> "Whenever an automobile, motor cycle, or other motor vehicle, or any vehicle whatsoever, regardless of the power by which the same may be propelled or drawn, strikes any person, or collides with any vehicle containing a person, the driver of, and all persons in, such automobile, motor cycle or other motor vehicle, or other vehicle, who have or assume authority over such driver, shall immediately cause such automobile, motor cycle, or other motor vehicle, or other vehicle, to stop, and shall render to the person struck, or to the occupants of the vehicle collided with, all necessary assistance including the carrying of such person or occupant to a physician or surgeon for medical or surgical treatment, if such treatment be required, or if such carrying is requested by the person struck or the occupant of the vehicle struck; and such driver, and person having or assuming authority over such driver, shall further give to the occupants of such vehicle or person struck, the number of such automobile, motor cycle, or other motor vehicle, or other vehicle, if the same have a number, together with the name and address of the driver of such automobile, motor cycle, or other motor vehicle, or other vehicle, also the name of the owner thereof and the name of the passenger; or passengers not exceeding five in such automobile, motor cycle, or other motor vehicle, or other vehicle at the time of such striking or collision. Any person violating any of the provisions of this section is punishable by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

Appellant's argument is that since such a collision might be due to dereliction of duty under circumstances showing an actual intent to injure and upon which a charge of criminal negligence might be based against the driver, the information which he is required to give under the provisions of said section 367c could be used as evidence in prosecuting him for the offense. Provisions similar to that found in the statute have been enacted in a number of states the organic laws of which, like our own, provide that no person in a criminal case shall be compelled to be a witness against himself. Among such states are Missouri and New York, the highest courts of which have upheld the law against the attack here made. See Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923; People v. Rosenheimer, 209 N. Y. 115, 102 N. E. 530. In the New York case the court held that it was within the power of the Legislature to prohibit altogether the operation of automobiles on the public highways, and since this power might be exercised by the Legislature any restrictions or conditions attached, less than absolute prohibition, subject to which they might be operated, was lawful; in other words, the greater power included the less. This position is based upon the theory that the driver of an automobile in the operation thereof exercises a privilege and not a right, and as to such privilege it is competent for the Legislature to prescribe the conditions upon which it shall be exercised, or deny it altogether. Reference is made to the opinion for the numerous authorities cited in support of the proposition. While the reasons thus assigned for sustaining the validity of a statute might be deemed ample ground for affirming the judgment, other reasons equally cogent are suggested. If a collision between automobiles be due to circumstances showing an actual intent to injure persons or the property of another, such fact would constitute a criminal offense, not by virtue, however, of section 367c, but by reason of other provisions of the law. In the case at bar it is not claimed, or even suggested, that the collision was due to criminal neglect on the part of defendant; hence, so far as shown by the record, no crime was committed. Under the law a witness may be compelled to give answers to competent and relevant questions upon the trial of an issue of fact; nevertheless, if such answers tend to incriminate or connect him with a crime, such fact justifies his refusal to answer. Conceding the case of a collision due to malicious and wanton intent of a person, he might—though we do not so hold, since it is unnecessary to so decide—as in any other case where the answer of a witness tends to incriminate him, assert his privilege and refuse to give the information upon the ground that compliance with the statute would compel him to give testimony against himself. Whatever might be the effect in the case of a collision due to criminal negligence of a party, suffice it to say that in the case at bar, since no crime was committed, the constitutional provision could have no application, and in such case the constitutional rights of defendant could not be infringed by exacting the information required by the statute.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] We adopt with approval what is said by the Supreme Court of Missouri in the Kneedler Case, as follows:

> "The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640. On the contrary, flight is regarded as evidence of guilt. In the large majority of cases, such accidents are free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provision. St. Louis v. Williams, 235 Mo. 503, 139 S. W. 340. We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods. St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577. If the law which exacts this information is invalid, because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all police regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a man's conduct from judicial inquiry, or aid him in fleeing from justice."

The record presented discloses no ground for defendant's contention, and the judgment and order are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

(168 Cal. 263)

McBOYLE et al. v. UNION NAT. BANK et al.

(S. F. 6976.)

(Supreme Court of California. July 24, 1914.)

APPEAL AND ERROR (§ 1099*)—SUBSEQUENT APPEAL—FORMER APPEAL AS LAW OF CASE.

In an action to establish title to a certificate of stock, where the fundamental question was whether the cashier of defendant bank had authority to sell the stock to plaintiff, and in which defendant's stipulation that a certain witness would testify that the stock at all times after its purchase by defendant was carried on its books in the bond investment account did not have any substantial bearing upon the question in issue, the determination of the Supreme Court on a former appeal that the finding that the cashier had not exceeded his authority in making the sale was not sustained by the evidence was the law of the case on a subsequent appeal; the evidence aside from the stipulation being the same as on the first trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by George McBoyle and another against the Union National Bank, and H. N. Morris, as receiver. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 162 Cal. 277, 122 Pac. 458.

Fitzgerald, Abbott & Beardsley, Fitzgerald & Abbott, and Leon A. Clark, all of Oakland, for appellants. T. C. Coogan, Powell & Dow, and W. H. Orrick, all of San Francisco, for respondents.

PER CURIAM. The defendants appeal from a judgment declaring the plaintiff Lulu May McBoyle to be the owner of 599 shares of the capital stock of Burnham-Standeford Company, a corporation, and of the certificate representing such shares, and adjudging that said plaintiff recover the 599 shares and certificate upon payment to the defendant receiver of the sum of $9,500, with interest.

The case has already been before this court on appeal. Upon a first trial, judgment had gone in favor of the defendants. The plaintiffs made a motion for a new trial, which was denied. This court, on March 2, 1912, rendered its judgment reversing the judgment below, as well as the order denying a new trial. The essential facts are stated in our opinion on the former appeal, reported in 162 Cal. 277, 122 Pac. 458. When the cause came before the superior court for a second trial, the defendant, with the leave of the court, filed an amended answer. This pleading did not, however, change the issues in any respect material to the questions now presented. At the trial, the cause was, by stipulation, submitted upon the evidence taken at the first trial, together with the further stipulated fact that a certain witness, if called, would have testified that the stock in controversy, "at all times after its purchase by said defendant Union National Bank was carried on its books in the bond investment account." We are satisfied that this additional testimony could not have had any substantial bearing upon the main issue in dispute, and, in fact, the contrary is not seriously urged here.

The fundamental question in the case is whether the cashier of the defendant bank had authority to sell the shares of stock to McBoyle. Upon the first trial the superior court found that the cashier had exceeded his authority in making the sale. The holding of this court was that this finding was not sustained by the evidence. Upon the second trial, the court below, following the conclusions reached by us, found in favor of the plaintiffs on this issue. The judgment entered upon such finding (together with the findings, not now assailed, on other issues) must be affirmed, unless we conclude that we erred in our former decision regarding the extent of the cashier's authority. We see no reason for changing the views heretofore expressed, if, indeed, any such change were not precluded by the doctrine of the "law of the case." The grounds of our action are fully stated in the opinion on the earlier appeals, and the reasoning of that opinion is adopted as the basis of the present decision.

The judgment is affirmed.

BEATTY, C. J., does not participate in the foregoing.

(168 Cal. 287)

In re HASSELL'S ESTATE. (S. F. 7026.)

(Supreme Court of California. July 29, 1914.)

1. WILLS (§ 535*)—PRETERMITTED CHILDREN.

Before the natural rights of children to share in the inheritance of their immediate ancestors is taken away, the intent that they shall not so share must appear convincingly on the face of the will, and if it does not so appear, the testator will be held to have inadvertently failed to provide for such children or children of deceased children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157–1160; Dec. Dig. § 535.*]

2. WILLS (§ 535*) — CONSTRUCTION — PRETERMITTED CHILDREN — DISINHERITANCE — "HEIRS."

Where testator provided that those of his heirs not mentioned in his will had been omitted with full knowledge, the word "heirs," was used to include children, so that those of his children not mentioned in his will were disinherited, not pretermitted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157–1160; Dec. Dig. § 535.*

For other definitions, see Words and Phrases, vol. 4, pp. 3241–3265; vol. 8, pp. 7677, 7678.]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Judicial settlement of the estate of Nils F. Hassell, deceased. On petition of three of testator's children who were disinherited, for a distributive share in the estate as pretermitted heirs. From an order denying the petition, petitioners appeal. Affirmed.

Edward R. Eliassen, of San Francisco, for appellants. Stetson & Koford, of San Francisco, for respondent. Gavin McNab and Nat Schmulowitz, both of San Francisco, for Mrs. Rosa S. Theorin.

HENSHAW, J. Nils F. Hassell died testate. His estate was probated in the county of Alameda. He was 79 years old at the time of his death. The executor petitioned for final distribution of his estate. Three of the children of Hassell petitioned for distributive shares of the estate as pretermitted heirs of the deceased. The court held that they were not pretermitted heirs, but had been intentionally omitted from any share in the testator's bounty. From the decree following this determination these children of Nils F. Hassell have appealed.

The will contained the following provisions:

> "One half thereof to Rosa S. Theorin of Chicago, Illinois, to have and to hold unto herself heirs and assigns forever, if she survive me, otherwise said share shall go to my son Carl J. Hagelund one half and the other one half thereof shall go to Signa Hagelund and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Marie Valentine, both of Chicago, Illinois, shares and shares alike. * * *

"Those of my heirs not herein mentioned has been omitted by me with full knowledge thereof.

"Any of the foregoing persons or any other person or persons claiming to be heirs of mine, and not herein mentioned, making any contest of this will under any pretense shall be, by such contest, excluded from taking any part of my estate."

[1] It is, of course, well established, that before what are considered to be the "natural rights" of children to share in the inheritance of their immediate ancestors shall be taken away, the intent that they shall not so share must appear upon the face of the will strongly and convincingly. In re Stevens, 83 Cal. 330, 23 Pac. 379, 17 Am. St. Rep. 252; Rhoton v. Blevin, 99 Cal. 647, 34 Pac. 513; In re Salmon, 107 Cal. 617, 40 Pac. 1030, 48 Am. St. Rep. 164. If the intent is not thus satisfactorily established, the law will reach the humane conclusion that the testator inadvertently failed to make provision for his children or children of deceased children.

[2] The first quotation from this will indicates the knowledge of the testator of the existence of one son, who is made the recipient of the father's bounty. It is argued by appellants that the language subsequently quoted, to the effect that "heirs not herein mentioned have been omitted with full knowledge," should not be construed to mean and to include his children, since if he had designed or intended to exclude his children, he would have used the precise word. But this is asking the court to put an unpermissible construction upon a word of well-defined meaning both at law and in popular parlance. At law, while the word may include others, it always includes the children of a decedent. In popular parlance it not only has the same meaning, but, if there be any difference, it is more frequently used as a synonym of "children." Thus, in common speech, a man will frequently speak of his heirs, meaning thereby his children and his children alone. No natural sympathy for the disinherited (the reason for which disinherison we cannot know) can be allowed so grossly to pervert the meaning of a well-understood word as to permit us to hold, as here under appellant's contention we would be obliged to hold, that the word "heirs" did not include and was not used to include a class universally embraced within its significance.

It follows herefrom that the decree appealed from must be and hereby is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(168 Cal. 270)

HARTFORD FIRE INS. CO. v. JORDAN, Secretary of State, et al. (S. F. 6382.)

(Supreme Court of California. July 28, 1914.)

1. States (§ 78*)—Officers—Collection of License Tax under Protest—Liability of Collecting Officer.

Under St. 1906, p. 43, making it the duty of all state officers to pay into the state treasury money received by them in their official capacity, Pol. Code, § 663 et seq., providing that money deposited in the state treasurer's office can be taken therefrom only on a proper warrant after audit of the state board of control, and Pen. Code, § 424, making it a felony to willfully fail to pay over public moneys to the state treasurer, the secretary of state was not individually liable to an insurance company for a license tax collected from it, pursuant to St. 1905, p. 493, and amendments thereto, and duly paid over to the state treasurer, where he acted merely in his ministerial official capacity, and did everything pursuant to the statute.

[Ed. Note.—For other cases, see States, Cent. Dig. § 78; Dec. Dig. § 78.*]

2. Appeal and Error (§ 843*)—Questions Reviewable—Jurisdiction.

An objection that an action by an insurance company against the secretary of state and treasurer of the state officially and individually was not maintainable because it was in effect an action against the state, was not available on appeal, where a nonsuit was granted as to the treasurer, and judgment was rendered against the secretary of state solely in his individual capacity, though the appeal purported to be taken by both defendants in their official capacity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. § 843.*]

3. Insurance (§ 7*)—License Tax—Voluntary Payment.

The payment of a license tax by an insurance company under protest, to avoid the forfeiture prescribed by St. 1905, p. 493, and amendments thereto, for nonpayment of such tax, which forfeiture would result in case the courts held such statute to be still in force, was not a voluntary payment, so as not to be recoverable by the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 6; Dec. Dig. § 7.*]

4. Insurance (§ 4*)—License Tax—Liability of Insurance Company.

Const. art. 13, § 14, providing that taxes "shall be levied, assessed and collected in the manner hereinafter provided," and requiring every insurance company to annually pay a certain tax, to be "in lieu of all other taxes and licenses * * * upon the property of such companies," supersedes the prior State License Act (St. 1905, p. 493 and amendments thereto) so far as it applied to insurance companies and exemptions from the provisions thereof as to the payment of the license tax thereunder.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 4; Dec. Dig. § 4.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Hartford Fire Insurance Company, a corporation, against Frank C. Jordan, as Secretary of State, and others. From judgment for plaintiff, defendants appeal. Reversed.

U. S. Webb, Atty. Gen., and John H. Riordan, of San Francisco, for appellants. Coogan & O'Connor, Page, McCutchen, Knight & Olney, and Samuel Knight, all of San Francisco, for respondent.

PER CURIAM. A rehearing was granted in this case for consideration of the sole question of the personal liability of defendant Frank C. Jordan, against whom, as an individual, judgment was given. This question did not receive the attention it merited, the mind of the court being led away from a consideration of its real importance by the fact that it was stipulated at the trial of the cause that no attempt would be made to enforce a personal judgment against Jordan, if in fact such a judgment was given. On rehearing it is pressed upon our attention with a force which cannot be combated that the silence of the opinion of the court upon this question is necessarily a determination that a public officer, under the indicated circumstances, is personally responsible, and it is urged that the question should be distinctly determined by the court. To that point and to that point alone this consideration is addressed; the opinion of the court heretofore given, in all other respects, standing affirmed and approved.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] As to the facts controlling this consideration it is to be noted that everything that Jordan did was in consonance with the language of the law of the state, and was done in his ministerial official capacity. He certified the list of delinquent corporations to the Governor, as the state law in terms ordered him to do. The Governor made his proclamation to the effect that the delinquent corporations would forfeit their right to do business in the state if their license fees were not paid upon the date fixed by the statute. Jordan, as secretary of state, received the fees, as the law declared it his duty to do, which were paid under protest by plaintiff. Thus the duress on plaintiff was the duress of the law, and not the duress of officers of the law. The fact that the money was paid to Jordan under protest enlarged neither his powers nor his liabilities. The law itself made plain the steps which he must take upon receipt of such moneys, whether paid under protest or not. It is the duty of all state officers to pay all moneys received by them in their official capacities into the state treasury. Stats. 1906, p. 43. They must make these payments monthly. It is the duty of the state treasurer to keep all moneys in the state treasury. Pol. Code, § 452. Once deposited in the state treasury funds can be taken therefrom only upon warrant of the state controller after audit by the state board of control. Pol. Code, § 663 et seq. It is pleaded and admitted that Jordan so paid the money into the state treasury. He was not only under the mandate of our fiscal civil laws so to do, but he was equally under the strong compulsion of the penal laws, since by section 424 of the Penal Code, his willful omission or refusal to pay over the moneys to the treasurer would have been a felony, punishable by imprisonment for from 1 to 10 years and by perpetual disqualification from holding office in the state. Therefore, notwithstanding the protest of plaintiff, Jordan could not, without committing a felony, have held the money in his own possession to respond to the judgment which plaintiff might obtain against him as an individual.

There will be found in the earlier adjudications a strictness of accountability upon the part of public officers which has been greatly and justly abated. Thus in Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373, it is said:

> "The case put by the third point is where, at the time of payment, notice is given to the collector that the duties are charged too high, and that party paying so paid to get possession of his goods, and accompanied by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasurer. This question must be answered in the affirmative, unless the broad proposition can be maintained that no action will lie against the collector to recover back an excess of duties paid him, but that recourse must be had to their government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection, sanctioned by the principles of law or sound public policy."

Cary v. Curtis, 3 How. 236, 11 L. Ed. 576, announces the same doctrine touching the responsibility of the agent where protest has been made at the time of payment, and Justice Story, in the course of his dissenting opinion in that case speaks as follows:

> "Hence it is a doctrine of the common law (so far as my researches extend), absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains, or exacts, or retains, money justly belonging to another, with notice that the latter contests the right of the former to receive, or exact, or retain it, an action for money had and received lies to recover it back, and it is no answer for the wrongdoer to say that he has paid it over to his superior; for, although as between the wrongdoer and his superior, the maxim may well apply, respondeat superior, yet the injured party is not bound to seek redress in that direction; and, a fortiori, * * * he is not so bound where, as in the case of the government, the superior is not suable. That would be a mere mockery of justice."

Of course these cases take no account of the unhappy dilemma of the agent, who is a public officer, when, as here, the law, notwithstanding the protest, compels him to pay over the money to his principal. This difference in the law is itself sufficient to demand the application of a different rule, and the opposite rule has in fact been declared in this state upon every occasion where the question has arisen. Thus in Phelan v. San Francisco, 120 Cal. 1, 52 Pac. 38, the action was to recover taxes against the tax collector, paid under protest. There, as here, the tax collector had paid the money into the treasury, as the law compelled him to do, and, says this court, he "having paid the money into the treasury in obedience to this official duty, it would violate all principles of justice to hold him individually liable to the plaintiff therefor, upon the ground that he had refused to follow the plaintiff's directions to disregard his official obligation." Bailey v. Johnson, 121 Cal. 562, 54 Pac. 80, was an action upon an agreed case between a protesting taxpayer and a tax collector. This court, in declaring the lack of power in the tax collector to make such an agreed case, said:

"He was but the agent of the county for the collection of the tax, with no interest other than that of an officer performing a duty enjoined by law, and with only such power and authority as the statute gave. He was not concerned in the question of the validity of the tax. If he failed to collect it because of its illegality, he was not responsible to the county; and if he collected it, and it subsequently proved to have been illegally assessed, he was not responsible to the aggrieved taxpayer."

Craig v. Boone, 146 Cal. 718, 81 Pac. 22, was another case brought against the tax collector by a protesting taxpayer. Here, with reference to and quotations from the above cited cases, the same doctrine is laid down. It conclusively follows herefrom that the defendant Jordan was not responsible to plaintiff and that the judgment against him in his individual capacity was therefore erroneous. To the end that it may be noted that the views of this court are not singular upon the question, but, as has been said, are in accord with the humane and just doctrine of later cases, reference may be made to 27 Am. & Eng. Ency. of Law, page 795; 37 Cyc. 1187; 2 Cooley, Taxation, pages 1477 et seq.; Mechem, Pub. Officers, § 694; Throop, Pub. Officers, § 760; Blackwell, Tax Titles (4th Ed.) page 187.

Following is that portion of the former opinion of the court which is here approved and adopted:

"Lorigan, J. This action was brought by plaintiff in its own behalf, and as assignee of several other fire insurance companies, to recover certain moneys paid by them under protest as a state license tax on fire insurance corporations for the fiscal year commencing July 1, 1911.

"The license tax in question is provided for under an act of the Legislature entitled 'An act relating to revenue and taxation providing for a license tax upon corporations and making a provision for the purpose of carrying out the objects of this act,' approved March 20, 1905 (Stats. 1905, p. 493), and amendments thereto.

"This act, in so far as material to the questions presented here, and as it stood when the license tax involved was paid, provides that every domestic corporation and every foreign corporation doing business in this state must procure from the secretary of state a license authorizing it to do so and pay a license tax therefor, the amount of tax being based on the authorized capital stock of the corporation; makes the tax payable to the secretary of state on July 1st of each year, and a delinquency of the corporation therefor if the tax is not paid by September 1st thereof. The act then provides for a report to the Governor of the state by the secretary of state before the 15th of September of each year of a list of delinquent corporations and the issuance forthwith by the Governor of a proclamation declaring under the act "that the charters of such delinquent domestic corporations will be forfeited, and the right of such foreign corporations to do business in the state shall be forfeited," unless payment of the license tax is made to the secretary of state on or before 4 o'clock of November 30th following. Provision is then made for the immediate filing of this proclamation of the Governor in the office of the secretary of state, that said secretary shall immediately publish it, and that at the hour and date specified in the proclamation the charters of all domestic corporations which have failed to pay said license tax shall be forfeited to the state and the right of all delinquent foreign corporations to do business in the state which have failed so to pay shall be likewise forfeited. The secretary of state is required to make out and transmit to each county clerk in the state, to be filed in his office, a list of such domestic and foreign corporations whose charters or right to do business have been forfeited. It is further made unlawful for any corporation delinquent under the act, whether domestic or foreign, which has not paid the license tax, to exercise the powers of such corporation or to transact any business in the state after November 30th next following the delinquency, and declares that any person who exercises any of the powers of the corporation so delinquent, or who transacts business for or on behalf of the corporation, after the date last referred to, shall be guilty of a misdemeanor and subject on conviction to fine or imprisonment, or both. In addition it is provided that the directors or managers, in office, of a delinquent domestic or foreign corporation whose charter or right to do business is forfeited shall be deemed trustees of the corporation with full power to settle up its affairs.

"Subsequent to the passage of the act and its amendments and in November, 1910, section 14 of article 13 of the Constitution of this state was ratified. That section as far as applicable here provides that:

" 'Sec. 14. Taxes levied, assessed and collected as hereinafter provided upon * * * telephone companies, * * * insurance companies, * * * and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. * * *

" '(b) Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state. * * * This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies. * * *'

"The principal question on this appeal, though others are involved, is whether the constitutional provision quoted superseded the state corporation license tax act and thus exempted the plaintiff and its assignors from the payment of such tax.

"The complaint alleged that plaintiff and its assignors are foreign fire insurance companies and were on July 1, 1911, each doing business in the state under certificates of authority regularly issued to them pursuant to law by the insurance commissioner of the state still in full force and effect, and that the value of the business of each in the state exceeded $20,000. It then alleged the proceedings taken under the act —the making of a report by Jordan as secretary of state to the Governor thereof on September 11, 1911, of a list of the corporations in the state claimed to have been delinquent in the payment to the state of license taxes, which list included plaintiff and its assignors, and a proclamation issued by the said Governor, declaring that their right to do business in the state would be forfeited unless said license tax was paid to the secretary of state by 4 o'clock p. m. of November 30, 1911; the filing of said proclamation and its publication as provided in the act. Further, that on October 17, 1911, Jordan, as such secretary, notified and threatened plaintiff and its assignors that unless such tax was paid by them by November 30, 1911, the right of each to do business in the state would be forfeited; that solely by reason of said proclamation and threat of forfeiture and to prevent such threatened forfeiture, plaintiff and its assignors, on November 29, 1911, paid involuntarily and under protest to said Jordan, as such secretary of state, the amounts claimed as said license taxes under the act, and simultaneously therewith presented and delivered to said Jordan, and he accepted and filed in his office, a protest against said payments, on the ground that the act under which it was being exacted was superseded by section 14 of article 13 of the Constitution above referred to, and that its exaction was therefore unauthorized and illegal; that Jordan, as such secretary of state, thereafter turned over the amounts paid to the defendant Roberts as state treasurer; that subsequently a demand for repayment to plaintiff and its assignors was made by them upon both Jordan and Roberts as said secretary and treasurer, respectively, and by both refused. The complaint as originally filed was against Jordan and Roberts in their official capacities only. Subsequently plaintiff by leave of court was allowed to amend the complaint by including said Jordan and Roberts in the title as defendants individually, and to amend the prayer by asking judgment also against them as individuals. All the allegations of the complaint were admitted except the allegation that the money was paid involuntarily under a threat of forfeiture. Plaintiff had judgment against the defendant Jordan individually, and from that judgment and an order denying their motions for a new trial, each of the defendants in all the capacities in which they were sued filed notice of this appeal.

"Several grounds are urged for a reversal but the three main propositions upon which this is sought need only be considered.

[2] "Defendants first contend that the superior court had no jurisdiction to entertain this action. In that regard it is insisted that this is an action against the defendants as state officers, in which judgment is sought against them in their official capacities; that while not nominally a suit against the state, in legal effect it is such, and cannot be maintained under the principle that the state cannot be sued without its consent, and there is no law under which consent to do so has been granted. But we do not perceive that this point is involved on this appeal. The action was originally brought against Jordan and Roberts in their official capacities. It was amended so as to make them also defendants individually. During the trial the motion of defendants for a nonsuit in favor of Roberts as defendant officially and individually was granted, and eliminated him entirely from the case. There was no judgment against Jordan in his official capacity, but solely against him individually. While it is true this appeal purports to be taken by both defendants in the official capacity in which they were sued, as there was no judgment against either of them in that capacity, they had no right of appeal as such, and there is therefore nothing in the case under which the question of the jurisdiction of the court attempted to be raised by them can be considered.

[3] "It is next insisted that the license tax was voluntarily paid, and hence cannot be recovered back. The general rule for determining whether a payment illegally exacted is voluntary or involuntary is well settled, and its discussion is not necessary here because attention will be presently called to cases where, under conditions similar to those shown here, if the payments herein named were illegally exacted, they were made involuntarily and may be recovered back. It appears here that under the provisions of the act in question the failure of the plaintiff to pay the tax to the state within the time provided would result in a proclamation declaring that it had forfeited its right and was without authority to do business in the state. The payment was made to prevent this threatened result, and was paid under a written protest against its exaction as being illegal for the reasons therein stated and urged here. The act provided for no judicial proceeding or action by the state to be taken on failure of the plaintiff to pay the tax under which an opportunity would be afforded it to test its legality. A forfeiture by the self-executing provisions of the act is declared against the right of plaintiff to do business in the state, and it was either compelled to make the license tax payment or go out of business. Under the act the parties were not placed on equal terms. The plaintiff had no choice; it must either submit to the illegal exaction or go out of business. Nor had it any redress for such illegal exaction unless payment under such circumstances is regarded as involuntary and compelled under duress. It is true, as asserted by appellants, that a declaration of forfeiture under the act following the proclamation of the Governor had no legal efficacy if the exaction of the tax against plaintiff was illegal; that if it was not subject to the tax, no forfeiture could result from a mere proclamation which declared it, and that when the right of plaintiff to do business was in any way attacked, it could show this. Of course, in any proceeding subsequent to the declared forfeiture against the corporation, its agents or officers, by the state in quo warranto proceedings or civil or criminal action, the attempted forfeiture under the act of the right of the plaintiff to do business might be disputed and declared invalid. But by that time great damage and injury might have resulted to the plaintiff from the fact that the forfeiture, though unjustified, had been declared. It is too clear for discussion that the effect of a proclamation, declaring that the right of plaintiff to further do business in the state had been forfeited, must necessarily work it an irreparable injury. Its business is to secure contracts of insurance therein and renewals thereof, and a proclamation of a forfeiture of its right to do so, even though not justified, would of itself—particularly as to fire insurance companies—have the direct effect of raising a question in the business community of the validity of contracts which the company might seek to make, and would naturally drive business which it might otherwise hold or secure to other corporations engaged in a like business, whose right to make them was not subjected to the same uncertainty and doubt. While asserting in good faith that the exaction was illegal, plaintiff and its assignors could have no certainty that their contention would be sustained in some judicial proceeding brought subsequent to the proclamation of forfeiture, and if their claim was not then sustained, they would have suffered the extraordinary penalty of having lost their right to do business in the state. Under such circumstances, to avoid this penalty, the only thing plaintiff could do was to make the payment under protest, and if the license tax was illegally exacted, we are satisfied under the authorities that the payment was involuntary, and plaintiff had a right to recover it back.

"This precise question has arisen in cases where the tax was exacted under the provisions of acts, in the main, similar to ours, and some less drastic in their provisions, and where it was held that the payments made were involuntary and could be recovered back.

"In A., T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, the action was to recover back a tax of 2 per cent. on the capital stock imposed by an act of the state of Colorado. The plaintiff was a Kansas corporation. As to the tax the Colorado law gave an action for debt to the state, and provided that every corporation failing to pay the tax should forfeit its right to do business in the state until the tax was paid, with certain penalties as long as its payment remained in default. Plaintiff paid the tax under protest that the act was unconstitutional as levying a tax on interstate commerce. The Supreme Court declared: 'The defendant did not argue that the tax could be maintained, but contended only that the payment was voluntary. * * * It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. * * * Of course we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objection by way of defense, but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made, but even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his proposed right on reasonably equal terms. See Ex parte Young, 209 U. S. 123, 146 [28 Sup. Ct. 441], 52 L. Ed. 714 [13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764]. * * * In this case the law, besides giving an action of debt to the state, provides that every corporation that fails to pay the tax shall forfeit its right to do business within the state until the tax is paid, and also shall pay a penalty of 10 per cent. for every six months or fractional part of six months of default after May 1st of each year. It may be that the forfeiture of the right to do business would not be authoritatively established except by a quo warranto provided for in a following section, but before or without the proceeding, the effect of the forfeiture clause upon the plaintiff's subsequent contracts and business might be serious. See Ludwig v. Western Union Tel. Co., 216 U. S. 146 [30 Sup. Ct. 280], 54 L. Ed. 423. And, in any event the penalty would go on accruing during all the time that might be spent before the validity of the defense could be adjudged. As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and in finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the payment was made under duress.'

"Gaar Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510, was also an action to recover back money paid as a tax under protest. An act of the state of Texas required foreign insurance companies doing business in Texas to pay a certain franchise tax measured by their capital stock, and provided that if by a given date payment was not made, a percentage penalty would be incurred, and that if the tax was not paid by a still further date, the permit of such company to do business in the state would be forfeited 'without judicial ascertainment,' and the company deprived of the right to sue in the courts. Plaintiff, a foreign corporation doing business in Texas, paid the tax under protest, on the ground that the amount was exacted under an unconstitutional law. Defendant contended that the payment was voluntary. The court holding to the contrary said: 'Neither a statute imposing a tax nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods. Or, if there is, a citizen, to avoid the consequences of the levy may pay the money, regain the use of his property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong, but he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of 25 per cent shall be incurred, the license of the company shall be canceled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary, but compulsory, and may be recovered back. Otherwise plaintiff might be without any remedy whatever.'

"Scottish Union Ins. Co. v. Herriott, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548, presents a case practically identical with the one at bar. A law of Iowa provided that foreign and domestic insurance companies on filing their annual statements should pay to the treasurer of the state as taxes a certain percentage tax (different as between foreign and domestic companies) on the gross amount of premiums received by them during the preceding year, taking a receipt therefor to be filed with the auditor of the state, who should not, until such filing, issue the annual certificate as provided by law authorizing the corporations to do business in the state. Upon failing to make payment of the taxes imposed when plaintiff filed its annual statement, it was notified by the auditor that if the amount was not paid, action would be taken to collect the tax by distress or suit, and that the company would be precluded from doing business in the state. The plaintiff then paid the tax to the state under protest, and subsequently sued to recover it back. It was claimed that the payment was voluntary. The court said: 'Again it is said that the money was paid voluntarily and cannot be recovered back. The petition recites, in substance, that plaintiff had large property interests in the state, which it was in duty bound to preserve and protect, and that the letter from the auditor of the state made it impossible for plaintiff to continue its business or protect its property without paying the tax. At the time of the payment plaintiff filed with both the treasurer and the auditor a written protest, in which it claimed that the tax was unconstitutional and invalid, and that by so paying it did not acknowledge its liability to pay the tax or waive any of its rights to contest the same. Plaintiff was bound to submit to the exaction or discontinue its business. Under such a state of facts, it is clear that plaintiff's act was not voluntary, and that it may recover back the amount paid, provided it has established its claim that the act in question was unconstitutional. Swift Co. v. United States, 111 U. S. 23 [4 Sup. Ct. 244, 28 L. Ed. 341]; Cunningham v. Munroe, 15 Gray, 471; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Beckwith v. Frisbie, 32 Vt. 559; Shelton v. Platt, 139 U. S. 594 [11 Sup. Ct. 646, 35 L. Ed. 273]; and cases cited in State v. Nelson, 41 Minn. 25 [42 N. W. 548, 4 L. R. A. 300].'

"We refer to and quote from these cases because of their practical identity with the case at bar. Cases other than those cited, supporting the proposition that payment made under similar conditions to those here are involuntary and may be recovered back, are Swift v. United States, 111 U. S. 29, 4 Sup. Ct. 244, 28 L. Ed. 341, Western Union, etc., Co. v. Mayer, 28 Ohio St. 521, and our own cases of Lewis v. San Francisco, 2 Cal. App. 112, 82 Pac. 1106, and Trower v. San Francisco, 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183.

[4] "It is next insisted by appellant that insurance companies are not exempt under the constitutional provision relied on by respondent from the payment of the corporation license tax exacted by the act. Appellant insists that it is matter of grave doubt whether the constitutional provision was intended to have this effect, and hence the rule of strict construction against the exemption of property from taxes should be applied; that the provision contains no express exemption respecting a 'license tax' or

'corporation license tax,' and that these terms should not be read into it. Along the same line it is insisted that as the only exemption proceeding from the payment of the percentage tax provided by the constitutional amendments is from 'all other taxes and licenses * * * *upon the property of such* companies,' etc., and as there is no such thing as a 'license upon the property,' the word 'license' as used in the provision is to be construed as intended to mean the same thing as 'taxes'; that as the tax in question in this case is neither 'a tax on property' nor a 'license on property,' but is purely a corporation license tax on the intangible privilege or right of insurance companies to do business in the state, it is not embraced within the terms of the exemption in the constitutional provision.

"These are the only points made by appellant against the exemption of such companies from the payment of the state license tax by virtue of the terms of the constitutional provision.

"An extended discussion of these points is rendered unnecessary by the decision of this court in City and County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 Pac. 971, rendered since the appeal in this case was submitted. That action was brought to recover a license fee or tax imposed by an ordinance of the city and county of San Francisco enacted prior to the adoption of section 14 of article 13 of the Constitution. The claim of defendant was that under such constitutional provision it was exempted from liability for such license charge. The trial court so held, and that ruling was sustained here upon a full consideration of the subject.

"In applying the reasoning of the court in that case to the contention of appellants in this, it is to be observed that though in the case referred to, a license tax imposed on a telephone company under a municipal ordinance was involved, and here an act of the Legislature imposing a state license tax on insurance companies is under consideration, the same constitutional provision applies to both these classes of corporatons. Both telephone and insurance companies are enumerated as among the persons and corporations to be taxed. By the constitutional provision 'a tax upon all franchises of any kind or nature shall be entirely and exclusively for state purposes and shall be assessed and collected in the manner hereinafter provided.' The manner provided is that taxes in the case of telephone corporations (and other corporations enumerated) shall be a specific percentage upon the gross receipts; in the case of insurance companies (both domestic and foreign) a specific percentage of gross premiums. As to each it was declared that the taxes so imposed were 'in lieu of all other taxes, state, county and municipal, upon the property of the corporations,' subject to certain specified exceptions which are not involved here.

"In the case cited the court stated the claims of the respective parties on the appeal; that of the appellant being 'that the constitutional provision relieves the companies named [telephone companies] from no burden except that of taxes *upon the property* theretofore enumerated, and that the charge imposed by the ordinance is a business or occupation tax, and not a tax upon property at all, and therefore not covered by the so-called exemption.' This is the identical point made by appellants here under their claim that, the exemption being from 'taxes' and 'licenses upon the property of the company,' the word 'licenses' should, under the rule of strict construction of provisions under which exemption from taxes is claimed, be given the same meaning as taxes.

"Defining the position of respondent in the cited case, the court said 'The respondent, on the other hand, claims that under a fair reading of the constitutional amendment the liability of a telephone company to pay a percentage of its gross receipts was designed to exclude the power of the state or any county or municipality to exact from it any further revenue, * * * whether by way of a direct tax upon its property, or in the guise of a license fee upon its business.' This is the position of the present respondent. Hence the claims of the respective parties here as to the construction to be given the constitutional provision are the same as with those made by the respective parties here. In disposing of the contention of the appellant in the cited case this court, after discussing the point made as to the rule of strict construction to be applied to provisions exempting from taxation and holding that the constitutional provision was to be interpreted upon a full consideration of all its terms, said: 'Giving, then, a fair and reasonable interpretation to the constitutional provision, we think the charge imposed by the ordinance of the city and county was within the class of taxes and licenses from the imposition of which the respondent was relieved by the amendment. It is true that a license tax upon an occupation or business is not a tax upon property, even though, by constitutional or statutory definition, franchises are included in the meaning of the word "property." This is clearly decided in City of Los Angeles v. Los Angeles Independent Gas Co., 152 Cal. 765, 93 Pac. 1006. If the amendment did no more than to declare that the percentage required to be paid by telephone companies should be in lieu of all other taxes upon the property of such companies, it would seem to be a necessary conclusion that the power to impose an occupation tax was not excluded. But there are other words in the provision, and all of the language must, under familiar principles of construction, be considered and given its fair meaning and effect. The percentage imposed is declared to be in lieu, not merely of other taxes, but "of all other taxes *and licenses* * * * upon the property." The word "license" properly speaking, means a grant of permission or authority to do a particular thing or carry on a particular business. City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674; Words and Phrases, page 4137. In the clause under discussion, the term is evidently used to designate the fee or charge imposed upon the exercise of the right. While such fee or charge is often spoken of as a tax, it is not in any sense a tax upon property. See City of Los Angeles v. Los Angeles Independent Gas Co., supra. In order to construe the clause as relieving from taxes or charges upon property alone, we should therefore be required to deny meaning and significance to the word "license." The right of the telephone company to carry on the business of supplying telephone service is a franchise. Franchises are included in the enumeration of classes of property which, by the terms of the amendment, are to be taxed for state purposes only. * * * Every word in the clause under discussion can be given a reasonable and legitimate effect by reading the term "licenses" as including revenue charges of any character upon the exercise of the franchises which are declared to be taxable for state purposes only. In this way, the phrase "upon the property above enumerated" is made fully effective as qualifying both "taxes" and "licenses" preceding it, while no word is either ignored or distorted from its fair meaning.'

"We do not think in view of this decision just quoted, that further discussion on this branch of this appeal is necessary. The right of insurance companies, whether domestic or foreign, to do an insurance business in this state is a franchise, is property of the company engaged in it, and it is upon this franchise that under the provisions of the constitutional amendment the tax therein provided for is levied. The state license tax imposed under the act as it stood when the constitutional amendment was adopted and under which the license tax here in question was exacted, is a tax for revenue imposed—so far as insurance companies are concerned—on their franchise right to do business in the state. But as this franchise is taxed under the constitutional amendment and the tax thereby levied is declared to be in lieu of 'all other taxes and licenses, *state*, county and municipal upon the property of such companies,' the effect of the amendment was to supersede the prior state license tax act so far as it applied to insurance companies and to exempt them from the provisions thereof as to the payment of the license tax thereunder."

The judgment appealed from is therefore reversed.

(168 Cal. 289)

MODESTO CREAMERY v. STANISLAUS CREAMERY CO. et al. (Sac. 2026.)

(Supreme Court of California. July 29, 1914.)

1. TRADE-MARKS AND TRADE-NAMES (§ 70*)—SUBJECT-MATTER OF TRADE-MARK.

While under Civ. Code, § 991, a designation which relates only to the place where the thing is produced cannot be appropriated as a trademark, defendants who fraudulently attempted, by the use of a geographical name which plaintiffs had used to designate their products, to palm off their goods as plaintiffs', will be enjoined.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 100*)—USE OF NAME—DECREE—CONSTRUCTIONS.

Where plaintiff used the name of the town in which it manufactured butter to designate its product, and defendants fraudulently marked their product with the same name, a judgment, declaring that, as against defendants, plaintiff had the exclusive right to use the town name as it appeared on its butter wrapper, and enjoining defendants from using the town name so as to deceive the buying public into the belief that their product was plaintiff's, is not an adjudication that plaintiff had the exclusive right to use the name of the town in connection with its product, but only adjudges that plaintiff has a superior right to the use of the name as it appears on its wrappers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. § 100.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 93*)—ACTIONS TO ENJOIN—EVIDENCE.

In a suit to enjoin defendants from using a wrapper for their goods similar to that used by plaintiff, evidence *held* to show that defendant used the wrapper for the purpose of deceiving the public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. § 93.*]

4. APPEAL AND ERROR (§ 1073*)—REVIEW—HARMLESS ERROR.

In a suit to enjoin defendants from using a label for their goods which they had adopted to deceive the buying public into believing they were those of plaintiff, the error in enjoining defendant from using a wrapper which had been abandoned before the commencement of the action was harmless, if erroneous, where the use of such wrapper would deceive the buying public.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240–4247; Dec. Dig. § 1073.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNFAIR COMPETITION—DAMAGES—RIGHT TO.

Where defendants by means of a fraudulent label deceived the buying public into the belief that their goods were those of plaintiff, plaintiff can recover as damages profits made by reason of defendants' unauthorized use of the label, even though plaintiff suffered no actual loss.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

In Bank. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Modesto Creamery against the Stanislaus Creamery Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Jordan, Rowe & Brann, H. K. McKevitt, and L. J. Maddux, all of San Francisco, for appellants. J. W. Dorsey and W. E. Cashman, both of San Francisco, and L. L. Dennett and J. M. Walthall, both of Modesto, for respondent.

SLOSS, J. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The action was brought to enjoin the defendants from selling butter marked with labels alleged to have been designed in imitation of plaintiff's label, and to recover damages for profits diverted from plaintiff or made by sales by defendants of butter so labeled.

The findings, which are responsive to the issues made by the pleadings are, in effect, as follows: Plaintiff is a corporation which, since the year 1900, has been manufacturing butter at the city of Modesto, and selling such butter at Modesto and elsewhere in the state of California. In the conduct of its business it has adopted and used as a symbol and name a device (shown on a wrapper attached to the complaint and marked "Exhibit A") consisting of the word "Modesto" in large script, with a scroll or flourish thereunder, the word "creamery" appearing in said scroll. The words "churned daily at Modesto, Cal." also appear upon the wrapper. Butter of plaintiff's manufacture, so wrapped and marked, acquired a valuable reputation, and is known by purchasers and the public as "Modesto Creamery Butter" or "Modesto Butter," the word "Modesto" having acquired "a special significance and secondary meaning apart from its geographical sense," and being taken to signify the origin, manufacture, and qualities of plaintiff's butter. The defendant Sherry-Freitas Company is engaged in the business of buying and selling butter. In April, 1910, said defendant, with the intent to deceive persons intending to buy plaintiff's butter, and to divert trade from plaintiff to itself by palming off its goods for those of plaintiff, offered its butter for sale under a wrapper, a copy of which is designated "Exhibit B." This wrapper contained the word "Modesto" in large type, and under it the word "brand" in smaller letters. By so doing defendant has endeavored to cause it to be believed, and has caused it to be believed, by the public that its butter was made in the city of Modesto, which was not the fact. The use of said wrapper misled and deceived customers into buying defendant's butter in the belief that it was plaintiff's product. Said butter was sold at a price less than that at which plaintiff's butter was offered to the public.

The defendant continued the sale of butter under the label or wrapper designated "Exhibit B" until about September 1, 1910, when it began to sell and offer for sale, and has since continued to sell, butter under a label or wrapper designated as "Exhibit C." This wrapper bore the word "Modesto" in script type similar to that appearing on "Exhibit A." The butter so wrapped has been made by the defendant Stanislaus Creamery Company at the city of Modesto. The findings relative to the purpose with which "Exhibit C" was used, and the effect upon the public and upon plaintiff's trade of the use of such wrapper, are, except with respect to the place of manufacture, similar to the findings, above outlined, in connection with "Exhibit B." It is further found that the defendant Stanislaus Creamery Company was organized by the officers and directors of the other defendant, Sherry-Freitas Company, with the object of having said Stanislaus Creamery Company assist its codefendant in the latter's wrongful acts. The court also finds that the defendants will, unless restrained, continue the unfair competition complained of.

The judgment declares that plaintiff is the owner of and has the exclusive right, as against the defendants and each of them, to use the word "Modesto" in the manner in which it appears on its butter wrapper. It adjudges that defendants be enjoined from using, in connection with the manufacture, advertisement, or sale of butter, the wrapper, labels, or brands shown on Exhibit A, Exhibit B, or other representation containing the word "Modesto" as its prominent feature "in a manner calculated to deceive the trade or public into purchasing the product of defendants, or either of them, as and for the product of plaintiff," from offering for sale or selling any butter under wrappers, labels or representations in imitation or likeness of any of said exhibits, which will be calculated to mislead the public into buying said product as and for the product of the plaintiff, and from advertising, representing, labeling, or wrapping butter in such manner as to cause it to be palmed off, sold or mistaken for plaintiff's product. Finally, it is determined that plaintiff is entitled to an accounting of the profits diverted from plaintiff or made by defendants, or either of them, by the sale of butter under Exhibit B or Exhibit C, and the court reserves power to take such accounting before itself or a referee.

[1, 2] The relief granted by the decree does not rest upon any ownership by plaintiff of the exclusive right to the use of the word "Modesto" as a trade-mark. A "designation which relates only to the * * * place where the thing is produced" cannot be appropriated as a trade-mark. Civ. Code, § 991. The suit is one to restrain unfair competition. The principles involved have been declared in numerous decisions, not a few of which have been rendered by this court. In Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704, they are stated in the following language which, with the substitution of the word "butter" for "bread" (the article which occasioned the controversy in the Banzhaf Case), is entirely appropriate to the case at bar:

> "The case of the plaintiffs * * * is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiffs and benefit himself, simulates the plaintiffs' goods, deceives the plaintiffs' patrons into the belief that his bread is that made by the plaintiffs, and thereby induces them to buy his own bread instead of the plaintiffs', thus by fraud and deception depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trade-mark. * * * The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trade-marks or of the ownership of such trademark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trade-mark, but the fraudulent injury to, and appropriation of, another's trade."

See, also, Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; Dodge, S. Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

The judgment does not assume to protect plaintiff in the exclusive use of the word "Modesto." All it does is to declare that the plaintiff has a right superior to that of defendants to use such word *in the manner in which it appears on its wrappers.* It enjoins the defendant from using the wrappers designated "Exhibit B" and "Exhibit C," or from using any wrapper containing the word "Modesto" in a manner calculated to deceive the public into purchasing defendants' product as and for that of plaintiffs. The other parts of the injunction are directed against other practices tending to thus deceive the public and thereby injure the plaintiff.

[3] So far as the particular labels, Exhibit B and Exhibit C, are concerned, the evidence fully justifies the findings that these wrappers were adopted with the purpose of deceiving the public as above stated, and that they accomplished this purpose. This is virtually conceded by appellants with respect to Exhibit B, which was applied to butter not in fact manufactured at Modesto.

The word "Modesto" is the most prominent feature of Exhibit C, as it is of Exhibit A. The type in which the word is printed is so similar on the two labels that this circumstance, in connection with the other facts shown amply warranted the conclusion that the use of Exhibit C was intended to have, and did have, the effect of misleading the public into the belief that the butter so marked was that manufactured and sold by plaintiff.

The argument that plaintiff cannot enjoin the use of the word "Modesto" unless such word has acquired a secondary meaning apart from its geographical sense—unless, that is to say, it has come to mean the goods of plaintiff rather than the place of their manufacture—is therefore beside the mark. The use of the name "Modesto" is not enjoined. All that is enjoined is the use of such name in a manner calculated to deceive purchasers into mistaking defendants' product for that of plaintiff. It is true that there is a finding that the word "Modesto," as applied to butter, has acquired the secondary meaning spoken of. This finding would have been necessary to support a decree recognizing plaintiff's exclusive right to the use of the word in its secondary sense. 38 Cyc. 770. But it is not material as a basis for the limited decree that was here made.

[4] It is urged that the use of Exhibit B should not have been enjoined, because the evidence showed that there had been no use of this wrapper for several months preceding the commencement of the action, and there was no proof that defendants intended to use it in the future. But, even if this part of the injunction were eliminated, the general restraint against the use of any wrapper calculated to deceive the public would still operate to prevent the use of Exhibit B. If there was any error in extending the injunction so as to cover this wrapper specifically, the error was technical merely, and without prejudice.

[5] Finally, the claim is made that the court erred in decreeing that plaintiff should have an accounting of the profits made by defendant through sales of butter under wrappers having the mark of Exhibit B or Exhibit C. So far as Exhibit B is concerned, it is contended that plaintiff suffered no damage, having sold its entire output, without diminution in price, during the period in which Exhibit B was used. But the decree does not order an accounting of damages as such. The accounting is to be directed to "profits diverted from the plaintiff, or made by the sale of any butter sold by the defendants or either of them under wrappers bearing the label and brand of Exhibit B and Exhibit C attached to the complaint." We think this provision should be construed as covering simply the profits made by the defendants through the use of these wrappers. In contemplation of law, such profits are diverted from plaintiff, being obtained through the improper invasion of plaintiff's trade rights. Entirely apart from the question of actual damage, the owner of a trade-mark is entitled to recover from an infringer the profits realized by the latter from sales under the simulated trade-mark. Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639. The same rule applies to cases of unfair competition, in which, while there is no violation of an exclusive right in a technical trade-mark, the defendant has used devices calculated to pass off his goods as those of plaintiff. 38 Cyc. 909; Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; Saxlehner v. Eisner, etc., Co., 138 Fed. 22, 70 C. C. A. 452.

The objection to an accounting with respect to Exhibit C is based on the contention that the use of this brand was not an invasion of plaintiff's rights. This contention is answered by what we have said in an earlier part of this opinion.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.

24 Cal. App. 773

HARBAUGH v. LASSEN IRR. CO.
(Civ. 1201.)

(District Court of Appeal, Third District, California. June 13, 1914.)

1. Exceptions, Bill of (§ 50*)—Settlement —Delivery to Judge—"Presentation."

Code Civ. Proc. § 650, provides that a party desiring a bill of exceptions after trial may prepare a draft of the bill and serve the same on the adverse party, who within ten days shall propose amendments and serve the same on the applicant for the bill, and the proposed bill and amendments must, within ten days thereafter, "be presented by the party seeking the settlement of the bill" to the judge who tried or heard the case, on five days' notice, or if no amendments are served, or, if served, are allowed, the proposed bill may be presented with the amendments, if any, for settlement without notice to the adverse party, and that when the bill is so received by the judge for settlement he must designate a time at which he will settle the bill. *Held*, that mere delivery of a proposed bill to the judge pending the time allowed by law or by stipulation within which amendments might be proposed and before the same had been proposed, without an agreement that the bill might be so presented, did not constitute a "presentation" of the bill to the judge for settlement, he having no power under such circumstances to fix or designate a day for settlement or to settle it.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 50.*

For other definitions, see Words and Phrases, vol. 6, pp. 5528, 5529; vol. 8, p. 7761.]

2. Appeal and Error (§ 787*)—Dismissal of Appeal—Supreme Court Rules.

Supreme Court rule 2 (119 Pac. ix) provides that appellant, within 40 days after appeal, shall serve and file the transcript of the record, duly certified to be correct by the attorneys of the respective parties or by the clerk of the court from which the appeal is taken, but if a proceeding is pending for the settlement of a bill of exceptions or statement which may be used in support of the appeal, the time shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed. A proposed bill of exceptions was delivered to the judge April 7, 1908, but

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on May 22d 30 days' additional time was allowed respondent, by stipulation, in which to file amendments. No further proceedings were taken, however, for over five years, though appellant's attorney on several occasions wrote letters requesting respondent's attorney to present his amendments and proceed with the settlement of the bill. *Held* that, even though the proposed bill was presented to the judge for settlement on April 7, 1908, such presentation was in effect withdrawn or waived by the extension of time to file amendments, and, more than six months having expired, which was the limit prescribed by Code Civ. Proc. § 473, within which appellant might obtain relief from default in presenting its bill of exceptions within the time required, there was no proceeding pending for the settlement of the bill, and respondent was entitled to a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3129, 3130; Dec. Dig. § 787.*]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by L. A. Harbaugh against the Lassen Irrigation Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Granted.

W. F. Williamson, of San Francisco, for appellant. Martin S. Vilas, of Burlington, Vt., for respondent.

HART, J. This is a motion by the respondent to dismiss the appeal taken herein from the judgment entered in his favor and against the appellant by the superior court of Lassen county for the sum of $500 and costs.

An opinion in which it was held that the motion ought to be granted was filed in this court on April 23, 1914, and judgment entered in this court accordingly on said day. Prior to and at the time of the filing of said opinion, there was no counter showing of any character by the appellant, and consequently the facts set forth in the affidavits filed by the respondent and upon which he rested his motion to dismiss the appeal stood uncontradicted. But within a brief time after the filing of said opinion, to wit, on the 25th day of April, 1914, a written stipulation, signed by the attorney for the respondent, was filed in this court, and therein it was stipulated that the attorney for the appellant might have to and including the 4th day of May, 1914, within which to file its brief upon the respondent's motion to dismiss the appeal. At the same time, appellant filed with the record here a number of affidavits in rebuttal of the facts alleged in the affidavits upon which the respondent based said motion. In view of the stipulation of counsel for the respondent, extending the time within which the appellant might file its brief and of the filing of the counter affidavits by the appellant, and preferring to decide the motion upon a record fully disclosing the history of the controversy from the viewpoints of both parties thereto, an order was made by this court, on the said 25th day of April, 1914, setting aside the former judgment herein, thereby reopening the proceeding for further consideration. The motion to dismiss the appeal is consequently now before us upon the record made up since the filing of the first opinion.

The grounds of the motion, as set forth in the notice thereof, are: (1) That the notice of appeal was not served on the plaintiff or his attorney; (2) that the appellant has failed to prosecute said appeal with diligence, and has not filed a transcript of the record on appeal within the time limited by rule 2 of the rules of this and the supreme courts.

The facts as revealed by the affidavits and certificate of the clerk of the superior court in and for the county of Lassen, filed by the respondent in support of the motion, are: On the 16th day of October, 1907, the said superior court of Lassen county "made and entered its judgment in the above-entitled action wherein L. A. Harbaugh is plaintiff and Lassen Irrigation Company, a corporation, is defendant, in favor of the said plaintiff, and against the said defendant, for the sum of $500, and plaintiff's costs incurred in said action taxed at $86.95, and that on the said 16th day of October, 1907, the said judgment was duly filed and entered therein and recorded in Book D of Judgments, at page 305;" that on the 21st day of October, 1907, W. F. Williamson, Esq., attorney of record for the said defendant, filed in said court a notice of appeal to the District Court of Appeal for the Third Appellate District from said judgment and the whole thereof; that the said original notice of appeal contains no written acknowledgment of service or other evidence of service of the same upon the plaintiff or his attorney, "and that no evidence of service of said notice of appeal upon the plaintiff or his attorney has been filed in said action"; that on the 21st day of October, 1907, an undertaking on appeal, in due form, was filed in said court and cause; that on the 21st day of October, 1907, there was filed in said court and cause an order by the judge of said court granting the defendant in the said cause 20 days' time in addition to the time allowed by law, "and the 30 days theretofore allowed by the plaintiff to said defendant, within which to prepare, serve, and file its proposed bill of exceptions in said cause"; that thereafter (December 16, 1907, and February 6, 1908) the court made two other orders, whereby the time within which the defendant might prepare, serve, and file its proposed bill of exceptions was further extended. The clerk of the court declares, in his certificate filed here, that:

> "No bill of exceptions, statement on motion for a new trial, or other bill or statement has at any time been presented to me as clerk of said court for the judge of said court, or other purpose or reason; that the appellant in said action has not at any time requested the clerk of said court to certify to a correct transcript, or any transcript, of the record on appeal

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in said action; nor is there any record in my office that any bill of exceptions, statement on motion for a new trial, or other bill or statement, has been presented to said court for settlement, nor that any bill of exceptions has ever been settled or allowed by this court."

The affidavits of W. F. Williamson and W. W. Sanderson, attorneys for the appellant, and William E. Miles, secretary of the defendant, declare that said bill of exceptions was presented for settlement to the judge who tried the case on the 8th day of April, 1908; that the matter of the settlement of the said bill was then taken up on the 20th day of May, 1908, and then postponed to the 22d day of May, 1908; that, on the last-named date, said Sanderson, who personally conducted said proceeding on behalf of appellant, "again presented the bill of exceptions to the judge for settlement, and some question having then arisen as to the manner in which certain exhibits should be incorporated into said bill, the court ordered that N. J. Barry, Esq., the attorney for the plaintiff and respondent in this cause, should be allowed to take with him the original bill of exceptions and the transcript of testimony and certain exhibits and papers in the said action to his office in Reno, in the state of Nevada, and examine the same there and report what portions of said exhibits he desired inserted in the said bill of exceptions." Sanderson proceeded to depose that, at the same time, said Barry stipulated that the said bill of exceptions had been served in the time provided by law, and asked and was granted a stipulation allowing him 30 days from said 22d day of May, 1908, within which to prepare certain amendments to said bill of exceptions.

The affidavit of N. J. Barry admits that the bill of exceptions in this cause was served upon him on the 29th day of January, 1908, but denies that said Barry "took the bill of exceptions from the records of Lassen county" at any time, or that he ever had such original bill of exceptions, or that he ever took the exhibits or any of them referred to in the affidavits filed by the appellant.

There is, as will be seen, a direct conflict arising in the affidavits upon the question whether Barry at any time took the bill of exceptions to his office, in Reno, Nev., but we think it is immaterial, so far as the decision of this motion is concerned, whether he did or did not.

Rule 2 of the Supreme Court (119 Pac. ix) provides that the appellant in a civil action shall, within 40 days after an appeal is perfected, serve and file the transcript of the record duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken.

> "If a proceeding is pending for the settlement of a bill of exceptions or statement which may be used in support of such appeal, the time aforesaid shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed."

The appellant here contends that, during all the years since it proposed and served upon the respondent its bill of exceptions in this action, there has been and is still now pending a proceeding for the settlement of the said bill of exceptions, which is to be used in support of its appeal herein. It cannot, in our opinion, from the facts stated in the affidavits filed herein by the appellant in resistance to this motion, be held that a proceeding for the settlement of the bill of exceptions in this action is still pending or was pending at the time of the institution of proceedings on this motion.

[1] Section 650 of the Code of Civil Procedure provides:

> "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, at any time thereafter, and within ten days after the entry of judgment, if the action was tried with a jury, or after receiving notice of the entry of judgment, if the action was tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. * * * Within ten days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, *be presented by the party seeking the settlement of the bill*, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk for the judge."

Or, where (so proceeds the same section), no amendments are served, or if served, are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement without notice to the adverse party. Said section further provides that when the bill is received by the judge for settlement, he must designate the time at which he will settle the bill, "and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill."

It will be observed that, before the judge can, or, indeed, has the right to designate a time or take any other legal steps looking to the settlement of the bill, the same must first have been presented to him for that purpose. The mere delivery of the bill to the judge pending the time allowed by law or by the stipulation of the parties within which amendments might be proposed and before the same had been proposed, there being no agreement by the parties that the bill might be so presented, would not be a presenting of the bill to the judge for settlement, for in such case the judge would have no legal right to fix or designate a day for its settlement or to settle it. It will be further observed that said section makes it necessary for the party seeking the settlement of the bill of exceptions—in other words, the party taking the appeal and desiring and intending to use such bill in support of his appeal—to present the bill, with any amendments proposed thereto, to the judge who tried the case, or to the clerk for the judge, for settlement. Or, where no amendments are served, it is likewise the duty of such party to present such bill for settlement, as provided.

> "Compliance with this requirement is essential to the right of a party to have his bill of exceptions settled, and, if he fails to so comply, his right is gone, unless he be relieved from the effect of such failure by the trial court, under the provisions of section 473 of the Code of Civil Procedure, on account of 'mistake, inadvertence, surprise, or excusable neglect.'" Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112.

Although, as seen, it appears from the affidavit of W. F. Williamson that the bill of exceptions was presented for settlement to Hon. F. A. Kelley, then judge of the superior court of Lassen county, on or about the 7th day of April, 1908, it further appears, as we have shown, from the affidavit of W. W. Sanderson, who was then associated with said Williamson in the practice of law, that on the 22d day of May, 1908, he (Sanderson) being in attendance on the session of the superior court of Lassen county before Hon. F. A. Kelley, then judge of said superior court, both in the matter of the settlement of said bill of exceptions and concerning other matters and trials set for said day, presented said bill of exceptions for settlement, "and, some question having been raised as to the manner in which certain exhibits should be incorporated into said bill of exceptions, the court ordered that N. J. Barry, Esq., the attorney for the plaintiff and respondent in this cause, should be allowed to take with him the original bill of exceptions and the transcript of the testimony and certain exhibits and papers in the said action, to his office in Reno, and examine the same there and report what portions of said exhibits he desired inserted in the said bill of exceptions. Said Barry at the same time * * * *asked and was granted a stipulation allowing him 30 days from said 22d day of May, 1908, within which to prepare certain amendments to said bill of exceptions;* that said stipulations were entered into, and the said order made in the court room of said superior court of Lassen county, in the city of Susanville, on the 22d day of May, 1908. Affiant thereupon returned to San Francisco, reported said action and proceedings to said W. F. Williamson, and has no further knowledge and taken no further action in the said matter since said date."

[2] It will thus be seen that, even though it be true that the bill was by the appellant presented to the judge for settlement on the 7th day of April, 1908, such presentation was in effect withdrawn or waived and ceased to operate when, on the 22d day of May, 30 days' additional time from said date within which he might propose amendments to said bill was allowed the respondent by the agreement and stipulation of the appellant. The effect of said stipulation was the same as if the bill had never, as a matter of fact, been presented for settlement as provided by section 650 of the Code of Civil Procedure. It follows, as before stated, that, at the time this motion was filed, there was no proceeding pending for the settlement of the bill of exceptions. And it is obvious that the time within which the appellant might, under section 473 of the Code of Civil Procedure (viz., six months) have obtained relief from the effect of its default in the matter of presenting its bill for settlement within the time provided by the statute has long since passed. Indeed, over five years have elapsed since the expiration of the time within which the appellant might have sought relief from the effect of its default under said section 473 of the Code of Civil Procedure.

As is said in Moultrie v. Tarpio, supra, so the facts as admitted by the appellant warrant us in saying is true here:

> "The rule of this court quoted above [rule 2] contemplates a proceeding for a settlement that is alive, at least to the extent that it is being in some degree pressed by the appellant. Ordinarily this court would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to a review on appeal. But where, as here, the facts are not in dispute, and it is apparent that no bill can ever be settled, and that the appellant has long since practically abandoned his proceeding for the settlement of any such bill, we are satisfied that it should not be held that there is a 'proceeding pending for a settlement of a bill of exceptions,' within the meaning of the rule."

In this case, even if it be true that counsel for the respondent took possession of the original bill of exceptions as proposed by the appellant, and wrongfully kept the custody thereof for an unreasonable time, still it was the duty of the appellant, as the actor in the proceeding looking to the preparation of his appeal, to move promptly and diligently in the matter and take such steps as might have been necessary for the preservation of the integrity of the proceeding inaugurated by it for the proper settlement and authentication of its record on appeal. No such steps seem to have been taken, unless it may be said that certain letters addressed to the respondent's attorney by the attorney for the appellant, requesting him to proceed to present any amendments he desired to propose to the bill, may be treated as such, but, obviously, under the circumstances disclosed here, the burden was upon the appellant, as the actor in the proceeding, to go further than merely to appeal to the adverse party to hasten the settlement of the bill.

Under the circumstances above stated, no other course is open to us but to dismiss the appeal. As has been shown herein, the appellant, in practical effect, over five years ago abandoned the proceedings essential to the prosecution of its appeal by failure to pursue the legal steps necessary to the preparation and the filing in this court of the record essential to a hearing thereon.

> "There can be no doubt of the inherent right of this court to dismiss an appeal under such circumstances." Moultrie v. Tarpio, supra.

In view of the conclusion thus arrived at, it is not necessary to notice the first point suggested above and urged by the respondent in support of the motion, viz., that the notice of appeal was not served upon him.

The motion to dismiss the appeal herein is granted.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 12

KOSKELA v. ALBION LUMBER CO. et al. (Civ. 1229.)

(District Court of Appeal, Third District, California. June 23, 1914. Rehearing Denied by Supreme Court Aug. 22, 1914.)

1. Shipping (§ 84*)—Death of Servant—Course of Employment.

Decedent, a sawmill employé, was loaned to perform the work of a longshoreman for the charterers of a vessel which was loading at the mill. As evening approached he was told by the captain to go ashore for his supper and return, as they intended to continue loading during the evening. Lumber was transported from the wharf to the vessel by means of a traveling chute arrangement on which the workmen rode between the ship and the wharf. When deceased returned from his supper and the cable was ready for use, the lumber company's foreman told deceased and his companion to "hurry up and get on that traveler"; they did so, and while being transported to the ship, the chute broke, precipitating decedent into the ocean, where he was drowned. *Held*, that decedent's contract of service included transportation to and from the wharf by means of the chute, and that he was therefore in the course of his employment when he was killed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

2. Shipping (§ 86*)—Death of Servant—Negligence—Res Ipsa Loquitur.

The breaking of a chute precipitating deceased into the ocean, in the absence of evidence to show the exact cause thereof, was sufficient to raise a presumption of negligence on the part of the defendants under the doctrine of res ipsa loquitur.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353–360; Dec. Dig. § 86.*]

3. Shipping (§ 84*)—Death of Servant—Defective Appliances—Joint Liability.

A ship chartered by S. & H. being about to take on a cargo of lumber at the A. Company's mill, a wire traveling chute, designed to carry lumber from the wharf to the vessel, was rigged, part of the appliances connected therewith being owned by the lumber company and part by the shipowners. All the parts, however, constituted a single appliance intended to transport the lumber, and were necessary to each other. The charterers being short of stevedores, decedent, an employé of the mill company was loaned to them to do stevedore work aboard the vessel, and while riding from the wharf to the vessel on the carrier, it gave way, precipitating him into the ocean and he was drowned. *Held*, that both the charterers and the lumber company were liable under the doctrine of res ipsa loquitur, in the absence of evidence that the accident was caused by the sole fault of one of them.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

4. Trial (§ 343*) — General Verdict — Effect.

A general verdict imports a finding in favor of plaintiff on all the averments of the complaint material to his recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809–812; Dec. Dig. § 343.*]

5. Trial (§ 359*)—General Verdict—Presumptions—Special Verdict.

All presumptions are in favor of a general verdict for plaintiff, and it must control if the special verdict is not absolutely irreconcilable therewith, while answers to interrogatories cannot be aided by intendment, but must be limited and controlled by their specific terms.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857–860, 875, 877, 878; Dec. Dig. § 359.*]

6. New Trial (§ 102*)—Newly Discovered Evidence.

Where deceased was killed by the breaking of a traveler chute by which lumber was conveyed from a wharf to a vessel and defendants had knowledge of the fact that the mate, who was present at the time and assisted in putting up and operating the appliance, would be a valuable witness for them, and also that his presence could be obtained, but made no application for a postponement in order that he might be present, it was not an abuse of the trial court's discretion to deny a motion for new trial for the alleged newly discovered evidence of the mate which in fact was but cumulative of that of the captain of the vessel, though in greater detail.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Maria Sophia Koskela, as administratrix of the estate of Matt Gabriel Koskela, against the Albion Lumber Company and Swayne & Hoyt. From a judgment for plaintiff and from orders denying a motion to set it aside and enter judgment for defendants, and denying defendants' motion for a new trial, they appeal. Affirmed.

Mannon & Mannon, of Ukiah, for appellants. M. H. Iverson and Preston & Preston, all of Ukiah, for respondent.

CHIPMAN, P. J. Action for damages resulting from alleged negligence of defendants through which plaintiff's intestate lost his life.

General and special demurrers to the amended complaint were overruled, and defendants answered, denying the material averments of the complaint alleging negligence, and pleaded in defense unavoidable accident; that defendants had no knowledge of any defects in the appliances which it is alleged had been carefully inspected prior to their use, and that the "accident was a casualty which no act of the defendants could have foreseen or prevented, and was caused through the breaking of a metal device of the loading apparatus, through a latent, unknown, undiscoverable defect in the metal thereof." The jury rendered a general verdict and also a special verdict, as follows:

"I. Did the wire cable give way by reason of any defect in it? Answer: Don't know.

"II. If so, what defect? Answer: Don't know.

"III. Did the wire cable give way by reason of any defect in the machinery or appliances by which it was supported? Answer: Yes.

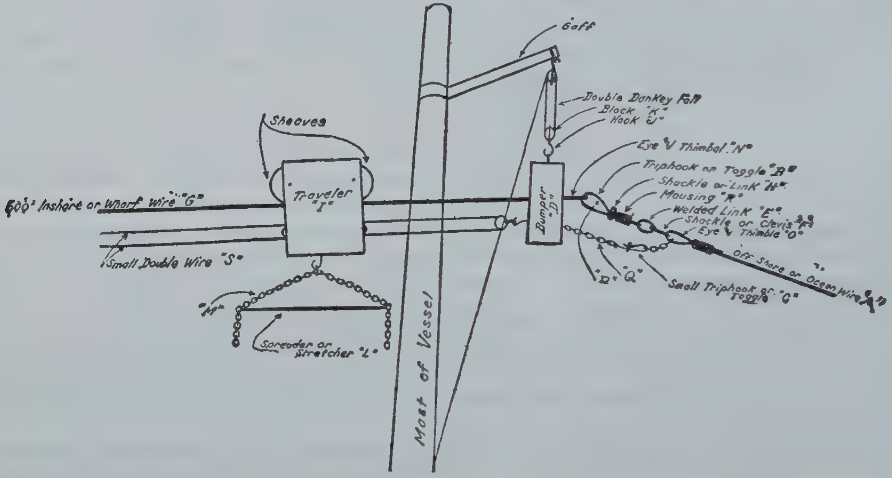
"IV. If so, what defect? Answer: Don't know.

"V. Did the wire cable give way by reason of the careless or negligent manner in which the machinery or appliances supporting it were adjusted? Answer: Yes.

"VI. If so, in what way were the appliances or machinery carelessly and negligently adjusted? Answer: The jury does not think that the evidence locates the defect that caused the accident."

Three appeals are prosecuted: (1) From a judgment in favor of plaintiff and against both defendants in the sum of $10,000; (2) from an order refusing to set aside the judgment and enter a judgment in favor of defendants on the special verdict rendered; (3) from an order denying defendants' motion for a new trial. The evidence is brought up on bill of exceptions.

A diagram was used at the trial which we find necessary to an understanding of the facts in the case and is here inserted in this opinion:



The general statement of the case found in appellants' opening brief is conceded by respondent to be substantially correct "for the purpose of getting the case before the court." We shall avail ourselves of this statement to some extent.

The defendant Albion Lumber Company has been for many years engaged in the operation of a sawmill at Albion in Mendocino county. As a part of its plant it owns and operates what is known as a "wire chute" at the end of a wharf, by means of which a vessel lying off the wharf can be loaded with lumber or other forest products. At the time of the accident here in issue, the other defendant, Swayne & Hoyt, had under charter and was operating the steamer Fulton, and by contract with Albion Lumber Company was transporting lumber and ties from Albion to other points. This "wire chute" is a device by which a wire cable is suspended between the wharf and the vessel to be loaded, and on this cable runs a "traveler" (I) from which is suspended the load to be transported between the wharf and the ship (L, M). The traveler is drawn back and forth by means of a steam donkey engine located on the wharf.

The cable, traveler, engine, and, in fact, everything belonging to the chute is the property of the Albion Lumber Company, with the exception that the "falls" and "tackle" (J,K), by which the seaward part of the chute is raised and lowered, is the property of the vessel, which is then being loaded. The "main wire" (G) on which the traveler runs is really two cables joined together at the ship with a "toggle" or "hook" (B). The offshore end of the main wire (A) is permanently moored in the harbor and when not in use this part of the wire rests on the bottom.

On January 17, 1911, the steamer Fulton came into Albion harbor and went "under the wire" to load. Her crew, all employés of Swayne & Hoyt, drew up the offshore wire from the bottom and, by means of a running line, pulled out the main wire from the wharf and then joined the two ends of the wire together by means of the toggle (B) which was permanently attached to the free end of the offshore wire. As a part of making this wire fast the vessel's crew "moused," i. e., tied with small rope, the tongue of the tripper or toggle hook (B).

The loading of the vessel then proceeded by means of the chute and continued during the 17th of January and all day of the 18th. At all times the employés of Albion Lumber Company had charge of the shore end of the wire and the employés of Swayne & Hoyt had charge of the vessel end thereof and attended to the storing away of the cargo. Matt Gabriel Koskela, plaintiff's intestate (hereafter referred to as Koskela), had been working in the lumber yard of the Albion Company and in its employ. On the morning of the 17th, however, the master of the Fulton found himself short of stevedores, and he therefore, with the permission of the Albion Company, employed Koskela in that capacity, and the latter went to work on the Fulton in the employ of Swayne & Hoyt about noon on the 17th, and continued in that employ until the accident.

About 5:30 p. m. on the 18th Koskela and another stevedore, called Jack Paavanen, having been working on the Fulton all day, came ashore for supper. They reached the shore by riding on the traveler across the wire chute, as was the custom in going ashore and returning to the vessel. After these men came across, the wharfman slackened the main wire between the wharf and the ship, so that it dropped to the bottom and another steamer which was lying at the wharf backed over the bight of the wire and then put out to sea. After this was done the wharf foreman, Byrne, set the wire tight by pulling it up again and put it in a position to carry loads over to the vessel. He then ran the traveler out with no load more than halfway to the ship, in order to test the wire, and then ran it back to the wharf. In the meantime, Koskela and Paavanen had gotten their supper and returned to the wharf, as it was proposed to continue loading that evening. When the wharf foreman gave the signal that everything was ready, Koskela and Paavanen took their places on the traveler to be transported back to the ship. The traveler was started out, and when it had gone halfway or a little less, the main wire dropped and caused the traveler with the two men to fall into the ocean. Paavanen was rescued, but Koskela was drowned.

An examination of the apparatus after the accident showed that the trip hook or toggle (B), holding the main wire together, was entirely gone, together with the link (E), by which it had been fastened to the shackle in the end of the offshore line. The trip hook and link disappeared either by falling into the water, as contended by appellants, or was thrown overboard by some one on the vessel to conceal their defects, as suggested by respondent. This trip hook (B) was a massive contrivance more than 26 inches long, and the link at its offshore end was made of material 1½ inches in diameter. The operation of the trip hook (B) can be understood from the diagram if it is remembered that there is a hinge in it just where it bears against the eye and thimble (N). Unless the tongue (P) is fastened down with the link or shackle (H) the trip hook will open and no longer hold the apparatus in position.

This action was brought against the two corporations to recover damages because of Koskela's death. The amended complaint alleges that Koskela's

> "death was caused by the negligence of said defendants committed as follows: * * * The said wire cable by reason of the defects in the machinery and appliances by which the same was supported, and by reason of the careless and negligent manner in which said machinery and appliances were adjusted, gave way and the deceased without fault on his part was * * * instantly killed. That said death of said deceased was the direct consequence of the defective and imperfect appliances and machinery of defendants and the negligent and careless manner in which same were used and adjusted, as above set forth, which said defects were well known to the defendants and each of them, and were unknown to the plaintiff. The said defendants ordered the deceased to undertake said journey to said vessel, well knowing that the said machinery and appliances for taking him there were defective, insecure, unsafe, and dangerous, and also well knowing that said machinery was adjusted in a careless and negligent manner."

Witness, George Olsen, called by plaintiff, was at the time the Albion Lumber Company's foreman on the wharf. He testified, in explanation of the operation of the apparatus, that when not in use the entire offshore wire from the thimble "N" and including the links of the small chain "Q" were dropped into the sea and rested at the bottom.

> "When the steamer is unloading and you trip the wire, this is untripped first [witness here indicates on diagram hook marked "C"] and this block [witness here indicates block marked "D"] and the little wire ('S') goes ashore, then you trip the big wire and the trip and this whole thing [witness indicates wire and trip marked "A," "B"] goes overboard. The end of this wire marked 'A' is under water too."

He testified further, that two or three months before the accident he assisted in overhauling the apparatus. He testified:

> "It was my duty to see that the rigging was in good order. These two wires (offshore wire 'A' and inshore wire 'G') are fastened together in this way: You pull the inshore wire out to the boat and raise it up and slip that trip hook (B) through the eye (N) of the inshore wire. After putting that link marked 'H' on there, they place a 'mousing' on outside that. I don't know whether that was done on that day of the loading of this vessel. I did not consider it a part of my duties to see whether that was fastened together right or not. On the day the steamer began to load I didn't fasten it; I was not aboard the boat. * * * We had some trouble with a part of the wire or the rigging of the vessel on the day before the accident."

Over defendants' objection he was permitted to explain the trouble:

> "The hook and this block here [indicating on diagram hook marked "J"] gave way and dropped the wire out aboard the vessel while the traveler was out there, and split the woodwork on this traveler here. * * * This block here [indicating block marked "K"] belonged to the steamer; it is used to hoist the wire up and down, and this hook and block both here [indicating "J," "K"], that belongs to the steamer, but the block there [indicating block marked "D"] belongs to the wire. It was this hook here on this block [marked "J"] which broke."

He testified that the next morning they began to load the vessel; ran the traveler out to see that it would work; did not examine to see whether the hook arrangement belonging to the vessel had been fixed; there might have been some little sling trouble at the vessel the day of the accident, but he was not certain. He testified that he went aboard the vessel about a half an hour after the accident and found the end of the inshore wire uncoupled from the offshore wire at the connection with the trip hook or toggle (B), and—

> "hanging in the rigging of this thing—right in the rigging [indicating on diagram point marked

"J"] * * * and the eye of this wire was right here in this block [indicating on diagram point marked "D"]. The weight of this inshore wire would naturally pull it toward the shore. * * * The offshore wire was not there at all. This bumper (D) was hanging right over the vessel. I did not find anything with reference to this trip hook [marked "B"]. Something was said about looking after it. I did not look for the offshore end of the wire or the coupler at this time of night."

It appeared that when Koskela started to return to the vessel it was at the hour of about 7 p. m. and it was quite dark, and "raining slightly." He testified that he proposed to look for the coupler.

"Q. Who did you propose it to? A. To the captain. Q. How was it you didn't look? A. Because the captain said it was too dark, and did not want to look for it."

The foregoing questions and answers were given over defendants' objection. "I did not hear any statement made by the captain as to what had become of the coupler." He testified that he examined the outside or offshore wire the next morning and found nothing on the end except the shackle or clevis (F). "The rest was gone," i. e., (B), (E), from that point to the eye or thimble at the end of the inshore wire. He was not certain whether the tripper (C) was here. The shackle or clevis (F) was not broken, and nothing on it showed a strain.

"Nobody dragged the ocean or sent any divers down to find that hook. I didn't look for it. I didn't see anybody else look for it. I have not seen the coupler since the accident."

He explained that the office of the little chain and tripper (C) was to hold the strain from the traveler (I). He got all of this chain and the tripper after the accident, but could not tell whether it was on the end of the inshore or outshore wire. He also testified that the "mousing" (R) was rope wound around the shackle (H) "and is always put on when you put the wire out. Every time you put the wire out it is customary to put on new mousing."

Witness Paavanen (Pavnen) was Koskela's companion and was on the traveler with Koskela when the latter was drowned. They had gone ashore for supper, and were, as directed to do by the captain of the vessel, returning to continue the work that night. His description of the accident is not material. He testified that during the day he worked the 18th, "something broke about the rigging of the vessel." Over objection he was permitted to describe what happened.

"This pulley broke off [indicating on the diagram marked "K"], and this whole thing [indicating traveler, bumper, and wire tripper] broke down into the hold of the vessel and broke the framework, and then they had to fix it. Q. Did that break let the wire down? A. Yes, sir. I do not remember what time of day this break was, but I thought it was in the forenoon. It was a couple of hours before they fixed it up. * * * After they fixed it we loaded more lumber or ties that day. I am also positive that it was the same day that I fell into the ocean. While they were fixing this traveler, they uncoupled the two wires. They had a rope around here in this block [indicating mousing on diagram]. Somebody took a knife and cut the rope off and then lifted this hook [indicating point "B"] and unhooked it. I didn't see him put this rope back. I didn't see them couple the wire back. I don't know whether they put the rope back on it or not. * * * They were hauling about 50 ties at a load across there on that day. Ties weigh from 100 to over 200 pounds. They were not carrying any load at the time Koskela and I got on the traveler. * * * There was nothing on the traveler to carry except we two men."

Witness Johnson was working "longshore" on the Fulton, and saw "the wire go down" at the time of the accident. He testified:

"I know what shape the coupler part that couples the two wires together was in that day. It was in good shape, and was tied. I don't know whether it was tied at the time of the accident. At the time I jumped out of the way. * * * All of the crew was around there when I jumped. I did not see this coupler after the wire fell. The wire didn't go quite overboard, the whole thing stood on top of the railing. I didn't see the offshore wire. I didn't look or help them look for the end of the wire that night. I didn't help them look for the coupler. I didn't hear anybody say anything about the coupler. I didn't hear the captain say anything about this machinery or any part of it, but when we was loading he told us to keep out of the way, that is all he said. He told us to keep out of the way, 'it ain't very safe around the load;' that is all I heard him say—that it was not very safe around there."

He testified that he saw the captain go ashore on the wire and return with the load a dozen times that day.

"He told us it would not be safe every time he was aboard the ship. When he was not there the mate told us. He never mentioned what was the matter. Neither the mate nor anybody else ever told us what was the matter."

On cross-examination he testified:

"When a load of ties goes out there on the steamer, and as it goes over the vessel it swings back and forth considerable. It always does. It is sure dangerous to stand around in the way of that and have it strike you."

On re-examination he testified:

"The captain and the mate surely made an examination of the rigging of the vessel in my presence while I was there that day. I don't know how many times they did that. * * * He didn't say it would not be safe while he was looking at that, but while he was running loads. He said the same thing every time but he didn't tell me what it was that would not be safe."

Plaintiff rested her case at the close of Johnson's testimony, and defendants moved for a nonsuit, which was denied. The motion presents certain questions which may as well be decided at this point as elsewhere. The grounds of the motion were: That the evidence does not show that Koskela was in the employ of either of defendants when the accident occurred; that it does not tend to prove negligence of either of the defendants, or that deceased in the course of his employment was directed by defendants, or either of them, to get upon the traveler; or that the cable gave way by reason of any defects therein; or that it gave way by reason of any defect in the appliances or in the negligent manner of operating the machinery; or that there were any defects in the machinery or its adjustment.

[1] There was evidence that the deceased was told by the captain of the vessel to return after getting his supper; that the traveler was used for transporting the workmen, and that when deceased returned from his supper to the wharf and the cable was ready for use, the lumber company's foreman said to deceased and his companion, Pavnen: "Hurry up and get on that traveler." It is true that there is no evidence that deceased was under pay while at his supper, or while he was returning on the cable. Strictly speaking, he may not have been at the time in defendants' employment. But we think it a fair inference from the evidence that the contract of service included transportation to and from his place of work by the very means through which he lost his life, and we think that the same rule should apply as would have been applicable if, without fault of his, he had been injured by the breaking of the cable while at work on the vessel.

[2] And that brings us to the question whether the circumstances thus far disclosed afforded reasonable evidence of want of care on defendants' part sufficient to require explanation by them. The rule or maxim, res ipsa loquitur, is stated as follows:

> "When a thing which caused the injury without fault of the injured person is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 99, 32 Sup. Ct. 399, 56 L. Ed. 680; Hill v. Pac. Gas & Elec. Co., 22 Cal. App. 788, 790, 136 Pac. 492.

It is not contended that deceased was at fault, and it seems to us that the undisputed facts show that the thing which caused the injury was under the exclusive control of the defendants, and that the injury was such as in the ordinary course of things would not have occurred had defendants used proper care. The appliances for loading vessels were such as were in ordinary use and, presumably, had been adopted by defendants as proper and suitable for the purpose designed. It is inconceivable that defendants would have adopted these means had they supposed that in the ordinary course of their operation, with proper care, such accidents as the one here were likely to occur. It is not necessary to refer to the many and great variety of cases in which the rule has been applied, to show that the present case comes plainly within its operation.

[3] Nor have we any doubt upon the remaining question presented by the motion, namely, whether or not defendants were jointly liable, if liable at all.

Appellants contend that:

> "The rule of res ipsa loquitur does not and cannot apply, for the reason that there cannot, under any view of the evidence, have been a joint liability by the defendants, and the evidence leaves it impossible to determine which if either defendant is liable."

The appliances used were in part owned by the lumber company and in part by the shipowners. All of these parts constituted the means of transportation, and were necessary to each other. It was also necessary that both parties should assist in the operation of the appliances, and they were jointly operated by and for the joint benefit of both defendants. In the absence of evidence tending to show by one of the parties that the accident happened by reason of the fault alone of the other, for which the former was in no sense responsible, we think it must be held that both were liable.

Appellants cite Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 Pac. 787, 55 L. R. A. 608. In that case the injury was to a passenger riding on a street car, and was caused by its colliding with a brewery wagon belonging to the National Brewing Company. Both companies were made defendants, and the contention was that, under the rule of res ipsa loquitur, a presumption of negligence arose against both parties. The court, speaking of this principle, said:

> "In the very nature of things it cannot be made to apply in favor of a plaintiff seeking to recover damages for injuries against two defendants wholly independent of each other; it being an open question as to which defendant had control of the particular instrumentality that caused the injury."

Appellants in their quotation omit to add the further statement of the court:

> "If it were a conceded fact in such a case [or, we may add, appeared from the evidence] that the instrumentalities of both defendants caused the injury, probably the principle could be applied, but not otherwise."

The undisputed evidence was that this very situation existed in the present case. The motion for nonsuit was rightly denied.

Capt. Jacobson, master of the steamer Fulton, was called by defendants, and testified that he assisted in adjusting the appliances aboard ship.

> "When we got this tripper up on deck I was right there and saw all of it, and there was no visible defect. That tripper did not go back in the water between that time and the time the accident happened. We didn't load any more that night."

He testified that "once the hook up above gave way" and also "the chain [marked "Q" on diagram] that takes the strain of the carriage"; these "were fixed and we kept on loading." He testified that he had to wait for the steamer Pomo to go out, and he told deceased and Pavnen to go and get their supper; that the bumper and the whole business was sent ashore and the inshore wire was let down to the bottom of the sea, and the Pomo went out over the wire.

> "I was on deck when this was done. Then we started up again. We sang to them on shore to heave tight the big wire, and then after that we got out the small line. * * * Then we rigged up our single and double donkey falls, the big wire was there already.

We did the same as we had done before, except that we had the main wire ashore."

He saw the bumper sent out part way, and then went in to his room.

> "I was in my room at the time this accident happened. I went out immediately, and when I got out there I found this here [indicating bumper and end of inshore line on diagram] hanging shoreward from the deck. I found all the rigging except that none of the offshore wire was on the vessel. I think the water there is somewhere around three or four fathoms deep."

He testified that George Olsen was not there that night, and that no one came from the wharf that night. Olsen's testimony is already given to the contrary. He testified that the next morning they got up the offshore line and there was nothing on it but the thimble or eye (marked "O" on diagram). "The tripper and the link and everything was gone, there was nothing left but just this tymbal [properly called thimble]." He explained that all his then crew were elsewhere employed at the time of the trial, and none of them testified except the captain. Concluding his testimony in chief, he said:

> "We didn't examine the tackle of the ship; that we took for granted was O. K. The tackle was hooked up on that day, if it was hooked up property (properly). I was over the wire myself on the day of the accident I should think a dozen times. I rode back and forth, out on the load and back empty."

On cross-examination he testified:

> "It was customary for the employés and longshoremen to go back and forth on this traveler; that is the way they always did."

He denied that the "mousing" was cut that day, or that the wires had been separated, and claimed that the breaking of the bumper and hook was the day before. The only explanation given by the witness as to his theory of what caused the accident was on his cross-examination, and was as follows:

> "The night this man was drowned that link must have broken" [indicating link marked "E" on big tripper]."

And his reason given was:

> "Because the tripper was not there. * * * I didn't make any investigation to see which way the trip hook fell over. No one saw it. I didn't see the trip hook. I don't know which side it went over on. If it had fallen in the boat I would have seen it."

He denied telling any of the men that the machinery was not safe. He told them when a load came out "to stand clear." He testified:

> "There was nothing the matter with any machinery such as the traveler or the dumping block, that I knew of. * * * It had been about 30 hours since I examined the mousing. It is the universal custom on all of these chutes for the vessel to make fast the two wires. We have no assistance at all in making it fast. We have men enough to do it ourselves."

Witness Byrne was called by defendants. He was the engineer handling the inshore end of the wire. He testified that they had trouble with the bumping block the day before the accident, but he didn't know of any other trouble. He was told by Olsen to send the longshoremen out; he tested the wire after the Pomo went out.

> "After I brought the traveler back and the two got on I started my engine; threw my clutch in and ran probably a third of the way out, or possibly half of the way, when everything dropped."

He explained that he had a rope or yarn tied around the wire to indicate when he had the wire taut.

> "When everything dropped I thought my mark might have slipped, or something, so I examined that the first thing, and found it where it belonged. It showed the main wire was not too tight. Of course, in setting that wire up it is difficult at night, and we go by that mark."

On cross-examination he testified:

> "The weight of an ordinary load of ties on the carriage would be probably three ton, from two to three tons, and at the time these men were out there was nothing at all on there except the two men. There was no reason that I know of why the toggle should break. Everything was in good order as far as I knew. There was no particular weight to these men to make it break when it had held up big loads before."

Pavnen was recalled for cross-examination, and testified that it was the evening before the accident that "the mousing on the big tripper" was cut, and that both he and Koskela worked there on the 17th and 18th.

Witness McKee testified for defendants as an expert in operating wire chutes. His testimony related to chutes at other places and the custom in their operation. We cannot see that his testimony throws any informing light on the case here. Of the wire chutes with which he was familiar he said: "It is not an unusual thing for some part of the rigging to carry away."

Olsen was recalled, and stated that it was the bumper and not the traveler that broke the night before the accident, and that the main wire was tripped that night. Witness Miller gave some expert testimony in rebuttal as to the proper construction of these wire chutes, but we do not think it important to state his opinions.

We have endeavored to give so much of the testimony, perhaps more than necessary, as would fairly present the salient facts in the case.

Reviewing the facts as shown by the testimony, we start with the presumption of negligence, i. e., that, under the rule res ipsa loquitur, there was reasonable evidence that the injury arose from the defendants' want of care. This alone, without considering specific facts indicating negligence, of which respondent claims there are many, would sustain the general verdict in the absence of satisfactory explanation by defendants of the cause of the injury exculpating them from responsibility therefor. And the sufficiency of the facts constituting such explanation was for the jury to determine. It is difficult to conceive of appliances that had during the day carried safely many loads of two or three tons weight suddenly, without fault of the operators or of the appliances themselves, breaking down under a load of 300 pounds. If the accident was susceptible of an explanation consistent with the assumption that the appliances were adequate and their operation by defendants without fault, the burden was upon defendants so to show to the satisfaction of the jury. The only member of the vessel's crew who testified was the master, Capt. Jacobson, and in his testimony in chief he made no explanation whatever of the cause of the accident. In his cross-examination the only suggestion made by him of a probable cause was that the "link must have broken [indicating point marked "E" on diagram] because the tripper was not there." It is possible that this link broke, if it did break, by engineer Byrne's having put a tension on the main wire to the breaking point when he sent the deceased out on the traveler. He was guided by a mere rope tied around the cable, which at first he thought had slipped, thus leading him to put too great a strain on the cable. It is not improbable that unwittingly he did this. However, it is not for us, nor was it for the jury, to speculate upon the cause of the breakdown. It was for defendants to make the explanation, and this, we think, they failed to do.

Appellants contend:

> "That the special verdict of the jury necessitates a judgment in favor of defendants, inasmuch as it affirmatively appears therefrom that the plaintiff did not prove to the satisfaction of the jury that the defendants' negligence caused Koskela's death."

[4] There was a general verdict for plaintiff and against defendants. The rule is that the general verdict imports a finding in favor of plaintiff on all the averments of the complaint material to his recovery. Merritt v. Wilcox, 52 Cal. 238, 242.

> "The presumption is that the general verdict covers findings in plaintiff's favor upon all the facts necessary to be proved under the issues not covered by the findings." Clementson on Special Verdicts, p. 135.

[5] And all presumptions are in favor of the general verdict for the plaintiff, and it must control if the special verdict is not absolutely irreconcilable therewith. Antonian v. S. P. Co., 9 Cal. App. 718, 731, 732, 100 Pac. 877. On the other hand, answers to interrogatories cannot be aided by intendment, as all intendments are in favor of the general verdict. Clementson on Special Verdicts, p. 134. And a special finding must be limited and controlled by its specific terms. Id. Special verdicts cannot control a general verdict unless consistent with each other, are not uncertain, and are free from obscurity. They cannot destroy the general verdict, if at all, except by their own inherent strength and clearness. Id., p. 135. Obviously, as the general verdict is an express finding for plaintiff on all material issues, it should not be overthrown unless the special findings are utterly at war with it. We have seen that the jury were warranted in finding the defendants guilty of negligence from which the injury resulted. We do not think it affirmatively appears from the special verdicts that plaintiff did not prove that defendants' negligence caused Koskela's death. Res ipsa loquitur. Special interrogatories I and II were not answered, and need not have been because plaintiff was not required to locate the particular defect in the wire cable. The jury did answer that the cable gave way by reason of defects in the machinery or in the appliances supporting it. Interrogatory III. But it was not required of the jury specifically to locate the defect. The jury also found that the wire gave way by reason of the careless and negligent manner in which the machinery or appliances supporting it were adjusted. Interrogatory V. These were findings of negligence, and respondent, we think, pertinently remarks:

> "Does this not exclude the idea of latent or undiscoverable defect? If the cause lay in the negligent manner in which this machinery was adjusted, the cause could not be a latent or undiscoverable defect. Negligent adjustment is not a latent defect."

Interrogatory VI invited an answer, In what way were the appliances or machinery negligently adjusted? The answer must be limited to the scope of the question which called for an explanation by the jury of the specific defect in the manner of adjusting the appliances which caused the accident. This the jury were unable to do. As shown, the happening of the accident under the circumstances and the death of deceased without his fault resulting therefrom established defendants' negligence. The jury found specifically that the cable gave way by reason of a defect in the machinery and appliances supporting it, and also by reason of the negligent manner in which they were adjusted. We must, if we can, under the rules stated, so construe the failure to answer interrogatory VI, as to be consistent with the answers just referred to. Besides, we do not think any inconsistency arises between this answer and the general verdict and the specific answers III and IV; nor, in our opinion, was an answer locating the defect necessary to the giving of full force to the general verdict.

We find no prejudicial error in any rulings of the court on the admission of evidence.

[6] The motion for a new trial was further urged on the ground of newly discovered evidence, and was supported by the affidavit of John Tietjen, mate of the steamer Fulton at the time of the accident. His affidavit shows that he was present and assisted in adjusting the appliances and operating them. It is in greater detail, and in some respects more specific, than the testimony of Capt. Jacobson, but is quite similar and, while corroborative and in that sense important, it was in large degree cumulative. He does not explain the cause of the accident, nor does he state facts which, if believed, would necessarily rebut the evidence of negligence. He

states that he "would have attended the trial on July 11, 1912, if he had had notice." Affiant Moran, manager of Swayne & Hoyt, deposed that he was notified, on June 24, 1912 (the case was set on June 20th), that the case had been set for trial July 11, 1912, and that he immediately "set about procuring Tietjen's attendance," and traced him aboard the steamer San Pedro, June 30, 1912, bound from San Francisco to Eureka and finally succeeded in obtaining information from the San Pedro's agent that she would arrive at San Francisco on July 9th, and that he, the agent, would employ a substitute mate, relieve Tietjen, and send him to Ukiah on the 10th; that affiant relied on this promise, and notified the defendants' attorneys that Tietjen would be at Ukiah on July 10th, not later than the 11th. It turned out that the San Pedro did not arrive at San Francisco until July 18th. No application was made to postpone the trial for the reason, as deposed by Attorney Mannon, that he could not assure the court that he would be able to secure Tietjen's attendance nor state where he was.

Attorney Preston, one of plaintiff's attorneys, deposed that the cause was at issue in February, 1912, and the case was called up to be set for trial about March 11th, and was set down for trial for April 25th, but on April 8th the order was vacated and the cause regularly continued from week to week to be reset until May 27th, when the trial date was fixed for June 27th, and at the request of defendants the cause was again postponed until July 11th, at which date the trial began; "that no application for a postponement was made on said last-named day, or at any other time; that John Tietjen does not reside in the county of Mendocino, nor did he reside at a place where he could be forced to attend trial by subpœna." There is no reason given why Tietjen's deposition was not taken except as may be inferred from the fact that Mr. Mannon was notified by Swayne & Hoyt that all the witnesses, including Tietjen, would be in attendance.

The granting of the motion, under the circumstances, was within the sound discretion of the court, and it is only where such discretion has been abused that its order will be reversed. People v. Urquidas, 96 Cal. 239, 31 Pac. 52.

Tietjen's evidence cannot be said to be newly discovered. It was well known to the defendants that he was present and acting as mate of the Fulton when the accident happened. Knowing as early as March that the cause was called up to be set for trial, defendants had ample time to assure themselves of the attendance of their witnesses, but it was not until June 24th that any effort was made to ascertain Tietjen's whereabouts. Swayne & Hoyt, being engaged in the coastwise shipping, had the means of learning who constituted the crews on coastwise vessels. Defendants' attorneys were justified in relying on their clients to secure the attendance of necessary witnesses, and defendants cannot be heard to complain of their own want of diligence. Had they made timely inquiry and learned that this witness could not be found or, if found, was so situated as to make it doubtful whether he could attend the trial, the attorneys should have been so notified and given an opportunity to move for a postponement before the trial began. We cannot say that the court abused its discretion in denying the motion.

The judgment and orders are affirmed.

We concur: HART, J.; BURNETT, J.

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COLLOM v. ROOS BROS., Incorporated. (Civ. 1320.)

(District Court of Appeal, First District, California. July 2, 1914. Rehearing Denied by Supreme Court Aug. 28, 1914.)

BROKERS (§ 46*)—COMPENSATION—PROCURING LEASE — OPTION TO RENEW — EXERCISE — LEASE TO DIFFERENT PERSON.

Plaintiff, a broker, having obtained an option for a lease for three years with a privilege of renewal at $500 a month, made an agreement with R. Bros. to lease the premises for that term with the privilege of renewal at $600 per month, they agreeing to pay plaintiff monthly the difference in the rent. This agreement was consummated, except that the lease executed to R. Bros. contained an option to renew for seven instead of three years for the sum of $600 per month. Prior to the expiration of the lease all the stockholders in R. Bros. Co. but two organized a new corporation, known as the R. Realty Co., to which R. Bros. assigned all its interest in the lease, etc. In February, 1909, R. Bros. notified the landlord that the privilege of renewal would not be exercised. A short time thereafter, however, one of the stockholders of the R. Realty Co. obtained from the landlord a lease to him, individually, for a rental of $600 a month from the end of the term of the former lease, with the privilege of renewal of the new lease for a term of three years and four months, and on the expiration of the old lease nothing further was paid to plaintiff. *Held*, that the new lease could not be regarded as a renewal of the old, and R. Bros. and, the R. Realty Co. being entirely different entities, plaintiff could not recover any portion of the rent reserved under the new lease, in the absence of any claim of fraud.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 47; Dec. Dig. § 46.*]

Appeal from Superior Court, City and County of San Francisco; Robert M. Clarke, Judge.

Suit by J. F. Collom against Roos Bros., Incorporated. Judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed and remanded.

Heller, Powers & Ehrman, of San Francisco, for appellant. John Ralph Wilson and Harding & Monroe, all of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $844.10, and from an order denying the defendant's motion for a new trial. The essential facts are these: The plaintiff in April, 1906, was a real estate broker in the employ of Madison & Burke, a real estate firm in San Francisco. After the earthquake and fire of that year, knowing that Mrs. B. McDermott was the owner of certain property on Fillmore street which she desired to rent, and having learned that the defendant wished to lease the property, the plaintiff went to the home of Mrs. McDermott in Oakland on April 26, 1906, and obtained from her an option for a lease of the premises for three years, with a privilege of renewal, and at a rental of $500 a month, the option to expire on May 1st. Two days later he made an agreement with Roos Bros., by which he agreed to procure a lease of the premises for them, for three years, with a privilege of renewal, at a rental of $600 per month, and by which Roos Bros. agreed to pay Collom "out of the monthly rental of $600 per month to be reserved in said lease, such amount as the owner of said premises may allow him, the same to be in full of all commissions and other services rendered and to be rendered by him as above." Having this agreement Collom then went back to Mrs. McDermott, and obtained the execution by her of a lease of the property to Roos Bros., for the term of three years, with an option of renewal for seven years additional, for the sum of $600 a month. He also obtained from Mrs. McDermott a letter addressed to Roos Bros., in which the latter were "authorized to pay on account to J. Frank Collom, his heirs or assigns, the sum of $100 per month during the full term of said lease and any renewal thereof for the period of seven years additional as therein provided." This letter was presented to Roos Bros. at the time of the execution of the lease on their part, and their acceptance of its terms was evinced by the payment to Collom for a time thereafter of the monthly sum of $100 out of the rents specified in their lease.

Roos Bros. is, and prior to the date of the lease in question was, a corporation composed of Leon L. Roos, Robert L. Roos, George H. Roos, Adolph Roos, and Achille Roos. Immediately after the earthquake and fire this corporation had taken a number of leases of real estate in San Francisco; but in the month of July, 1906, a new corporation was formed, known as Roos Realty Company, which then took over and thereafter conducted separately the real estate branch of the business of Roos Bros., with which the two elder members of the former corporation did not wish to be further concerned. The stockholders of the new corporation were Leon L., Robert L., and George H. Roos; and in it the two elder members of the Roos family, Adolph and Achille, had no interest. To this new corporation the older one of Roos Bros. assigned all of its interest in these several leases, including that made by Mrs. McDermott, and thereafter the Roos Realty Company paid to Mrs. McDermott the portion of the rental to which she was entitled under the foregoing agreements, and also paid to the plaintiff, Collom, his share thereof in accordance with Mrs. McDermott's direction. In the month of February, 1909, Roos Bros. notified Mrs. McDermott that the privilege of renewal in the lease of April, 1906, would not be exercised. A short while later negotiations were entered into between George H. Roos, representing the Roos Realty Company, and the owner of the property, for another lease of the premises, as a result of which a new lease was entered into between Mrs. McDermott and George H. Roos, whereby, for a rental of $600 a month, the latter leased the property for a term of three years and eight months from the end of the term of the former lease, with the privilege of renewal of the new lease for a further term of three years and four months from the end of the stated term thereof. Upon the execution of this instrument and the expiration of the former lease Mrs. McDermott instructed Roos Bros. in writing to cease paying Collom any further sum. The payments to Collom accordingly ceased on May 1, 1909, and in November 1909, he brought this action.

In his third amended complaint the plaintiff, after stating the substance of the option and agreements out of which the first lease came into being, together with the direction of Mrs. McDermott to Roos Bros. as to the payment of the $100 a month to him during the term of said lease, and also the fact of the making of the later lease, proceeded to aver that George H. Roos, to whom the second lease ran, was a large stockholder and officer of Roos Bros. and was also a large stockholder and officer of Roos Realty Company; that the stockholders of Roos Realty Company are all stockholders of the defendant Roos Bros., and were all as such stockholders beneficially interested in the original lease, and were in fact the only stockholders of the defendant corporation who ever had any beneficial interest therein; that said second lease was taken in the name of George H. Roos as the agent and trustee of Roos Realty Company, and that the same was taken and held by said George H. Roos in the form of a new lease, and not as a specific renewal of the lease of April, 1906, "as an attempt on the part of defendant to evade its liability under its contract with the plaintiff for the payment to him of $100 a month during any renewal of the former lease." In its answer to this third amended complaint the defendant admits that George H. Roos is a large stockholder both of the defendant and the Roos Realty Company, and admits that the stockholders of the Roos Realty Company are all stockholders of the defendant, and admits that they were all as such stockholders interested in the first lease, but denies that they were the only stockholders so interested therein, and alleges that the other stockholders of the defendant were also interested in said first lease at the time of its execution, and so continued to be until its transfer to the Roos Realty Company, but not thereafter; the defendant also admits that George H. Roos took the second lease as trustee for the Roos Realty Company, but denies that the said last-named lease was taken in the form of a new lease as an attempt on the part of the defendant to evade its liability to the plaintiff in the event of a renewal of the former lease; but, on the contrary, avers that the new lease constituted an entirely new and independent transaction with the owner of the property, and was in no sense a renewal of the old lease, but was different in time and terms from what such renewal would or could have been; that the old lease was not renewed, and hence that defendant's liability to the plaintiff ceased with its expiration on May 1st of 1909, and that the defendant owes the plaintiff nothing.

Upon the issues as thus formed the cause went to trial. The plaintiff introduced in evidence the several documents referred to in the history of the transaction, and thereupon and upon the admissions of the pleadings rested his case. The defendant moved for a nonsuit upon the ground of plaintiff's failure of proof, which motion the court denied, and to which the defendant duly excepted, and now assigns the same as error.

We think the defendant's motion for nonsuit should have been granted. The plaintiff's theory as to his right of recovery is predicated upon a twofold aspect of the facts as presented by the documentary proofs and by the admissions of the pleadings in the case. The first of these is that the defendant, by its transfer of the first lease to the Roos Realty Company, transferred to it the right to enter into a renewal thereof, which, if consummated, would serve to bind the defendant to continue its payment of $100 monthly to the plaintiff during the term of such renewal, and that the new lease taken by George H. Roos as the agent and trustee of the Roos Realty Company constituted in fact such renewal. But while it may be conceded that the defendant, by its transfer of the first lease passed over to the Roos Realty Company the right to make a renewal of it by which the defendant would be bound to continue its payments to the plaintiff, it does not follow that the new lease is, on its face and standing by itself, to be considered to be a renewal of the former lease. It is made to a different person, representing a different entity from that of the former lessee. It is for a different term from that provided for in the privilege of renewal stipulated in the former lease. This is an essential variation; and, while it is true that a new lease made between the immediate parties to a former one containing the privilege of a renewal, may, under the authorities, be varied as to its terms and still be held to constitute a renewal thereof, this flexibility in the exercise of the privilege cannot be held to apply as between the lessor and a transferee of the first lease. Otherwise the original lessee would be placed in a position where it would be bound by obligations to which it was not a party and differing from those which it would have consented to incur. In order, therefore, that this new lease, made between different parties and for a different term than the former one, might be held to be a renewal of it so as to bind Roos Bros. to a continuance of their payments to the plaintiff, it must either have been identical in terms with the original lease, or it must be aided by those proofs which the plaintiff in his complaint undertook to supply; that is to say, by evidence sustaining the plaintiff's averments that the second lease was taken in the form of a new lease, and not as a specific renewal of the former one, in "an attempt on the part of the defendant to evade its liability under its contract with plaintiff," or, in other words, with the fraudulent design and effort on the part of the appellant to avoid its obligation; for this is what the averments of the plaintiff's complaint must be held to mean, although the plaintiff in his brief disclaims the intent to impute fraud to the appellant.

This branch of the plaintiff's case, requiring averment in his complaint, and being traversed by the answer, of necessity demanded affirmative proof on the part of plaintiff at the trial; but this proof, essential to his case, the plaintiff utterly failed to produce, unless it is to be found in the documents which evidence the transaction, or in the admissions of the defendant's pleadings, or in both read together.

So far as the documents are concerned, they, in themselves, evince no such fraudulent intent or attempt as the plaintiff avers; and so far as the admissions of the pleadings go, the only admission of the defendant which plaintiff urges as supporting this view of the case is the admission that the stockholders of Roos Realty Company, the corporation for whose benefit the second lease was made, were also stockholders of Roos Bros., the corporation named as lessee of the first lease and the transferrer thereof to the later corporation. But this admitted fact, either taken alone or in connection with the documentary proofs, does not tend to disclose any fraudulent design or effort on the part of Roos Bros. to avoid its obligation to the plaintiff. It is not shown, or even contended, that these two corporations are one entity, even though all of the stockholders of Roos Realty Company are also some of the stockholders of Roos Bros. On the contrary, the pleadings and proofs of the plaintiff himself show that they are two different entities, having different holdings and engaged in distinct forms of corporate energy; that the latter corporation was organized to take over the real estate activities and investments of the former corporation which certain of its stockholders no longer wished themselves or it to be interested in; that it did so openly, and that thereafter its business and affairs were entirely separate from those of the earlier corporation; that these facts were known to the plaintiff at the time; and that during practically the entire term of the first lease he dealt with the Roos Realty Company as a separate entity and as the successor in interest in such lease of the former corporation. The mere fact that the same persons were stockholders of one corporation doing one kind of business, and are also stockholders of another corporation engaged in another and distinct line of business, is not in itself sufficient to impute liability to one for the acts of the other in the absence of some direct proof of a fraudulent design in the carrying out of which the two entities are controlled and act as one. No such proof had been presented at the close of the plaintiff's case. This being the state of the record and the proofs when the plaintiff rested, we think the court erred in refusing to grant the defendant's motion for nonsuit at that stage of the trial.

The subsequent proofs cannot be said to have in any way strengthened the plaintiff's original case; and hence it follows that if the motion for a nonsuit should have been granted, the judgment which the court rendered and entered at the close of the trial should be reversed, as well as the order of the court refusing to grant a new trial.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: LENNON, P. J.; KERRIGAN, J.

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25 Cal. App. 1

PEOPLE v. SVENDSEN. (Cr. 323.)

(District Court of Appeal, Second District, California. June 18, 1914. Rehearing Denied by Supreme Court Aug. 17, 1914.)

1. ROBBERY (§ 24*)—EVIDENCE—CONVICTION.
In a prosecution for robbery, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32–36; Dec. Dec. Dig. § 24.*]

2. CRIMINAL LAW (§ 1170½*)—WITNESSES—CROSS-EXAMINATION — LIMITATION — APPEAL—REVIEW.
Exercise of discretion by the trial judge with reference to the cross-examination of a witness and permitting leading questions to be asked of a party's own witness will not be disturbed on appeal, unless abuse of discretion and prejudice are shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

3. WITNESSES (§ 268*)—CROSS-EXAMINATION—SCOPE.
In a prosecution involving the life or liberty of accused, where the guilt depends on the uncorroborated evidence of the prosecuting witness, it is the court's duty to permit a full investigation, and not to hold too strictly to the rules governing cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

4. CRIMINAL LAW (§ 409*) — EVIDENCE — ADMISSIONS TO OFFICER—PRELIMINARY PROOF.
Admissions made by accused to a police officer when placed under arrest, if not confessions of guilt, are admissible without the preliminary laying of a foundation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972; Dec. Dig. § 409.*]

5. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS — REQUESTS TO CHARGE — INSTRUCTIONS GIVEN.
It is not error to refuse requests to charge fully and fairly covered by other instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 834*)—TRIAL—REQUESTS TO CHARGE—MODIFICATION.
Accused requested the court to charge that if, after considering the whole case, any juror should entertain a reasonable doubt of accused's guilt it was the juror's duty "not to vote for a verdict of guilty nor" not to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of guilty. *Held*, that the striking out of the quoted words left the instruction complete and unobjectionable, and its modification was therefore not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

7. CRIMINAL LAW (§ 1166½*)—TRIAL—MISCONDUCT OF COURT.
Alleged misconduct of the court, consisting of a hostile manner towards accused's counsel, was not of itself sufficient to constitute reversible error, but merely accentuated prejudicial error exhibited by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3123; Dec. Dig. § 1166½.*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Neils Svendsen was convicted of robbery, and he appeals. Affirmed.

Frank A. McDonald and Nathaniel R. Rutherford, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of robbery. He appeals from the judgment alone.

On the night of August 2, 1913, defendant, who had been to the city of Los Angeles, alighted from a suburban electric car at a point near the town of Whittier, from which point he started to walk to the farm where he was employed as a dairyman. On the same car was a Chinaman, Sing Lee, who was also traveling from Los Angeles to his place of employment as a farm laborer near Whittier, and distant about one mile from the point where both he and the defendant left the electric car at the same time. In going to their respective places of employment, both defendant and Sing Lee on foot and together traveled the same road. When they had reached a point about a quarter of a mile from the camp where Sing Lee was employed, and at about 12:15 o'clock on the morning of August 3d, a fight ensued wherein defendant, as conclusively shown, inflicted upon the Chinaman some 40 to 50 knife wounds, a number of which were dangerous, and as a result of which Sing Lee was left in a disabled and semiconscious condition, in which he was found several hours later by persons traveling the thoroughfare. There were no witnesses other than the parties to the encounter, and their versions as to who was the aggressor and other material facts are conflicting. According to Sing Lee's testimony, defendant, without provocation, suddenly attacked him by grasping his throat, holding his knuckles against his vocal cords, and, saying, "God damn, no likee me," began using a knife on him until, disabled from his numerous wounds, he fell to the ground, when defendant searched his pockets, taking therefrom a purse containing $4.05, and left him. Defendant testified: "This Chinaman met me on the boulevard, and he says 'Where do you live?' I told him it was none of his damn business. He said, 'What is the matter with you?' I says, 'Don't bother me; I ain't got no use for Chinamen; cheap labor.' And about that time he pulled out a knife and struck me on the forehead with the knife, and we had quite a fight there on the boulevard. I got the advantage of him and took his knife away from him and give him quite a beating." But that he did not go through his pockets, nor take any money from, nor rob him. That Sing Lee first struck him in the forehead with a knife, whereupon he took the knife away from the Chinaman and struck him once or twice. That in taking the knife he took hold of the blade, cutting his hand. There was some corroborative evidence that defendant had a cut on his hand.

[1] It is apparent that the jury in reaching a verdict believed the testimony of the Chinaman, to the effect that the defendant robbed him of the purse containing the money. Defendant's story, in view of the fact that when found the next morning Sing Lee had 40 or 50 knife wounds in his body, that he took the knife from Sing Lee, who was the aggressor, and struck him with it once or twice only, was well calculated to cause the jury to discredit his entire testimony. It was the province of the jury to determine the fact, as to which the evidence was conflicting. Hence there is no merit in the contention that the evidence was insufficient to support the verdict of conviction.

[2] On direct examination Sing Lee testified: "He [the defendant] took from me a pocketbook containing four dollars and five cents." On cross-examination, after stating that he had this purse in his trousers pocket, he was asked: "Did the defendant put his hand in your pocket and take your purse from your pocket?" The judge, without waiting for an objection to be interposed or answer given, interrupted, saying, "He has answered that," to which defendant's attorney replied, "Not that question," in reply to which the learned judge said: "Yes, he has. I will sustain an objection and make it myself. We have got to get through here some time. The next question, if you have got another one, Mr. McDonald." The witness stated the trousers he had on were those worn at the time of the robbery, and that while he was in the hospital the nurse took them to the laundry, having them cleaned. He was then asked: "Is that the only person that has ever had your trousers in their possession or cleaned them since the 2d day of August?" to which the court sustained an objection upon the ground that it was immaterial. He was also asked: "Who lives with you on this ranch?" Whereupon, no objection being interposed, the court said, "That is not proper cross-examination." An objection was also sustained to a question as to whether he had been spending the night in Chinatown and what he had been doing. The control of the cross-examination of a witness, and the permitting of leading questions to be asked of one's own witness, is largely in the discretion of the trial judge, and unless there be an abuse in the exercise thereof and the rights of defendant prejudiced thereby, the action of the court should not be disturbed. The witness, if we may determine from the record, had not stated in terms, as said by the court, that defendant put his hand in his pocket and took therefrom his purse, and, conceding that he had, he might very properly have been permitted to answer the question. Doubtless he would have given an affirmative answer, since by reason of its being in his pocket he could not have obtained it otherwise, except by forcing Sing Lee to take it from the pocket and hand it over to him, in which case the act would have constituted the offense charged. Hence, conceding the ruling of the court to be error, it must likewise be conceded that it was not prejudicial to the substantial rights of defendant. The other questions to which objections were sustained appear to have been immaterial. The answers, whatever they might have been, could not have had the slightest effect upon the question at issue. The same remarks apply with equal force to a number of like assignments of error based upon rulings in the admission and rejection of evidence. While we think the court might properly have allowed defendant greater latitude in the cross-examination of the prosecuting witness, it cannot be said the record discloses that defendant's rights were prejudiced by the limitation placed thereon.

[3] In this connection it may be said gen-

erally, however, that where the life or liberty of one accused of an offense depends upon the uncorroborated evidence of the prosecuting witness, the ends of justice will be best subserved by permitting the light of a full investigation to be thrown upon the transaction, which, other than his own statement, in the absence of direct evidence elicited by the district attorney, can only be done on cross-examination of the witness. The policy often pursued by district attorneys in proving the bare facts and then objecting to questions calculated to illuminate the subject involved, asked by the accused, upon the ground that they are not proper cross-examination, is not to be commended; and the trial judge, who is supposed as between the accuser and the accused to sit impartially, should, notwithstanding the limited scope of the direct examination, grant to defendant the fullest opportunity for cross-examination and inquiry as to direct statements made against him by his prosecutor. So long as the present system of criminal procedure prevails, and particularly since the adoption of section 4½, article 6, of the Constitution, under which notwithstanding a defendant has, by a ruling of the court, been deprived of a legal right in his trial, he is nevertheless, on appeal, without remedy, unless this court can say upon the entire evidence that such error has resulted in a miscarriage of justice, a greater and larger responsibility rests upon the trial judge in seeing that a defendant on trial is accorded every right to which he is entitled; otherwise a legal wrong is done under judicial sanction for which the aggrieved is without remedy.

[4] One of the officers who made the arrest of defendant was called as a witness for the people, and testified as to certain statements made to him by defendant at the time when placed under arrest. After the district attorney had asked certain preliminary questions, the witness was told to repeat the conversation had with defendant. Thereupon the following proceedings were had:

"Mr. McDonald: Just a moment. Was this conversation had—

"The Court: You are not cross-examining.

"Mr. McDonald: For the purpose of objection—

"The Court: "Well, I don't care anything about that. You will get your chance when the time comes."

And again, when the witness was asked to repeat another talk had with defendant, his attorney, addressing the court, stated:

"For the purpose of objecting, I would like to ask the witness one or two questions."

"The Court: I think not."

As we gather from appellant's brief, his complaint is that the admissions made by defendant to the officer in the conversation had with him constituted confessions, and as such were inadmissible in evidence for want of proper foundation laid. Assuming the statements made by defendant, as testified to by the witness, were confessions, we think a sufficient foundation was laid to entitle them to admission as evidence. Moreover, an examination of the statements made by defendant in the conversations to which the witness testified clearly shows that they were not confessions of guilt; indeed, nothing that he said could be so construed. For this reason it was not necessary to make the proofs required as a prerequisite to introducing a confession in evidence. People v. Wilkins, 158 Cal. 530, 111 Pac. 612; People v. Weber, 149 Cal. 325, 86 Pac. 671; People v. Stokes, 5 Cal. App. 211, 89 Pac. 997.

[5, 6] Certain instructions to the jury requested by defendant were refused, or given as modified. Where such instructions were refused the subject thereof appears to have been fully and fairly covered by other instructions given. Hence, conceding the instructions requested to have been correct and applicable to the case, nevertheless the rights of defendant could not have been prejudiced by the refusal to give the same. Of the requested instructions given as modified, the changes therein appear to have been by running a line through such portion as was elsewhere given, or by the court deemed improper. As so modified, the instructions, taken with those given, were correct, full, and fair statements of the law applicable to the case. Assuming that defendant was entitled to the instruction that, "if after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror *not to vote for a verdict of 'guilty' nor* not to be influenced into voting for the single reason that a majority of the jury should be in favor of a verdict of 'guilty'" (the failure to give which, however, has been repeatedly held not error. People v. Loomer, 13 Cal. App. 660, 110 Pac. 466; People v. Singh, 20 Cal. App. 150, 128 Pac. 420; People v. Fisher, 16 Cal. App 271, 116 Pac. 688), the modification thereof by striking out the part underscored left the instruction complete and unobjectionable; the jurors being correctly told that the fact that a majority of their number favored a verdict of guilty should not in itself influence any one of them who entertained a reasonable doubt as to defendant's guilt to so vote. It is also claimed the defendant's rights were prejudiced by permitting the jury to take these instructions so modified to the jury room, an inspection of which disclosed the parts thereof so stricken out. There is nothing in the record showing that the instructions were so delivered to the jury.

[7] Assignments are made of misconduct on the part of the court, it being claimed that the manner in which the rulings were made showed hostility to counsel for the defendant in the method in which he presented his client's case, and tended to humiliate counsel and prejudice the cause of defendant. Some of the rulings upon which

appellant bases his claim are hereinbefore stated. Many of the questions asked by defendant's counsel were immaterial and of the most trivial nature, and, while doubtless he was defending his client to the best of his ability, nevertheless his conduct of the case was calculated to try the patience of the court. While the court might have expressed its rulings in a manner indicative of less impatience and less calculated to affect the sensibilities of defendant's counsel, it cannot be said, in the absence of prejudicial error, that this alone was sufficient to prejudice the rights of defendant. As said by this court in an opinion filed June 10th, in the case of People v. Costa, such action on the part of the court merely accentuates prejudicial error exhibited by the record. People v. Szafcsur, 161 Cal. 636, 119 Pac. 1083; People v. Casselman, 10 Cal. App. 238, 101 Pac. 693; People v. Modina, 146 Cal. 142, 79 Pac. 842.

Counsel for appellant cites section 4½, article 6, of the state Constitution, to the effect that no judgment in a criminal case shall be set aside for error unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the errors complained of have resulted in a miscarriage of justice. In compliance with appellant's request, we have read this provision which, however, is not, as indicated by counsel, entirely new to us, and we have likewise carefully read the record, and are convinced that it discloses no error which will justify this court in holding there has been a miscarriage of justice. Appellant's counsel have filed voluminous briefs, a large part of which is not devoted to a discussion of alleged errors contained in the record, but to the fact that defendant, a white man, has been convicted upon the uncorroborated testimony of a "heathen Chinaman" (and other matters wholly foreign to the questions presented for review), and insist that the laws of the state permitting such an outrage should be changed. The labor of the court would have been greatly lessened had counsel devoted their time to a discussion of the alleged errors contained in the record.

The judgment herein is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(168 Cal. 295)

TITLE GUARANTY & TRUST CO. et al. v. RAILROAD COMMISSION OF CALIFORNIA. (S. F. 6666.)

(Supreme Court of California. Aug. 3, 1914. Rehearing Denied Sept. 2, 1914.)

1. Waters and Water Courses (§ 203*)—Public Water Supply—Service Connections—Duty to Furnish.

A franchise giving a water company the right to furnish water to the inhabitants of a city at specified rates and to use the streets for mains does not authorize the company to charge consumers for service connections, but requires the holder of the franchise to furnish such connections free of charge; the consumers having no right or authority to use the streets for such purposes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

2. Waters and Water Courses (§ 203*)—Public Water Companies—Water Supply—Service Connections—Statutes.

Civ. Code, § 549, declares that all corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof for family uses, on demand, and that the proper authorities may prescribe rules as to the delivery of water, not inconsistent with the laws of the state. *Held*, that such section makes it the duty of water companies to deliver the water to the consumer, which includes the installation of service connections in the street at their own expense, which duty they cannot avoid while enjoying their franchise by showing that their articles of incorporation did not give the authority to engage in the service.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

3. Waters and Water Courses (§ 203*)—Public Water Supply — Regulation — Railroad Commission—Powers.

Const. art. 12, § 23, as amended (see St. Ex. Sess. 1911, p. xlviii), defines public utilities, including companies furnishing water to the inhabitants of cities and towns, and then declares that the railroad commission shall have jurisdiction to supervise and regulate such utilities and fix rates, etc., provided that the section shall not affect such powers of control over any public utility vested in any city and county or incorporated city or town, as, at an election to be held pursuant to laws to be passed, a majority of the electors voting thereon shall vote to retain, and until such election such powers shall continue unimpaired. *Held* that, since a city of the sixth class, organized under the general Municipal Corporation Act (St. 1883, p. 93), had full power to regulate and control rates and service by water companies furnishing water to its inhabitants, such authority could not be exercised by the railroad commission prior to an election voting to delegate such power to the commission.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

4. WATERS AND WATER COURSES (§ 203*)—PUBLIC WATER SUPPLY—METERS—DUTY OF WATER COMPANY TO FURNISH.

Const. art. 11, § 19, article 14, § 1, and St. 1881, p. 54, each conferring on cities power to fix rates for water to be delivered to the inhabitants of the city by any company engaged in that service, conferred on a city power to compel such companies to install meters to measure the service at their own expense.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

5. WATERS AND WATER COURSES (§ 203*)—PUBLIC WATER SUPPLY — CITIES — WATER COMPANIES — DUTY TO PROVIDE SERVICE CONNECTIONS—STATUTES.

Const. art. 11, § 11, declares that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, and Civ. Code, § 549, gives city authorities power to prescribe proper rules relating to the delivery of water. Municipal Corporation Act (St. 1883, p. 270) § 862, subd. 14, authorizes cities of the sixth class to punish violations of ordinances by fine and imprisonment as misdemeanors. *Held*, that a city of the sixth class, incorporated under the general Municipal Corporation Act, had authority to require a municipal water company to furnish consumers with service connections and meters at its own expense, to forbid such companies to charge for meters, and to declare a violation of the ordinance a misdemeanor punishable by fine and imprisonment.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

In Bank. Certiorari by the Title Guaranty & Trust Company and another against the Railroad Commission of California, to review an order requiring plaintiffs, as public service water companies, to install meters without charge to consumers. Order annulled.

W. G. Cooke, Tanner, Taft & Odell, and E. W. Sargent, all of Los Angeles, for petitioners. Max Thelen and Douglas Brookman, both of San Francisco, and Jones & Evans, of Los Angeles, for defendant.

SHAW, J. This is a proceeding in certiorari, under the provisions of sections 67 and 68 of the Public Utilities Act of 1911 (Stats. Ex. Sess. 1911, p. 55), to review an order of the state railroad commission requiring the plaintiffs, as public service water companies, to install meters and lay service connections in the city of Glendale, without charge to the consumers.

The plaintiffs, respectively, on October 10, 1911, were and ever since have been engaged in the business of supplying water to the inhabitants of portions of the city of Glendale. They had each made and were enforcing a rule whereby each consumer of water from them, respectively, was charged and compelled to pay $15 for installing a meter and making service connection between the water main of the company in the street and the property line of the consumer. On the application of the city of Glendale, the railroad commission made the order complained of, which is as follows:

> "It is hereby ordered that said rule or regulation be and the same is hereby abrogated, and that said defendants be and they are hereby ordered to make service connections to the property line and install meters free of charge for persons living in the city of Glendale along the mains or pipe lines of said companies and desiring connection for the service of water."

It is contended by the plaintiffs that the railroad commission has no power to supervise or regulate, in this respect, corporations or persons engaged in supplying water to the inhabitants of cities of the sixth class, to which class Glendale belongs.

The powers of the railroad commission over such public utilities are derived from the Public Utilities Act of 1911, enacted in pursuance of the authority given to the Legislature by section 23 of article 12 of the Constitution, as amended on October 10, 1911. Stats. Ex. Sess. 1911, xlviii.

[1] A franchise giving the right to furnish water to the inhabitants of a city, at rates to be fixed, and to use the streets as a place in which to lay the necessary pipes, does not authorize the holder to charge consumers for the expense of laying service pipes from the main to consumers along the street, unless such right is conferred by some clause of the franchise or by some provision of law applicable to such service. The franchise to furnish water to the inhabitants includes the duty of conveying the water to the consumer. The inhabitants have been given no right to use the streets at all for the laying of pipes therein. Their use of the streets for that purpose would be a private use. They could not make the connection without unlawfully obstructing the public street. The company, therefore, does not perform its full duty except by laying the service pipes to the premises of the consumer. See Hatch v. Consumers' Co., 17 Idaho, 204, 104 Pac. 670, 40 L. R. A. (N. S.) 263; Consumers' Co. v. Hatch, 224 U. S. 148, 32 Sup. Ct. 465, 56 L. Ed. 703; Pocatello W. Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Bothwell v. Consumers' Co., 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485; Montgomery v. McDade (Ala. App.) 60 South. 798; Pine Bluff v. Toney, 96 Ark. 345, 131 S. W. 680, Ann. Cas. 1912B, 544; International W. Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816; Cleveland v. Malden W. Co., 69 Wash. 541, 125 Pac. 769; State ex rel. v. Hoquiam W. Co., 70 Wash. 682, 127 Pac. 304. It is not claimed that there is anything in the nature of a contract between Glendale and either of the plaintiffs that would exempt

them, or either of them, from the operation of this rule.

[2] There is no provision of the law of this state making it the duty of the consumer to lay the service pipe, or to pay the expense thereof. Section 549 of the Civil Code implies, if it does not actually express, the doctrine above stated. It declares that:

> "All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor. * * * The board of supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the state."

This makes it the duty of such corporations to deliver the water to the consumer and brings them within the rule. Any corporation actually engaged in supplying water to the inhabitants of a city must be deemed to be a corporation formed for that purpose, in any controversy between it and the consumer, or between it and the city, with regard to its duty under that section. While it continued to enjoy the franchise, it could not escape the duty by showing that its articles of incorporation did not give it the authority to engage in the service. It follows that the regulation was one which could lawfully be imposed on the plaintiffs by the public agency to which the regulating power may be delegated by law.

[3] The opening sentence of said section 23 of the Constitution defines public utilities, including therein almost every conceivable variety of public service, and giving the Legislature power to include others, and declares that every person or corporation in the state engaged in any such service is "subject to such control and regulation by the railroad commission as may be provided by the Legislature." It then declares that the commission "shall have and exercise such power and jurisdiction to supervise and regulate public utilities in the state of California and to fix the rates to be charged for commodities furnished or services rendered as may be conferred upon it by the Legislature, and the right of the Legislature to confer such powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution." This, if not qualified by any other part of the section, would give the Legislature authority to confer upon the commission the power to regulate public utilities in cities, as well as elsewhere. It is not left without qualification, however. The second paragraph of the section, after declaring that, upon the passage of laws conferring upon the railroad commission powers respecting public utilities, all the powers of like character conflicting therewith and previously vested in municipalities shall cease, continues with the following:

> "Provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be hereafter passed by the Legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law."

Section 82 of the Public Utilities Act is in the same terms as the above proviso.

The effect of these two provisions is that the powers of control over existing public utilities which were vested in any city at the time of the adoption of the amendment and of the taking effect of the Public Utilities Act on March 23, 1912, are still retained by such city, and that such powers do not pass to the railroad commission until, at an election for that purpose pursuant to the act of January 2, 1912 (Stats. Ex. Sess. 1911, p. 168), the qualified electors of the city, voting thereon, shall have voted not to retain such power or powers. The question whether this rule applies to public utilities which have come into existence or have entered a city since the passage of the Public Utilities Act is not here involved, and, as it has been argued in another case pending, we here express no opinion concerning it. No election has been held in Glendale on the question. Therefore Glendale still retains such powers of control over public utilities as it had at the dates of the adoption of the amendment and the passage of the Public Utilities Act, and the railroad commission will not possess them until there is such an election with a result favorable to the transfer thereof to it. The question is therefore fairly presented whether or not, prior to October 10, 1911, the date of the adoption of said constitutional amendment, cities of the sixth class possessed the power to regulate water corporations engaged in supplying water to the inhabitants thereof, with respect to their operations and service within such cities, and in so doing to make such orders or regulations as that made by the commission and above set out. If these cities had such power, then it still remains vested in the city of Glendale; the railroad commission did not have the power; and the order is void.

[4] Section 19, art. 11, and section 1, art. 14, of the Constitution, and the act of March 7, 1881 (Stats. 1881, p. 54), each confer upon the cities in this state the power to fix the rates at which water is to be delivered to the inhabitants of a city by any company engaged in that service. So far as the order forbids a charge for meters, it is a part of this rate fixing power. In order to fix rates according to the exact quantity of water supplied, a meter is necessary. The power to fix rates in that manner must include the power to say who shall provide and pay for the meter to be used to determine the amount the consumer shall pay.

> "The requirement that the party furnishing water shall provide the means necessary for its measurement, so that the quantity furnished and to be paid for may be known, is not an unreasonable regulation. The expense of the meter could not be imposed on the consumer." Spring V. W. W. v. San Francisco, 82 Cal. 316, 22 Pac. 917, 6 L. R. A. 756, 16 Am. St. Rep. 116.
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> "A meter is a contrivance to regulate the distribution of water by adjusting the quantity and price. It is therefore within the province of the city board's duties to enable them to fix their rates with exactness, instead of by uncertain estimate, and to deal justly with the consumers" to install such meter. Red Star, etc., Co. v. Jersey City, 45 N. J. Law, 249.

The New Jersey case holds that the city could not charge the consumer for meters. The passage quoted shows, however, that the installation of the meter is directly connected with the rate charge, from which it follows that the requirement that a meter shall be used is an incident of the process of fixing the rate. The power to direct that the company shall not charge the consumer for the meter necessary to determine the amount of water used and the rate to be paid is within the scope of the powers of the city and cannot be vested in the railroad commission, except by a vote of the city.

[5] The regulation of charges for service connections is not so directly related to the fixing of rates. We need not determine whether it is a part of that process or not, for it is included in other powers that were vested in cities at the time stated. Section 549 of the Civil Code, above quoted, gives the city authorities power to "prescribe proper rules relating to the delivery of water." Inasmuch as it is the duty of the water company to deliver the water to the premises of the consumer and to lay the necessary service pipes for that purpose, as a part of the water system of the company, it is also the duty of the company to bear the expense of these pipes. It would be a proper rule for the delivery of the water to prohibit the company from charging this expense to the consumer, or from imposing payment of the charge as a condition precedent to the delivery of water to him. The city of Glendale had exercised this power. It passed an ordinance in 1912 requiring water companies to lay service connections at their own expense on demand, giving them authority to install meters at their own expense, forbidding such companies to charge the consumer for meters, and declaring a violation of the ordinance to be a misdemeanor punishable by a fine, or imprisonment, or both.

Section 11 of article 11 of the Constitution provides that:

> "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

There may be some room for doubt whether this would include the power to prohibit charges for service connections within the limits of the city, if it were considered apart from the foregoing clause of section 549 of the Civil Code, giving power to prescribe rules for the delivery of water. Subdivision 14 of section 862 of the Municipal Corporation Act (St. 1883, p. 270) empowers cities of the sixth class to punish violations of ordinances by fine and imprisonment as misdemeanors. This, in connection with the constitutional provision and the Civil Code, makes it plain that the city of Glendale has ample power to make and enforce the regulation.

It follows that the railroad commission has not yet acquired the power to make regulations of this character for the government of water companies serving the inhabitants of the city of Glendale, and that the order complained of is in excess of its power and for that reason invalid.

It is ordered that said order of the railroad commission be annulled.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

The petition for a rehearing is denied.

(168 Cal. 304)

PROVIDENT GOLD MINING CO. v. MANHATTAN SECURITIES CO.

(L. A. 3327.)

(Supreme Court of California. Aug. 10, 1914.)

1. Corporations (§ 77*)—Subscription to Stock — Contract — Construction — Option.

The accepted offer to a corporation for blocks of its stock, "to be delivered to us in amounts as called for and as paid for," with provision "that no sales of stock are to be made by your company except to us, and that, unless special arrangements are made, for the first 60 days after operations on the property are commenced, no demands are to be made on us for amounts exceeding $5,000 per month, * * * and from that time forward no demands exceeding $10,000 per month are to be made on us," is a contract of purchase and sale, and not a mere option.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210–212, 219–243, 455; Dec. Dig. § 77.*]

2. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

The right interpretation having been put on a contract, admission of parol evidence to aid in its construction, when it was not ambiguous or uncertain, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Provident Gold Mining Company against the Manhattan Securities Company. From an adverse judgment and order, defendant appeals. Affirmed.

Thomas C. Job and Joseph E. Hannon, both of Los Angeles, for appellant. Robert Young, of Los Angeles, for respondent.

HENSHAW, J. Plaintiff brought this action to recover the sum of $88,791.94, alleged to be due it as the purchase price of certain shares of the capital stock of plaintiff, subscribed for by the defendant. Judgment was given for plaintiff, and from that judgment, and from the order denying its motion for a new trial, defendant appeals.

The appellant states that the whole controversy centers on the interpretation of the subscription contract. The contract was in the form of a communication by defendant to plaintiff. This communication declared that defendant had given full consideration to the mining operations which plaintiff was conducting, and believed that it would be for the best interest of plaintiff if it expended from $75,000 to $100,000 in the development of the mine; that by so doing the mine would be opened up and its possibilities become certainties. The communication then proceeds in the following language:

"We beg to make you the following offers for blocks of the capital stock of your company; stocks to be delivered to us in amounts as called for and as paid for:

100,000	shares at	25	cents net to your company.
100,000	" "	37½	" " " " "
100,000	" "	50	" " " " "
50,000	" "	62½	" " " " "

"It is to be understood between us, if our offer is accepted, that no sales of stock are to be made by your company except to us, and that, unless special arrangements are made, for the first 60 days after operations on the property are commenced, no demands are to be made upon us for amounts exceeding $5,000 per month; that for the next 90 days no demands are to be made upon us for amounts exceeding $7,500 per month, and from that time forward no demands exceeding $10,000 per month are to be made upon us. If this offer is satisfactory to you, we ask that you instruct the proper officers of your company to accept the same by signing the sheet in the space provided below."

[1, 2] This offer of defendant was accepted in writing by plaintiff. Certain payments were made by defendant, as provided in the contract, and, upon its failure and refusal to make later payments, this action was brought. Appellant's contention is that the offer, with its acceptance, amounted to but an option to purchase the stock given by plaintiff to defendant, with the right to defendant to proceed with the purchase of the stock or to decline to proceed, at its pleasure. The trial court, entertaining the view that the language of the contract was somewhat ambiguous and uncertain, admitted evidence touching the circumstances surrounding and attending the contract when it was made. Civ. Code, § 1647, and Code Civ. Proc. 1860. Appellant complains that the introduction of this evidence was error, because the contract is in no respect uncertain or ambiguous, so as to justify the introduction of these explanatory matters, insisting, as has been said, that the contract was a mere option. We agree with appellant's first proposition that the contract is not ambiguous or uncertain, but we disagree with its second contention. The contract was clearly a contract of purchase and sale, as the court found it to be. The admitted evidence, the nature of which it is unnecessary to discuss, is strongly confirmatory of this construction. Since the court set the right interpretation upon the contract, the introduction of this evidence was not injurious. The same result would have been reached necessarily without that evidence.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(168 Cal. 265)

COHEN v. CITY OF ALAMEDA.

(S. F. 6796.)

(Supreme Court of California. July 25, 1914. Rehearing Denied Aug. 24, 1914.)

1. Statutes (§ 76*)—Special Laws—Practice.

As Const. art. 4, § 25, subds. 3, 33, prohibiting special laws regulating the practice of the courts of justice or in any case where a general law can be made applicable, does not require the Legislature to prescribe uniform provisions for appeals, Act March 21, 1905, § 6 (St. 1905, p. 567), requiring appeals in proceedings to vacate assessments for the lighting of streets to be taken within 30 days after judgment, is not invalid, though prescribing a different limitation from the general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½–78½; Dec. Dig. § 76.*]

2. Municipal Corporations (§ 513*)—Assessments—Perfection of Appeal.

Act March 21, 1905 (St. 1905, p. 564), requiring appeals in proceedings to vacate assessments for street lighting to be perfected within 30 days after judgment, is not unreasonable; the subject-matter of the proceeding necessitating dispatch.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. § 513.*]

3. STATUTES (§ 123*)—TITLE OF ACTS.

Act March 21, 1905 (St. 1905, p. 564), entitled "An act to provide for the lighting of public streets, etc., and for the assessment of the expenses upon the property benefited," is sufficiently broad to include provisions fixing the time for appeals from judgments denying a suit to vacate an assessment for street lighting.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

On Petition for Rehearing.

4. APPEAL AND ERROR (§ 843*)—MOOT CASE.

In a suit to vacate an assessment for street lighting, where the only attack on the assessment involved the regularity of the proceedings, it will not be determined on appeal whether the limitations in the assessment act as to appeals apply to actions in equity and those where the constitutionality of the act is attacked; those matters being moot questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Emily G. Cohen against the City of Alameda. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

Jordan, Rowe & Brann, of San Francisco, for appellant. A. F. St. Sure, of Alameda, and Samuel Poorman, Jr., of San Francisco, for respondent.

SHAW, J. The appeal is by the plaintiff from a judgment in favor of the defendant. The defendant moves to dismiss the appeal on the ground that it was not taken within the time prescribed by law.

The appeal was taken within less than 60 days, but more than 30 days, after the entry of judgment. Under sections 939 and 941b of the Code of Civil Procedure, this would be within the time prescribed. The contention of the respondent is that the case is governed by the provisions of section 6 of the act of March 21, 1905, providing for the levy of assessments upon a district to pay for lighting the streets therein. Stats. 1905, 567; Deering's Gen. Stats. 645.

The plaintiff began the action in behalf of herself, her children, and all other persons interested in the relief asked. The object of the action was to declare void an assessment under the aforesaid act, levied upon property within an assessment district in the city of Alameda, including property of plaintiff and her children and other persons, and to enjoin a threatened sale of her own property to enforce payment of the sum assessed against it.

[1, 2] The complaint alleges that the assessment was void because of divers defects in the proceedings, and also upon the ground that the act is unconstitutional.

Section 6 of the aforesaid act is as follows:

> "The validity of an assessment levied under this act shall not be contested in any action or proceeding unless the same is commenced within thirty days after the time said assessment is levied, and any appeal from a final judgment in such an action or proceeding must be perfected within thirty days after the entry of such judgment."

It is contended by the appellant that this section is contrary to the mandate of the Constitution of this state prohibiting special laws regulating the practice of courts of justice, or in any case where a general law can be made applicable. Article 4, § 25, subds. 3, 33. She therefore claims that an appeal may be taken in this case, as in other cases, within six months after the entry of the judgment.

It has never been considered that these provisions of the Constitution required the Legislature to prescribe a uniform and single limitation of actions or proceedings, applicable alike to all cases. The Code of Civil Procedure is full of special provisions applicable only to particular classes of cases. Appeals from ordinary final judgments must be taken within six months after entry; from a judgment of forcible entry and detainer in the superior court upon an appeal from an inferior court, in the cases specified in section 964 of the Code of Civil Procedure, within 90 days after entry; from orders in ordinary actions or probate proceedings, within 60 days after entry. Code Civ. Proc. §§ 939, 1715. Appeals from judgments or orders, under section 941b, must be taken within 60 days after service of notice of entry thereof. So also, in the matter of limitation of actions, many different periods are prescribed for the different kinds of actions. As to some of these it might be difficult to discover substantial reasons for the different periods fixed. It has not been supposed that these varying provisions were special laws, such as are forbidden by the above provisions of the Constitution. In general, it may be said that the legislative discretion as to the different modes of procedure or rules of practice to be prescribed for the numerous and various actions and proceedings allowed in courts of justice is very wide, and that its judgment on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with, except for very grave causes, and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists. People v. Mullender, 132 Cal. 221, 64 Pac. 299; Wheeler v. Herbert, 152 Cal. 232, 92 Pac. 353; Title, etc., Co. v. Kerrigan, 150 Cal. 322, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rep. 199; Gridley v. Fellows, 166 Cal. 765, 138 Pac. 355.

Sufficient reasons for the shorter period of limitation of appeals prescribed by this section appear in the law itself. It provides for the lighting of public streets and public places in cities by assessing the expense thereof upon the owners of property benefited thereby. The assessment may be for either or all of three purposes: First, to construct and erect the necessary poles, wires, conduits, lamps, and the other apparatus constituting what may be designated the permanent part of the improvement; second, to provide for the maintenance of these lighting works and appliances after the same are erected; third, to provide the necessary gas or electricity for use to furnish the light. The permanent works for this purpose would, in general, be much less expensive than other kinds of public improvements, and the assessment to each person would be correspondingly smaller. For the cost of maintenance and cost of light the assessments in each case would be still less to each individual. With regard to the second and third classes, the act provides that the assessment for each shall be for periods not exceeding two years, and a new assessment must therefore be made and collected every two years for these purposes, if the public service is to be maintained under this law. Ordinary street improvements, such as grading, paving, or sewering, are permanent structures which, when completed, the public may immediately and continuously use without further expense and for many years thereafter. Ample time is afforded for the settlement of all questions concerning the validity of such assessments before the improvement has become worn so that a new improvement becomes necessary. Two reasons therefore appear for the shorter limitation in this statute upon the right of appeal. The first is that the sums involved will be trifling and that protracted litigation should not be indulged over the validity thereof. The second is that the short period covered by the assessments for maintenance and light makes it to the interest of all concerned that there should be a speedier settlement of disputes over the validity of such assessments than is required in the larger assessments for improvements of longer duration involved in other kinds of public improvements. These considerations form a sufficient basis for the distinction between assessments under this act and those for the general class of public improvements authorized by other statutes, and justify the limitation of the time for appeal to 30 days after the entry of judgment in any action or proceeding in which the validity of such assessment is contested.

[3] It is further claimed that this particular provision of the act is not embraced within the title thereof. The act is entitled:

> "An act to provide for the lighting of public streets, lanes, alleys, courts and places in municipalities, and for the assessment of the costs and expenses thereof upon the property benefited thereby."

The point does not deserve elaborate consideration. The provision for a special limitation upon appeals in suits involving the validity of assessments under the act is a matter clearly germane to the general subject and appropriate to carry out its object. Robinson v. Kerrigan, 151 Cal. 50, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; Ex parte Liddell, 93 Cal. 635, 29 Pac. 251; Davies v. Los Angeles, 86 Cal. 43, 24 Pac. 771; Deyoe v. Superior Court, 140 Cal. 488, 74 Pac. 28, 98 Am. St. Rep. 73.

The appeal is dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

On Petition for Rehearing.

PER CURIAM. [4] The appellants ask a rehearing of the application for an order dismissing the appeal. Their petition is based on the proposition that section 6 of the assessment act in question does not apply to an action in equity, or to a defense, attacking the validity of an assessment on the ground that the act itself is unconstitutional as a deprivation of property without due process of law. The attack made upon the assessment by the appellants in this action is based wholly upon objections which do not go to the constitutionality of the act under which the assessment was levied, but which involve only the regularity of the proceedings leading up to the assessment. The question whether section 6 is embraced in the title does not affect the validity of the other provisions of the act, and it was not raised, except in resisting the motion to dismiss the appeal. Hence the question whether the limitation of the section applies to actions in equity or other proceedings in which the assessment is alleged to be void because the act under which it is made is void is not involved here, and the decision dismissing the appeal is not to be understood as applying to such question.

25 Cal. App. 44

PEOPLE v. LAUGENOUR. (Civ. 1192.)

(District Court of Appeal, Third District, California. June 25, 1914. Rehearing Denied by Supreme Court Aug. 24, 1914.)

1. DEDICATION (§ 19*)—OFFER TO DEDICATE—SURVEY AND PLATTING.

The survey, platting, marking, and mapping of lands showing a strip through the same for highway purposes, and the filing of the map with the county recorder, constitutes an offer of dedication of the land for a highway as delineated on the map.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*]

2. DEDICATION (§ 19*)—PLATTING—ACTS OF VENDEE—RATIFICATION.

The act of a vendee under a contract of sale, in platting, mapping, and recording a map of land showing a strip for a highway, was sufficient to constitute a valid offer to dedicate, where the vendors acquiesced in and ratified the platting by subsequently making deeds of conveyance by reference to the map and the highway in question as delineated thereon.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*]

3. DEDICATION (§ 16*)—OFFER TO DEDICATE—ACCEPTANCE—PROOF.

Offer of a landowner to dedicate a highway and its acceptance by the public may be manifested in any number of ways indicating an intent to dedicate and to accept.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 15–49; Dec. Dig. § 16.*]

4. DEDICATION (§ 29*)—LAND FOR HIGHWAY—ACCEPTANCE.

Where a binding offer to dedicate land for a highway has been made by the owner, and before revocation of the offer an acceptance by the public is manifested, either by a formal act of the authorities, or by habitual user by the public, long enough to show clearly that it was thus recognized, used, and accepted by the public as a highway, a valid dedication is fully consummated.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

5. DEDICATION (§ 19*)—CONSTRUCTIVE DEDICATION—WHAT CONSTITUTES.

Where the owner of land has platted it, laid out streets or roadways, and has sold the land by reference to the plat, or in selling smaller subvisions has described them as bounded by a road laid out through the larger tract, a constructive dedication arises.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*]

6. DEDICATION (§ 19*)—HIGHWAYS—ACCEPTANCE—USER—EVIDENCE.

Owners of land had it surveyed and subdivided, with a roadway running through it, on which smaller subdivisions abutted. As so subdivided and marked, the land was platted, and the owners caused the map to be filed as a public record. They sold many of the smaller subdivisions according to the plat, with the road delineated thereon, and for at least 20 years the roadway was customarily and continuously used by purchasers of the smaller tracts and by any part of the public having occasion to travel over it, without objection. *Held*, to show a valid dedication, notwithstanding the fact that the road was closed by a gate at both ends and parts of the land in the road were cultivated and planted to trees, cereals, or vegetables, or used as pasture.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37–47; Dec. Dig. § 19.*]

7. DEDICATION (§ 51*)—HIGHWAYS—WIDTH OF WAY.

Where there is a finding or indisputable evidence that a roadway as dedicated was of a specified width, the fact that the main travel was customarily confined to narrower limits is not conclusive of the width of the road, nor did the fact that the sides of the road were otherwise used for agriculture constitute any evidence of an intention to revoke the dedication, or limit the road to the track customarily traveled.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 95; Dec. Dig. § 51.*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by the People against Charles T. Laugenour, to establish the existence of a public highway and to compel the removal of obstructions therefrom, etc. From a judgment in favor of defendant, complainant appeals. Reversed.

A. G. Bailey, of Woodland, for appellant. Arthur C. Huston, of Woodland, for respondent.

HART, J. This is an action instituted in the name and on behalf of the people of the state of California by the district attorney of Yolo county against the defendant, for the purpose of securing a decree that a certain strip of land situated in said county and specifically described in the complaint be declared a public highway, that certain obstructions alleged to have been placed and to be maintained on said land be abated or removed, "and that the defendant be enjoined from further maintaining said obstructions, or any of them upon, over, across, or along said highway, and for costs of suit." The strip of land in dispute is described as being a roadway 60 feet wide, running west from the Knight's Landing and Woodland road, across Coward's subdivision of the Marston tract, and bounded on the north by lots 12, 13, 14, 15, 16, and 17 and on the south by lots 5, 6, 7, 8, 9, 10, and 11 of said Coward's subdivision of the Marston tract, according to the map or plat thereof on file and of record in the office of the county recorder of said county of Yolo. It is alleged in the complaint that said strip of land "is now, and for more than 24 years last past has been, a public highway, dedicated and abandoned to the public, and accepted and used by the public during all of said time as a public highway"; that the same "is a public highway, duly and legally accepted as a public highway by the board of supervisors of the county of Yolo," etc. The complaint then charges that the defendant, on or about the 16th day of May, 1912, and prior to the filing of the complaint herein, "plowed up said highway, and erected, constructed, built, and maintained a levee and other embankments, excavations, cuts, and ditches over and across said highway, and that said defendant tore up the roadway and the roadbed of the said highway and left said roadbed in great lumps and clods," that said highway is still being maintained by the defendant in the condition as thus described, and that thereby the right of the public to travel over and along said highway in the usual and customary manner is interfered with. The answer denies that the land described in the complaint was ever a public highway, dedicated or abandoned to the public, or accepted or used by the public at any time for that purpose; denies that said land was ever dedicated for the purpose of a public highway, or duly or legally accepted for such purposes by the board of supervisors of the county of Yolo; admits that the defendant did, at about the time mentioned in the complaint, make certain excavations in and erect certain embankments on said land, and that he is still maintaining thereon said embankments, etc., but avers that the defendant had a legal right to do said work "and to do or perform any act done or performed by him on said lands and premises, and referred to in said complaint." Further answering said complaint, the defendant "alleges that the said lands and premises do not constitute a public highway, and the said plaintiff herein has no interest whatever in said right of way, and the public has no interest therein, and the same does not constitute a highway." The findings of the court coincide with the denials and admissions of the answer, and the defendant was accordingly awarded judgment, from which this appeal, supported by a transcript of the testimony, is prosecuted by the plaintiff, said appeal having been taken under the new or alternative method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The undisputed facts are: That, on the 12th day of November, 1886, W. W. Brownell and J. D. Laugenour, having previously purchased from one H. F. Marston a certain tract of land, situate in Yolo county, entered into the following agreement respecting said land with one W. M. Coward:

> "The parties of the first part [Brownell and Laugenour] bind themselves to deed said land above referred to, in tracts or parcels as the same shall be sold by the party of the second part [Coward], and to make good and sufficient deeds to the purchasers, provided that no expense for conveyancing shall accrue to the parties of the first part. The party of the second part agrees not to sell any of said land at less than one hundred dollars per acre, without the consent of said parties of the first part, and to apply the entire proceeds of each sale at the time such sales may be made to the payment of a certain promissory note of even date herewith given by said second party to parties of the first part for the sum of thirteen thousand dollars, with ten per cent. interest, and due on or before two years from date. As soon as complete payment shall have been made of the principal and interest of said described note, the parties of the first part agree to convey all of said land that may remain unsold to the said party of the second part, or to his heirs or assigns, free from all incumbrances. This agreement is for the security of the said sum of money and it is intended as a bond for a deed to the party of the second part, but the obligations of the parties of the first part under this agreement to the party of the second part shall cease at the expiration of two years from the date hereof or at the date of the expiration of the above described note. * * *
>
> "And it is further agreed by and between the said parties that all rents, issues and profits arising from the said above described premises shall accrue to the said W. M. Coward, the party of the second part, for the term of two years from the date of this agreement."

The foregoing agreement, duly signed and acknowledged by the parties thereto, was recorded in the office of the county recorder of Yolo county, on the 15th day of December, 1886. Subsequently to the filing for record of the said agreement, Coward caused the tract of land described therein to be surveyed, and subdivided the same into smaller tracts. This survey called for and located a roadway across said entire tract, 60 feet in width, and running east and west, and connecting on the east with the county road running in a northerly and southerly direction from the town of Knight's Landing to the city of Woodland. A map or plat of said subdivision, including the roadway in question, as so surveyed and laid out, was, at the instigation and under the supervision of said Coward, made and completed by the surveyor on the 28th day of January, 1887, and said Coward caused the same to be filed for recordation with the county recorder of Yolo county on the 10th day of June, 1887, and it was on that day duly recorded by that officer. The roadway so laid out and delineated on said map was fenced off. The smaller tracts or subdivisions were then placed upon the market for sale, and all that were sold, of which there were many, were conveyed by reference and according to the said map or plat. Among the lots of said subdivision conveyed by J. D. Laugenour and W. W. Brownell, under their agreement with said Coward, was one to F. M. Price. The deed to Price reserved "to the grantors one acre in the S. W. corner of the tract described, to be laid out as nearly square as may be, *and a right of way over the tract sold to the tract reserved.*" On June 11, 1887, said Laugenour and Brownell, in pursuance of their contract with Coward, conveyed to Messrs. Allison & Treat portions of the Coward subdivision, and which embraced 172.69 acres. The deed to Allison & Treat contained, as in effect do all the deeds conveying portions of said subdivision, the following provisions:

> "* * * Also *a roadway over the route heretofore reserved in the deed to F. M. Price,* and the right to use the acre reserved in said deed in common with all purchasers of portions of said Marston tract and right of way for irrigating ditches as designated on the plat of said subdivision."

On August 9, 1889, Allison & Treat conveyed the land described said deed to one George Poinsett, the said deed containing the same language concerning a roadway, etc., as that above quoted, and, on May 31, 1893, Poinsett conveyed the same land or tract to the defendant in this action, C. T. Laugenour, the deed to the latter following the language relative to the roadway, etc., contained in the two previous deeds referred to. On the 7th day of March, 1905, the board of supervisors of Yolo county adopted a resolution purporting to be and intended as a formal acceptance of the avenue or roadway in controversy as a public highway. It will thus be noted that there elapsed between the date of the recordation of the map of the subdivision and the date of the purported acceptance by the board of supervisors of the roadway as a public highway a period of almost 18 years. The undisputed evidence shows that the avenue in question was, at all times and continuously after the sale of lots in the subdivision through which it passes, used by the purchasers of said lots and their successors in interest and such other persons as had business or other relations with those residing in said subdivision. The evidence further shows that the county never did any work on said roadway or otherwise recognized it as a public highway until about and after the time of the adoption by its board of supervisors of the resolution purporting to accept said roadway as a public highway, and above referred to. It appears that, some time prior to the year of 1893, a fence had been erected along the entire north boundary line of the roadway. It also appears to be an undisputed fact that the defendant or his predecessors in interest planted a row of olive trees in the road some six or eight feet south of the fence just mentioned. Others owning lots abutting upon the roadway also cultivated portions of the same in one form or another. There remained at all times, however, an open and unobstructed track in the roadway of about 20 or 25 feet in width, and it was this track or way over which the people traveled back and forth through the Marston or Coward subdivision. The people owning property in said subdivision occasionally, or whenever it was necessary to facilitate the convenient use of the road, worked on and improved the roadway. It was shown that some of the owners of property in the Diggs subdivision had on various occasions worked on and graded the road. The evidence shows that for quite a period of time a fence was maintained across the west end of the avenue or roadway, or at a point where what was known as the "Diggs Subdivision" adjoins the Coward subdivision. This fence had been removed prior to the time at which the defendant became the owner of his tract of land in the latter subdivision. At the east end of the roadway, where it intersects with the county road running between Woodland and Knight's Landing, a gate or a "panel" had always been maintained. This gate was generally kept open until the defendant came to the subdivision, after which he aimed and endeavored to keep it closed. A controversy arose between the owners of property in the subdivision and the defendant over the matter of the closing of the gate, the defendant insisting that the gate should be kept closed and the other owners of land in the subdivision claiming that to keep the gate closed would be in violation of their rights. This controversy led to the proceedings by the board of supervisors whereby the county attempted formally to indicate its acceptance of the roadway as a public highway. It is admitted that the road was constantly used for a period of about 20 years before the institution of this action, not only by the residents of the Marston or Coward subdivision, but also by those residing on the Diggs subdivision, which, as seen, joins the former subdivision on the west. The defendant himself testified that the road was and had been for many years used by the residents of the Coward subdivision and by other people having business with or occasion to visit the residents of said subdivision.

The foregoing embraces a statement, in substance, of all the important evidence produced at the trial, and, as before stated, it is admitted that the facts thereby established are true.

The defendant contends that, while he has never denied, nor does he now deny, that the road in question constitutes a private way for the use of the owners of the lands situated in the Coward subdivision, said roadway is not a public highway. Indeed, in his testimony, the defendant goes so far as to declare that ownership of the land constituting the roadway was in him, but that he did not "deny the people the privilege of passing over it." In support of his position, the defendant emphasizes the following propositions of fact developed by the evidence: That the county never worked the road and never made any attempt to accept it as a highway until about 18 years after the map of the Coward subdivision was recorded; that, at the time of the filing of said map, both ends of the roadway were inclosed, either with a fence or a panel; that at all times the east end was closed with either a panel or a gate; that, since said "strip of land does not touch a county road on the west, the same was not thrown open to the public" at any time from the date of the filing of the map to the present time; that the avenue has been used for pasture purposes, and that "it has never been traveled except by persons residing on the subdivision and those who had business with them."

[1] It cannot be doubted that the survey, platting, marking, and mapping of the lands concerned here, and the filing of said map with the county recorder, constituted an offer of dedication of the roadway delineated on said map as a public highway. People v. Reed, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; Forsyth v. Dunnagan, 94 Cal. 438, 441, 29 Pac. 770; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Davidow v. Griswold, 137 Pac. 619.

[2] The point first urged by the defendant that the acts of Coward in platting, mapping,

and recording the map cannot be held to be an offer of dedication for the reason that he was not the owner of the land, and therefore had no right or authority to make the offer, is without force, inasmuch as it is undisputed that the tract was subdivided and the road in question laid out by Coward under his agreement with Laugenour and Brownell and by the authority of the latter, and since, furthermore, Laugenour and Brownell acquiesced in and ratified the act of platting the tract as delineated on the map by making their deeds of conveyance by reference to said map and the road in question as outlined thereon.

[3] The single question remaining is: Does the evidence disclose that there was an acceptance of said offer of dedication of said road by the public? It is very doubtful whether the purported formal acceptance of the offer of dedication of said road as a public highway by the board of supervisors under the circumstances as above indicated may be held to be a legal acceptance. This question need not, however, be decided here.

> "The offer of the owner to dedicate may be manifested in a hundred different ways; *and the acceptance of the offer by the public may be manifested in a like number of ways.*" City of Los Angeles v. Kysor, supra.

[4] If a binding offer to dedicate has been made by the owner and before revocation of such offer by any act or acts of the donor an acceptance of the offer by the public is manifested either by a formal act of the public authorities or by habitual user by the public a sufficient length of time clearly to show that it was thus recognized, used, and accepted by the public as a public highway, then the dedication is fully consummated.

[5] And it has been held that where the owner of land has platted the same and laid out streets or roadways and has sold the land by reference to said plat, or where he has a map or plat made and, in selling the smaller subdivisions, has described them as bounded by a road laid out through the larger tract, a constructive dedication arises. It is true that some of the cases hold that the acts last referred to do not in strictness constitute a dedication, but that their effect is to work an estoppel in pais, precluding the donor or owner of the lands through which the way passes, and all claiming under him, from asserting any ownership inconsistent with the use of the way as such. Elliott on Roads and Streets (3d Ed.) p. 147; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; M. E. Church v. Mayor, etc., of Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 697; Oregon City v. Oregon Street Railroad, Oregon Supreme Court, 44 Or. 446, 74 Pac. 926; Davidow v. Griswold, supra. But whether the acts mentioned amount strictly to a dedication or merely work an estoppel in pais, precluding the owner from claiming rights in or over the street or roadway inconsistent with their use by the public as a public way, is immaterial, for, as is said in Davidow v. Griswold, supra, the result is the same.

In Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591, it is said:

> "Independently of the statute, however, we think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements. A common-law dedication operates against the dedicator by estoppel, and this estoppel may be invoked by or on behalf of the public at large, as well as by the municipal authorities of the city; for a street is a highway for the use and benefit of the public at large, though under the immediate care of the municipality."

In Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145, it is said:

> "Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. Harding v. Jasper, 14 Cal. 648. It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express, and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use. Even though the acceptance presumed from an express dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest."

After quoting the foregoing excerpt from the Archer Case, this court, in Davidow v. Griswold, supra, adds:

> "A very large number of cases from other jurisdictions holding similarly is cited by respondents, but we may forego specific consideration of them. In some it is assigned as a sufficient reason for saying that the dedication is complete that the purchasers represent the public; that the latter is not a distinct class from the former; that the purchasers are as much a part of the public as those who use the streets for the purpose of travel; and that they have equal authority to accept a dedication of the street for the public."

[6] We can see no escape from the conclusion that the facts of the present case bring it clearly within the rule enunciated in the foregoing cases.

It is true that the question of dedication "is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court." Harding v. Jasper, 14 Cal. 648; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R.

A. 145. In this case, however, as we have shown, the facts are undisputed. The filing of the map with the county recorder constituted a clear and unquestionable manifestation by the owners of the subdivision of an intention to dedicate the roadway in question to the use and benefit of the public. The evidence undoubtedly shows, and, indeed, it is admitted, that the public continuously used the road from the time that it was laid out and the map was filed. To recapitulate briefly the evidence, we find this situation presented in this case: That owners of a tract of land had the same surveyed and subdivided into smaller tracts, with a roadway running through the larger tract and upon which the smaller subdivisions abutted; that, as so subdivided and marked out, the land was platted and mapped and the owners caused the map to be filed as a public record; that they sold many of the smaller subdivisions according to the plat as indicated by said map, the road in question being delineated thereon; that for at least 20 years said roadway has been customarily and continuously used by the purchasers of the smaller tracts and by any part of the public having occasion to use or travel over the same, no objection, until the defendant objected, ever having been made against the use of the road by the public.

The fence across the west end of the Coward subdivision was there when the tract was subdivided, platted, and mapped, as was likewise the gate at the east end. These circumstances cannot therefore be regarded as evidence of an intention in the owners of the tract to revoke the offer of dedication.

[7] Nor, under the circumstances of this case, can the fact that certain parts of the roadway as delineated and described on the map filed with the public recorder were cultivated and planted to trees and cereals or vegetables or used as pasture be accorded any significance as proof of the revocation of the dedication. The roadway as laid out was 60 feet in width, and it was so outlined on the map. The uncontradicted evidence shows that it was the purchasers of lots in the subdivision, and not the original owners or dedicators, who cultivated portions of the roadway, and there is no claim by any who so cultivated said roadway, except the defendant, that they did so as a matter of right, or with any intention of indicating a revocation of the dedication. Where there is a finding or, as here, indisputable evidence that a roadway dedicated to the use of the public is, as so dedicated, of a certain width, the fact, if it be a fact, that the main travel has customarily been confined to narrower limits than the width of the road as marked out and dedicated is not conclusive of the width of the road. S. P. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929. And in this case, as stated, the circumstances under which portions of the roadway were so used do not constitute the slightest evidence of an intention to revoke the dedication or to limit the width of the road to the track which has been customarily traveled.

It seems to us that it would be difficult to conceive how a much stronger case of constructive dedication than the present could well be developed. As is said in Davidow v. Griswold, supra, so it is true here:

> "The owner has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the said purchases under conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. *And if they are to be considered as really streets * * * when we regard the rights of the purchasers, it is difficult to understand how their status would be changed when we regard the rights of the public generally.*"

Our conclusion is that the uncontroverted evidence and admitted facts beyond doubt show that there was in this case a fully completed dedication, that the findings are not justified, and that the judgment is, consequently, erroneous.

The answer admits that the defendant has excavated and otherwise obstructed the highway in question, and it follows from the conclusion at which we have arrived that he has done so without any legal authority.

The judgment is reversed.

We concur: **CHIPMAN, P. J.**; **BURNETT, J.**

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25 Cal. App. 56

FITZSIMMONS v. WILKS. (Civ. 1473.)

(District Court of Appeal, First District, California. June 30, 1914.)

1. ELECTIONS (§ 188*)—BALLOTS—CONSTRUCTION.

While the intent of a voter must in the first instance be ascertained from the ballot, the ballot, if ambiguous, must be construed as any other paper writing, and hence evidence of the surrounding circumstances is admissible.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 162; Dec. Dig. § 188.*]

2. ELECTIONS (§ 293*)—BALLOTS—VALIDITY.

In view of Pol. Code, § 1205, providing that an elector may vote for a candidate whose name is not printed on the ballot by writing the name of such person in the blank space left therefor, ballots marked merely with the surname of a candidate at a recall election will be counted in his favor, where the candidate was the only one of that name, and the only other persons of that name in the locality were members of his family, who were not seeking the office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 288–296; Dec. Dig. § 293.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Election contest by A. M. Fitzsimmons against Joseph Wilks. From a judgment for contestant, the contestee appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Daugherty & Lacey, of Salinas, and S. W. Mack, of Monterey, for appellant. H. G. Jorgensen, of Monterey, for respondent.

LENNON, P. J. At a special election held in Pacific Grove township, Monterey county, the plaintiff and defendant were candidates for the office of justice of the peace in the event that the then incumbent of the office should be recalled. The election resulted in the recall of the then incumbent, and, upon a canvass of the returns, the defendant was declared elected to the office for the unexpired term. Subsequently plaintiff instituted proceedings in the superior court of Monterey county, under the provisions of part 3, tit. 2, of the Code of Civil Procedure, contesting the right of the defendant to the office. The lower court rendered and entered judgment in favor of the plaintiff, declaring him to have been elected to the office, and directing that a certificate to that effect be issued to him by the county clerk. The defendant has appealed from the judgment.

A recount in open court of the admitted legal ballots cast at the election in question disclosed beyond dispute that 176 votes were cast for A. M. Fitzsimmons, the plaintiff; 217 for Joseph Wilks, the defendant; and 3 votes for one R. M. Fitzsimmons. In addition, however, to the undisputed ballots, the recount showed that there were 49 ballots cast at the election, bearing merely the surname "Fitzsimmons," which, over the objection of the defendant that it was impossible to ascertain for whom they were intended, were admitted in evidence and counted for the plaintiff, thereby increasing his total vote to 225, and giving him a majority over the defendant of eight votes. The correctness of the court's ruling in counting these particular ballots is the only point presented for review.

[1, 2] We are of the opinion that, under all of the particular and peculiar facts and circumstances surrounding the election in controversy, the lower court did not err in the ruling complained of. Those facts and circumstances, as revealed by the bill of exceptions accompanying the judgment roll, may, in so far as they are pertinent to the point under discussion, be briefly stated as follows: The plaintiff became a candidate for the office in question by simply making an announcement of his candidacy and personally soliciting the support of voters throughout the township in which the election was held. His candidacy was announced daily, for a period of about 30 days preceding the election, in two daily newspapers printed and published in Monterey county, and which had in the aggregate a regular daily circulation of 495 copies in the township in which the election was held. Prior to and at the time of the election, there were but four persons bearing the surname Fitzsimmons residing in the township, all of whom were duly registered electors and eligible to the office of justice of the peace. They were the plaintiff, A. M. Fitzsimmons, his wife, Mary J. Fitzsimmons, and his two sons, R. M. Fitzsimmons and E. W. Fitzsimmons. The plaintiff, however, was the only one person of the name of Fitzsimmons, who sought the office in question and announced his candidacy therefor; and all the aforesaid members of his family sought and endeavored to bring about his election. The surname Fitzsimmons was written upon each of the 49 ballots in question by the voter casting the same. It does not appear in the bill of exceptions or elsewhere in the record how or in what manner the defendant became a candidate for the office in question; that is to say, the record before us does not show whether the defendant was nominated for that office by petition or otherwise, or whether he, as did the plaintiff, merely announced his candidacy and trusted to the voters to write his name upon the ballots. Incidentally it appears that R. M. Fitzsimmons, who, notwithstanding that he was not a candidate for the office, received three votes, had for four years held the office of city treasurer of Pacific Grove, and had been defeated for that office at an election held in June, 1912.

It is the general rule that the intent of a voter must be in the first instance ascertained from the ballot itself; and that such intent cannot, by proof of extrinsic circumstances, be shown to be other than that plainly and unequivocally expressed upon the face of the ballot. Maddux v. Walthall, 141 Cal. 412, 74 Pac. 1026. This general rule, however, is subject to the exception that, where the intent of the voter is doubtful, the ballot must be construed as any other paper writing; and therefore evidence of facts and circumstances of public notoriety concerning the candidates and connected with the election may be resorted to for the purpose of ascertaining the intention of the voter. Rutledge v. Crawford, 91 Cal. 526, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212; Payne's Law of Elections, § 550. Section 1205 of the Political Code provides that an elector may vote "for a candidate or person whose name is not printed in the ballot by writing a name for such office in the blank space left therefor." The plaintiff, A. M. Fitzsimmons, was the only person of that name who was an avowed, known, and active candidate for the office in controversy. There was no evidence to show that any person by the name of Fitzsimmons other than the plaintiff, or that any member of the plaintiff's family, was known or understood by the electors of the township to be a candidate for the office; and, in the absence of competent evidence to the contrary, the presumption must be that the electors intended to vote for the only Fitzsimmons who was either known to or heard of by them as a candidate for that office. It is a fair inference from all the facts and circumstances of the present case that the 49 voters who wrote in the name of Fitzsimmons in the blank space left in the ballot for voting for the office of justice of the peace intended thereby to vote for the only Fitzsimmons who was announced and known as a candidate for the office. This inference is fortified, we think, by the fact that the only other persons bearing the name of Fitzsimmons and residing in the township in which the election was held were the wife and two sons of the plaintiff, all of whom sought and endeavored to accomplish the election of the plaintiff. It is not improbable that the three voters who cast their votes for R. M. Fitzsimmons had in mind the plaintiff, because he was the only person by the name of Fitzsimmons residing in the township who was a candidate for that office. However that may be, having written upon their ballots the surname and initials of a person who resided within the county and who was eligible to the office, the law conclusively presumes that those voters intended to do that which they actually did. But assuming, aside from the presumption of law, that these voters actually intended to vote for R. M. Fitzsimmons and not for the plaintiff, it does not necessarily follow that there exists such an uncertainty as to the intent of the 49 voters who merely wrote in the name of Fitzsimmons on their ballots as would preclude such ballots from being counted for the plaintiff. Of course, if R. M. Fitzsimmons as well as the plaintiff, A. M. Fitzsimmons, had been an avowed and announced candidate for the office, the uncertainty as to which Fitzsimmons the 49 ballots in controversy were intended for would have been so pronounced as to require a ruling refusing to count them at all. No such situation, however, confronts us in the present case.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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25 Cal. App. 34

PEOPLE v. PEDDE et al. (Cr. 246.)

(District Court of Appeal, Third District, California. June 25, 1914.)

1. CRIMINAL LAW (§ 742*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The question of credibility between witnesses for the defendants and those for the prosecution is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. § 742.*]

2. CRIMINAL LAW (§ 369*) — EVIDENCE OF OTHER CRIMES.

Only as shedding light on the charge of the indictment that C. was assaulted with murderous intent are the facts relating to the assault of another in the same difficulty material.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 742*)—CONFLICT IN TESTIMONY OF STATE'S WITNESSES—PROVINCE OF JURY.

It is for the jury to reconcile the conflict between the testimony of two witnesses for the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. § 742.*]

4. HOMICIDE (§ 257*)—ASSAULT WITH INTENT—EVIDENCE.

Evidence that defendants and D., another Indian, arrested by C. and N., when told where they were being taken, objected, and without further parley pounced on C., and D. got C.'s rifle, that defendants held C. while D. shot at N., and that, after C. freed himself from them, they ran, and C. shot his revolver at D., whereupon D. shot at him, warrants a conviction of assault on C., with intent to murder him; they being engaged in resisting an officer in the discharge of his duty, a crime under Pen. Code, §§ 69, 148, and it being for the jury to say whether they intended to escape, though it might become necessary to kill one or both of the officers, and section 31, making all concerned in the commission of a crime principals.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543–552; Dec. Dig. § 257.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

John Pedde and John Hendricks were convicted of assault with intent to murder, and appeal. Affirmed.

Jamison & Wylie, of Alturas, R. M. Rankin, of Susanville, and T. Selvage, of San Francisco, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. It was charged in the information that Wilson Duke, John Pedde, and John Hendricks, at Lassen county, on the 26th day of April, 1913, with a deadly weapon, to wit, a rifle, made an assault upon the person of F. P. Cady, and did then and there shoot and wound, with intent then and there to kill and murder, him (the said Cady). Duke had a separate trial, with what result does not appear. Pedde and Hendricks were jointly tried, and the jury rendered a verdict of guilty as charged, recommending them to the mercy of the court. Judgment of conviction followed, and they were each sentenced to imprisonment for the term of three years at San Quentin. The appeal is from the judgment.

The only claim made for reversal is that the evidence is insufficient to justify the verdict, and that no greater offense was shown than simple assault.

The defense of the Indians seems to have been in charge of Mr. T. H. Selvage, deputy United States attorney, and the prosecution was conducted by the district attorney of the county.

F. P. Cady and Joseph R. Nelligan were, on April 26, 1913, fish and game wardens. On that day they arrested a party of 11 Indians, old and young, whom they found, about the hour of noon, fishing and having fish in their possession, in violation of a county ordinance, at Cedar creek, about eight miles from the town of Madeline. After being placed under arrest, Nelligan searched each one of the party for arms and fish and found no weapons but all had fish. They left the fishing ground, Cady and Nelligan on foot and the Indians on horseback, Cady in front and Nelligan at the rear of the party. They had gone about one mile to a point, near some buildings, without anything noticeable occurring. What then took place was testified to by Cady and Nelligan. Cady testified that at this point defendant Hendricks was riding beside him, defendant Pedde immediately behind Hendricks, and Duke directly behind witness Cady. What occurred will be given in the witness' language:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"When you arrived at these buildings, what happened there? A. Some one behind and to my right said, 'How far are we going?' I looked over my shoulder and said, 'To Madeline.' The defendant John Pedde replied, 'Can't go to Madeline, too far.' I then stopped and turned partially around and said, 'You have to go to Madeline; that is the nearest place; no other place to take you.' He replied, 'Can't go to Madeline; got to talk that over,' and commenced to get off his horse. Q. What did you do then? A. I immediately turned to my left and found Wilson Duke off his horse and so close to me, just putting his hands on me. So close to me that I couldn't get the muzzle of my rifle down to shoot. I then, when I found I could not shoot, raised the rifle to strike him, and he caught the barrel of the rifle. Q. Where was John Hendricks and John Pedde at that time? A. Almost at the same instant or so close to it that I could not tell any difference in the time, the defendant John Pedde jumped on my back and caught me around the shoulders, and Hendricks caught me by this arm. Q. Go on and relate what happened. A. The rifle was taken away from me. Wilson Duke had it and then stepped back sideways from me with the gun in this position, looking back toward the rear where Nelligan was. Q. Toward the rear of the column? A. Yes, sir. Q. What was John Pedde and Hendricks doing then? A. They held on to me, and sometimes I was down on my knees and sometimes up until I finally got loose from them. All the time I was trying to get my pistol out that I had in a scabbard. When I got loose they immediately ran. I looked for Wilson Duke, and he stood behind a little pile of lumber about perhaps 15 steps from me. I can't estimate the distance correctly. He was in an upright position, with the gun in this position looking back somewhere towards the rear of the column. I looked to see where Nelligan was. Mr. Selvage: We object to this on the ground it is immaterial and irrelevant. There is no charge here in this case against Wilson Duke. Duke is not on trial, and the testimony as to what Duke did from this point on is immaterial. The Court: Overruled. A. And saw Nelligan lying on the ground, face downward, apparently dead. I then shot at Wilson Duke twice without any apparent effect, and didn't even make him look around and notice me. The third time I took a deliberate aim and saw the bullet hit the ground between he and I close to his feet. He immediately turned and raised the gun to shoot, and I started and ran for a little building directly below the road and a little distance off to get behind that. As I ran I heard the report of a rifle once when I was part way to the house. Just as I got to the corner of the house and started to turn, I heard the report again, and the bullet struck me. Q. Where did it strike you? A. In back here, and came out here in the side. Q. How were you armed, Mr. Cady? A. With a 30-30 Winchester rifle and 32 caliber automatic Colt's revolver. * * *"

A map was used and different positions of the parties noted on it, but no map was sent up with the record.

"* * * Q. Now, Mr. Cady, you say that Wilson Duke succeeded in getting this rifle away from you? A. The three of them did. Q. What was John Pedde and John Hendricks doing? Relate what they were doing at that time. A. John Pedde had me around the shoulders partially on my back and round the shoulders, and John Hendricks had me pulling on this arm, and Hendricks pulling me back from the shoulder, or Pedde on the shoulder. Q. Did you succeed in getting away from them? A. Yes, after a little time. Q. What became of them after you got loose; do you know? A. I don't know. Q. Can you indicate on the map the object there that would represent the little house behind which you ran? A. This one down here. Q. Are you able to approximate the distance of that house from the place where this occurrence took place? A. Approximately —you say where the occurrence took place; you mean from this point? Q. Yes, sir. A. Approximately between 45 and 50 yards. * * * Q. At the time of this skirmish there, what became of the other Indians? A. I don't know. Q. When this shooting or when this shot struck you in the back as you state, did you fall? A. I made one or two short steps and then—I shouldn't say fell. I lay down behind the house. Q. Did you see any of the Indians after that? A. I saw one. Q. Do you know which one it was? A. I could not say positively. To the best of my knowledge it was Hendricks. Q. Where was he? A. Riding a white horse going along the hillside along here and leading a dark colored, bay or brown, horse with an empty saddle."

The testimony of the Indians was that they all took to flight as soon as the shooting commenced.

On cross-examination Cady was asked what Duke did when he got the gun, and replied:

"Stepped right out still facing me this way. He stepped off sideways with the gun this way, looking back in this direction. Q. How did you come to notice he was facing in that particular position when two men had you down or forcing you down? A. It was all in an instant's time, and when he got the gun I naturally kept my eye on the gun, expecting to see him use it on me. Instead of that he kept looking back the other way and took no further notice of me that I saw. Q. How far did he go? A. I couldn't tell how far it was. Q. There is a lumber pile marked here. A. That represents a lumber pile. Q. We will mark that X5. How far from that point was it to where Wilson Duke went after he got the gun from you? A. How far from which point? Q. From X5."

The question was not answered, but later along he estimated it:

"* * * Q. How long was it after John Pedde and John Hendricks grappled with you that they left you? A. I couldn't tell you. Q. Do you know where they went? A. No, sir. Q. Why didn't you watch them? A. I was too busy. Q. They were the ones you were busy with? A. Not after they left me. Q. Why did they leave you? A. I got loose and got the pistol and saw them go. I didn't know where they went; I didn't watch them. Q. Had you forced them loose from you? A. I couldn't tell you. Q. Do you know whether they left you alone and run away? A. I could not say. Q. Did you pay any further attention to them? A. No, sir. Q. Why didn't you? A. I was looking for the man with the gun. Q. You knew they were harmless was the reason you didn't pay any further attention to them? A. No, sir. The reason was I wanted to see where the man with the gun was. Q. The man with the gun wasn't looking at you? A. Not when I looked at him he wasn't. Q. You pulled a pistol and fired at him? A. Yes, sir. Q. He was still looking the other way? A. Yes, sir. Q. And you fired again? A. Yes, sir. Q. And he was still looking the other way? A. Yes, sir. Q. And you fired a third shot? A. Yes, sir. Q. And struck the dirt at his feet and threw up dirt at his feet? A. Somewheres in the neighborhood of his feet. Q. And threw up dirt all around him? A. No, sir; it didn't throw up dirt all around him. There is sand there, and it threw up a little cloud of sand at his feet. Q. How close did it strike to his feet? A. I couldn't estimate. Q. And that attracted his attention? A. I presume so; something did. * * * Q. Did you hear any shots during that time? A. None but my own. Q. When you saw the dirt fly up and his attention was called to your shot, what did he do? A. I didn't say his attention was attracted by my shot, but what he did was to turn toward me and start to raise the rifle. Q. Show me where you were standing at the time, as near as you can. I want you to tell us as near as you can. A. As near as I could judge, when I think it over, about 15 steps from there in this general direction. That is practically somewhere near the line between this cabin and the lumber pile below the road. Q. Mark the place, as near as you can, where you think you were. A. Somewheres in this neighborhood. I don't know. Q. We will call it X7. The point where you were at the time you did the shooting was at X7. During all this time you were shooting there at Wilson Duke you stood about at the point that you mentioned, about that point? A. Somewheres in that neighborhood. Q. During that time you didn't move? A. I have no recollection of moving during the time I was shooting. Q. Did you shoot as rapidly as you could or take pretty careful aim? A. The first two shots I shot pretty quick. When I saw I had not hit him, I stopped and took deliberate aim. I saw he was not looking at me, and that was the one that struck the ground. Q. How far did you say you were from him at the time? A. It is a matter of guess only. A man don't estimate distances on occasions of that kind, but somewheres from 15 to 20 steps. * * * Q. When he turned toward you and brought his gun up on a level, did you think he was going to shoot you then? A. Yes, sir. Q. And you ran? A. I did; yes. Q. When you were shooting at him and saw that he paid no attention to your shots, why didn't you run closer to him and make certain? A. I thought I was close enough. I thought I was a good enough shot to hit him if the pistol would shoot all right."

He testified that he heard two rifle shots before he got behind the cabin. The last shot struck him.

"I presume I fainted, as I didn't see anything for some time. * * * Q. You didn't hear any shots except—up to the time you quit shooting you didn't hear any shots except your own? A. No, sir. Q. And from that on you heard no shots except two rifle shots behind you? A. That is all. I swooned immediately. Q. In other words, if there was a battle going on between Wilson Duke and Nelligan, you didn't hear a shot fired? A. If I did it didn't make any impression on my mind so I could testify to it. Q. At no time did you hear any shots until you commenced firing yourself? A. No, sir; I have no recollection of hearing a shot. Q. Up to that time you yourself had not been shot? A. No, sir. Q. You don't know whether or not Nelligan was shot when he was laying there? A. No, sir. I didn't at that time. I know now. Q. You only know by hearsay now? A. I saw his condition. Q. But you don't know when he was shot? A. No, I don't know the time he was shot. Q. When you got through shooting, did you see any Indians about there? A. Only Wilson Duke."

Nelligan testified that, when the party stopped near the building and lumber pile mentioned above, he was back 70 or 80 feet and heard some conversation in front but distinguished only the word "Madeline."

"They were talking among themselves, but I didn't understand them. Q. What did you see? A. I saw Wilson Duke rush off his horse and rush in on Mr. Cady, and then Pedde and Hendricks, one had him by the arm, and I saw the other on his back struggling with Frank the last I saw. Q. What did you do? A. I started to rush up there and just took a few steps, and this Wilson Duke had the gun already and stepped out to the side, and I run in back of Smokey Charlie's horse, and just as I stepped around behind the horse he shot me in the leg. Q. Wilson Duke shot you? A. Yes, sir. Q. What did he shoot you with? A. A 30-30, Frank's gun. Q. What did you do? A. It turned me, and when I came around I shot at him. Q. Did you fall? A. Yes, sir. Q. What was done then? A. The shooting went on. He run for the lumber pile. Q. He—who do you mean by he? A. Wilson Duke. He went in back of that lumber pile and shot me again in the breast. Q. The first time he shot you in the— A. Leg. * * * Q. What else happened? A. I kind of dazed off after that, and don't know exactly how long it was, but in a few seconds I was in a daze, and when I come to he was standing watching me with the rifle up to his shoulder watching me, and I slipped my hand in my pocket and took out a shell and inserted it in the automatic and fired and shot him. He dropped the rifle. Threw up his hands and dropped the rifle. Q. Before this, did you see Frank Cady? A. I did. Q. Where? A. Ahead of me. Q. What was he doing? A. Scuffling with John Pedde and John Hendricks. Q. After this scuffle, did you see him after that? A. Yes, sir. Q. Where? A. He started to run toward a building in that direction. Q. Tell what you saw. A. I saw Wilson Duke shoot at him twice. Q. When he was running toward the building? A. Yes, sir. Q. Wilson Duke was standing at the lumber pile? A. Yes, sir. Q. What happened after that? A. I come to and crawled up and got the rifle and started to crawl toward the lake. Q. You say he shot you once in the leg, and then shot your little finger off? A. The second shot hit me in the breast. Q. Explain where that shot hit. A. It hit here and come out down in here over my heart. That is where the hole was. They was showing me my heart thumping. Q. In what position were you when this second shot hit you? A. Laying down. Q. Laying on the ground? A. Yes, sir. Q. Watching Wilson Duke? A. Yes, sir. Q. And he was standing near the lumber pile? A. Yes, sir."

[1] Several of the Indians were witnesses at the trial, and all testified that Pedde and Hendricks were not riding next to Cady, but were back in the group, and that Cady struck Duke with his gun and pulled Duke off his horse. They also testified that the first shot was fired by Nelligan. They all agree that all the Indians, other than Duke, fled as soon as the shooting commenced. The testimony

was that Pedde reported the affray to some white men who went to the place and carried Cady and Nelligan away. It also appeared that some of the Indians returned and carried Duke to his home. Witnesses testified, and it was admitted by the prosecution that the defendants bore a good reputation for peace and quiet, and it appeared that they were engaged in farming and lived a quiet and peaceable life. The jury, however, were authorized to accept the testimony of the two prosecuting witnesses, and from their description of the encounter arrive at a conclusion.

[2-4] The question is: Does the evidence warrant the inference that Pedde and Hendricks made the assault on Cady with intent to murder him? So far as the assault on Nelligan is concerned, it is no part of the crime charged, and the facts relating to it are material only as they shed light upon the charge that Cady was assaulted with murderous intent.

Cady's testimony was that, when he saw Nelligan down, Duke was paying no attention to Cady and did not do so until Cady had fired three times at him. Duke then turned upon Cady, who ran for cover, and Duke shot him in the back. It is not clear from Nelligan's testimony whether all the shots fired at him (Cady) by Duke were from the lumber pile. He thought the first shot that wounded him in the leg was when Duke was about halfway from Cady to the lumber pile.

There was no evidence of any concerted action on the part of these three Indians until they were told that they were being taken to Madeline. They replied, "Too far; got to talk it over; can't go to Madeline;" and, without further parley, according to Cady's testimony, the three immediately dismounted and pounced upon him, and Duke got the rifle. Cady testified that they did not try to get his revolver, and he did not know whether they knew he had one. Pedde and Hendricks were undoubtedly guilty of an assault, and they were guilty of resisting a lawful arrest by an officer in the discharge of his duty and of making their escape from lawful arrest. The tragedy was of short duration, and the events followed each other quickly. It was but a few seconds after Duke got the rifle that he commenced firing on Nelligan, and the fusilade between the parties was rapid until all three were down. And the testimony of Nelligan was that Duke fired the first shot, from which the jury might well have inferred that he at least intended to use the weapon when he took it from Cady. That the gun was taken pursuant to the concerted purpose of all three Indians, as an aid to their escape from arrest, though that purpose was instantly formed after they were told they must go to Madeline, we think fairly inferable from the evidence. At one point in his testimony Nelligan testified as follows:

> "Q. Where did you last see Pedde and Hendricks? A. Struggling with Frank Cady. Q. After Wilson Duke had the gun or before? A. After and before both. Q. And you never saw them after that? A. After they were struggling with Frank? Q. Yes. A. Yes, when I was laying on the sand here alongside of the road they were struggling with Frank. Q. After that did you see them? A. No, I didn't."

If this be true, defendants must have been struggling with Cady while Duke was shooting at Nelligan. It was for the jury to reconcile this statement with Cady's, who testified that Pedde and Hendricks ran away, or that he did not know where they were after Duke got his rifle. We cannot say that Nelligan was mistaken in this, and, if true, it connects Pedde and Hendricks so intimately with the consequences which followed as to make them responsible and equally guilty as aiding and abetting Duke in his part of the conspiracy.

> "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." Pen. Code, § 31.

It was said in People v. Brown, 59 Cal. 345, 352:

> "Where men confederate together to commit crimes of a nature or under such circumstances as will, when tested by human experience, probably result in taking human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understand the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish the object of the conspiracy."

The circumstances in the case at bar are not so incriminatory as they were in the case cited, yet defendants were engaged in acts punishable as a crime. Pen. Code, §§ 69, 148. We feel compelled to hold that the facts were sufficient to justify the verdict. The argument of counsel is based on the statement of Cady that defendants ran away as soon as Duke got the gun and had no part in the shooting. But, as we have seen, there was evidence that they held Cady while Duke was shooting at Nelligan. Nelligan was in position to observe the movements and acts of these men and better able to judge of what was taking place prior to his being himself shot than was Cady, who was engaged in a personal encounter and being roughly handled by the Indians. It was for the jury to decide, in view of all the circumstances, whether the Indians intended to escape from lawful arrest, even though it might become necessary to kill one or both of the officers.

It is suggested that the feelings of the community at the place of the trial were highly inflamed towards the defendants, and that this public sentiment found its way to and influenced the jury, to defendants' prejudice. There is no evidence in the record pointing in the slightest in that direction.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

25 Cal. App. 9

PEOPLE v. DE MARTINI. (Cr. 492.)

(District Court of Appeal, First District, California. June 22, 1914. Rehearing Denied by Supreme Court Aug. 21, 1914.)

1. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE.

An allegation of the offense of pandering in the charging part of an information in the language of the statute is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110.*]

2. PROSTITUTION (§ 3*)—INFORMATION—PARTICULAR HOUSE.

In a prosecution for pandering, it is not necessary that the information allege the particular house of prostitution of which the female was induced to become an inmate.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. INDICTMENT AND INFORMATION (§ 175*)—VARIANCE — VENUE — CRIME COMMITTED PARTLY IN TWO COUNTIES.

Under Pen. Code, § 781, providing that, when a public offense is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two counties, the jurisdiction is in either county, the fact that an information charged the crime of pandering to have been committed in the city and county of San Francisco, while the evidence showed that it was committed partly in that county and partly in another, did not constitute a fatal variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 544–547; Dec. Dig. § 175.*]

4. PROSTITUTION (§ 4*)—PANDERING — CHARACTER OF HOUSE—REPUTATION—EVIDENCE.

In a prosecution for pandering, the character of the house which it is claimed the female was induced to enter may be proved by reputation.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

5. PROSTITUTION (§ 4*)—CHARACTER OF HOUSE—PROOF—REPUTATION—STATUTES—EFFECT.

Pen. Code, § 315, as amended by St. 1905, p. 668, providing that in all prosecutions for keeping disorderly houses common reputation may be received of the character of the house and the purpose for which it is kept and used, does not limit proof of the character of a disorderly house by reputation to prosecutions for keeping such houses.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Joe De Martini was convicted of pandering, and he appeals. Affirmed.

Nathan C. Coghlan and B. I. Bloch, both of San Francisco, for appellant. Attorney General U. S. Webb and Asst. Atty. Gen. John H. Riordan, for the People.

KERRIGAN, J. The defendant was charged by information with the crime of pandering, committed in the city and county of San Francisco, in that he did willfully and feloniously, and by promise of a salary of $35 per month, and by other devices, cause, induce, persuade, and encourage a certain woman (naming her) to become an inmate of a house of prostitution. He was tried, convicted, and sentenced. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

[1] The information charges the offense in the language of the statute, stating also the place where it was committed, and in fact every other element necessary to constitute the completed crime, defendant's contention to the contrary notwithstanding. The offense designated is what is termed generally a statutory crime, and it was sufficient to describe it in the charging part of the paper in the words of the statute. People v. Gordon, 133 Cal. 328, 65 Pac. 746, 85 Am. St. Rep. 174; People v. Frigerio, 107 Cal. 151, 40 Pac. 107.

[2] It was unnecessary for the information to show the particular house of prostitution of which the woman was induced to become an inmate.

[3] While the information alleges that the crime was committed in the city and county of San Francisco, the evidence shows that it was committed partly in that and partly in another county. This did not constitute a variance between the information and the evidence. The offense having been committed partly in each of two counties, it was sufficient, we think, under the terms of section 781 of the Penal Code, to allege the venue as was done, and to show by the evidence that the crime was partly committed in the county designated. That section reads:

> "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

[4] The court correctly received evidence of the reputation of the house in question, for it may be said that the rule, though not universal, is well established that the character of a house of prostitution may be established by evidence of its reputation as such. De Martini v. Anderson, 127 Cal. 33, 37, 59 Pac. 207; People v. Nitta, 17 Cal. App. 152, 118 Pac. 946; State v. Hoyle, 98 Minn. 254, 107 N. W. 1130; State v. Smith, 29 Minn. 193, 12 N. W. 524; State v. Bresland, 59 Minn. 281, 61 N. W. 450.

[5] Counsel for the defendant seems to attach some significance to the fact that the Legislature in 1905 (St. 1905, p. 668), in amending section 315 of the Penal Code, provided that, in all prosecutions for keeping houses of prostitution, "common repute may be received of the character of the house" and the "purpose for which it is kept and used"; the argument being that the Legislature having expressed in what cases such evidence may be admitted, has excluded it from all others. The maxim here relied upon is applied as a means only of discovering the legislative intent, and is never permitted to defeat the purpose of the Legislature when the purpose is otherwise plain. Black on In-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terpretation of Laws, p. 219; 36 Cyc. 1122. At the time this amendment was enacted, the better rule as to the admission of this sort of evidence was, and it still is, that it is admissible, but, doubtless, at that time, being one of judicial construction and not being universal, was lacking in the element of certainty; and therefore, for the purpose of making the rule definite as to the class of cases then under consideration, section 315 of the Penal Code was amended in the particular stated. But there is nothing in the amendment indicating that the Legislature intended that the rule then announced should apply only to that class of cases; nor is there any reason why the amendment should be given this limited construction. Black on Interpretation of Laws, 222. It will be noted that the case of People v. Nitta, supra, was decided after the amendment, and there it was held that the general reputation of a certain premises as being a house of prostitution was admissible.

The criticism of the instructions of the court to the jury is not well founded, and does not require consideration.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 117

GRATZ v. SCHULER et al. (Civ. 1330.)

(District Court of Appeal, First District, California. July 8, 1914. Rehearing Denied Aug. 6, 1914; Denied by Supreme Court Sept. 2, 1914.)

1. Fraud (§ 58*)—Actions—Evidence.
In an action for damages for deceit in the sale of a panorama, evidence *held* insufficient to show that defendants represented that the panorama would in the future earn a specified sum each day.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

2. Fraud (§ 9*)—Misrepresentations—Actions.
Representations made in a sale, to be the foundation of an action for damages, must have been falsely made with intent to deceive and must have been relied upon by the buyer while acting with reasonable prudence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

3. Fraud (§ 22*)—Actions—Defenses.
The right of a party to a contract to recover damages for false representations is not destroyed because he did not avail himself of the means of knowledge at hand; but, if he did avail himself of an opportunity to test the truth of the representations and discovered their falsity, there can be no recovery.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19–23; Dec. Dig. § 22.*]

4. Fraud (§ 22*)—Actions—Defenses.
In an action for damages for misrepresentations made in the sale of a panorama, plaintiff cannot recover, where, after discovering the falsity of some of the representations, he made no effort to ascertain the truth of others, although the means of knowledge was at hand.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19–23; Dec. Dig. § 22.*]

5. Fraud (§ 49*)—Actions—Pleading.
In an action for damages for deceit in a sale of a panorama, plaintiff cannot recover on the theory that he was intoxicated when the purchase was made, where no such matter was pleaded.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. § 49.*]

6. Fraud (§ 35*)—Actions—Right of Recovery.
Though plaintiff was inveigled into purchasing a panorama from defendants while under the influence of intoxicating liquors supplied by them, the fact of his intoxication is no ground for recovery in an action for deceit, where plaintiff, some time after the negotiations, voluntarily consummated his bargain.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 30; Dec. Dig. § 35.*]

On Rehearing.

7. Fraud (§ 13*)—Actions—Defenses.
In an action for damages for deceit in the sale of a panorama, plaintiff, who purchased it, cannot recover for defendants' misrepresentations that it would earn $20 a day, where before the consummation of the bargain a test exhibition was had and the receipts fell much below that sum.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3–5; Dec. Dig. § 13.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Ernst W. Gratz against Jacob Schuler and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed and remanded.

F. J. Castelhun, of San Francisco, for appellants. Henry H. Davis, of San Francisco, for respondent.

LENNON, P. J. In this action the plaintiff sought and recovered damages for fraud and deceit alleged to have been perpetrated upon him by the defendants in the negotiation and consummation of an agreement for the purchase and sale of a picture machine, known as the "Kaiser Panorama," which the defendants owned and, at the time of the sale, were exhibiting at a place of public amusement in the city and county of San Francisco. The fraud and deceit complained of in the plaintiff's complaint consisted of the following alleged false representations by the defendants: (1) That the defendants had paid the sum of $1,900 for the panorama; (2) that because of its earning capacity it was worth the sum of $1,900 for exhibition purposes; (3) that the panorama had been earning $20 a day; (4) that the defendants had been offered $100 per month to exhibit it at Idora Park in the city of Oakland; (5) that it was a valuable device for exhibition purposes, and would earn for the plaintiff the sum of $20 per day. Plaintiff's complaint further averred that the defendants willfully and knowingly made such alleged false representations with the intent and for the purpose of cheating and defrauding the plaintiff; and that, believing such false representations and relying solely thereon, he purchased the panorama and paid therefor the sum of $1,100. All of the material allegations of the plaintiff's complaint were denied by the answer of the defendants. The issues thus raised were tried with a jury, and a verdict rendered for the plaintiff in the sum of $1,000. From the judgment entered thereon and from an order denying a new trial the defendants have appealed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The insufficiency of the evidence to support the verdict is the principal point relied upon for a reversal. The point is well taken. The case of the plaintiff, in so far as the making and falsity of the representations were concerned, was rested entirely upon his own testimony, and such testimony did not in the slightest degree tend to show the falsity of the defendants' alleged representations concerning the original cost of the panorama. Upon the other hand, the testimony of the defendants, uncontradicted and unimpeached either by direct or circumstantial evidence, was to the effect that they had paid $1,900 for the panorama. Plainly, therefore, the verdict cannot be supported upon the theory that the evidence shows that the defendants falsely represented the original cost of the panorama.

We have searched the record in vain for any evidence which even remotely tends to support the allegations of the complaint that the defendants represented to the plaintiff that the panorama would earn for him the sum of $20 per day. In this behalf the plaintiff's testimony in its entirety reveals nothing more than that the defendants said to him when negotiating the sale that they had been offered $100 per month to exhibit the panorama at Idora Park, and that "it makes lots of money; * * * you can bring it to Idora Park and * * * rent it out."

Conceding that the false representation concerning the future earning capacity of the panorama would, under all of the circumstances of the present case, constitute a good cause of action for fraud and deceit, nevertheless it is clear that the plaintiff's testimony upon this phase of the case would not support a finding that the defendants had falsely represented that the panorama would earn a specified sum per day. Stripped of immaterial matters, the sum and substance of plaintiff's testimony upon direct and cross-examination is that he was induced to pay the sum of $1,100 for the panorama solely because of the representation that it had in the past earned $20 per day, and that he could place it in Idora Park at a monthly rental of $100. Further testifying in this behalf the plaintiff in effect said that, while the statement as to past earnings influenced him to buy the panorama, nevertheless the representation that he could rent it to Idora Park had to a greater extent influenced him, because there it "would pay more interest on the money than the German Bank."

It follows that the verdict and judgment can be sustained only upon the theory that the evidence shows that the plaintiff was induced to purchase and part with his money solely by reason of the false representation that the panorama had been earning $20 per day, and that he could rent it to the management of Idora Park for $100 per month. While the conflict in the evidence upon this phase of the case was resolved in favor of the plaintiff, we are satisfied that, under all of the circumstances of the transaction in suit, such representations, even if falsely made, were not as a matter of law sufficient to warrant a verdict and judgment for damages upon the ground of deceit.

[2-4] Fraud is the basis of an action for damages for deceit; and when such action arises out of alleged false representations of a material fact the plaintiff, in order to prevail, must ordinarily show not only that such representations were knowingly false and made with intent to deceive, but that the plaintiff, relying upon such false representations and while acting with reasonable prudence, was thereby deceived into doing something to his detriment.

It may be conceded that the undisputed fact in the present case, that the panorama never at any time after the plaintiff finally purchased it earned more than $5 per day, was sufficient to warrant the finding of the jury implied from the verdict that the representations of the defendants as to its previous earnings were false and fraudulent. Del Vecchio v. Savelli, 10 Cal. App. 79, 101 Pac. 32. Therefore we would have but little difficulty in sustaining the judgment if the evidence upon the whole case was sufficient to warrant the inference that the plaintiff relied upon and was in fact deceived by such representations. But the evidence will not justify any such inference. To the contrary, the evidence clearly and without conflict shows that the plaintiff did not rely upon and was not deceived by the statement that the panorama had been earning $20 per day while owned and operated by the defendants. That this is so is shown by the plaintiff's own testimony to the effect that, upon the payment of $50 on account, he was given possession of the panorama, and during the three weeks following gave three exhibitions at the original stand "to see what it was earning." The receipts of the first exhibition amounted to $12.50; the second exhibition a week after brought but 75 cents to the box office; the receipts of the third exhibition given a week after the second amounted to but 15 cents. Notwithstanding this actual demonstration of the real earning capacity of the panorama, the plaintiff, without further representations of the defendants, completed the purchase by the payment of the balance of the price originally agreed upon. Surely, under these circumstances, it cannot be said that the evidence shows that the plaintiff was justified in relying solely upon the representations of the defendants that the panorama had been earning $20 per day. Generally speaking, if one party to a contract is justified in relying and does in fact rely upon false representations, his right of action for rescission or for damages for deceit is not destroyed merely because he did not avail himself of the means of knowledge immediately at hand as to the truth or falsity of the representations (Ruhl v. Mott, 120 Cal. 668, 53 Pac. 304; Neher v. Hansen, 12 Cal. App. 370, 107 Pac. 565; Tarke v. Bingham, 123 Cal. 163, 55 Pac. 759; Willey v. Clements, 146 Cal. 91, 79 Pac. 850); but if he does avail himself of an opportunity to test the truth of the representations made, and thereby discovers prior to the consummation of the contract that such representations were false, he will not be heard to say that he was deceived by them. We take it that this proposition needs no authority to support it. Assuming that the plaintiff was justified in relying and acting upon the representation that the defendants had been offered $100 per month to exhibit the panorama at Idora Park, and that the plaintiff, if he purchased the panorama, could rent it to that park, still these were facts which were readily susceptible of verification, and under the particular circumstances of the present case, should have been verified by the plaintiff before he purchased and paid for the panorama. Ordinarily perhaps this might not be so; but, having ascertained that the defendants falsely represented one material matter in the transaction, this was notice that the defendants may have been false in all else that they said; and therefore it was incumbent upon the plaintiff thereafter to make a full investigation as to the truth or falsity of every other material representation. This is so, because the law does not undertake the care of persons who, with notice of a fraud and the means of prevention at hand, will not take care of themselves. Ruhl v. Mott, supra; Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384.

[5,6] During the course of plaintiff's testimony it was incidentally developed that during the negotiations for the sale of the panorama the plaintiff became intoxicated from drinking beer supplied to him by the defendants, and that while so intoxicated he made the first payment of $50 on account. We are at a loss to conceive how this fact can be availed of in support of the verdict. In the first place, the plaintiff's complaint did not plead or attempt to plead such fact as a part of his cause of action; in the second place, the uncontradicted evidence is to the effect that the purchase of the panorama was not completed until some three weeks after the deposit had been paid on account; and the evidence does not show, nor is it contended here, that the plaintiff was intoxicated at that time. Conceding that the plaintiff may have been so intoxicated during the original negotiations for the sale of the panorama that he did not realize what he was doing, nevertheless, having completed the same when he was undoubtedly sober, this was a ratification of the original agreement, which precludes the plaintiff from repudiating the transaction, or asserting that advantage was taken of his intoxicated condition to defraud and deceive him.

For the reasons stated, the judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

On Rehearing.

LENNON, P. J. In fairness to the plaintiff (respondent) in the above-entitled action, the statement of the facts of the case in the opinion heretofore rendered, reversing the judgment of the lower court, should be modified in certain particulars.

[7] While the testimony of the plaintiff is in part at least somewhat confused and uncertain, as to whether or not he personally conducted one or three exhibitions of the panorama purchased from the defendants, prior to the payment of the full purchase price, upon a further consideration of the record, still before us, we must confess that the plaintiff's testimony, when considered in its entirety, and liberally construed, is to the effect that after the payment of $50 as a deposit, and before the payment of the full purchase price of the panorama, he personally conducted but one exhibition, the receipts of which, as stated in the opinion heretofore rendered, amounted to $12.50. The other two exhibitions mentioned in that opinion apparently were given by the plaintiff after he had paid the full amount of the purchase price. This correction of the statement of the facts of the case will not, however, operate to alter or in any wise impair the conclusion previously reached, that the plaintiff's testimony shows that he did not rely upon and was not deceived by the defendants' statement that the panorama had been earning twenty dollars per day while owned and operated by them. The result of the single exhibition given by the plaintiff prior to the payment of the purchase price should have been sufficient, we think, to put him upon further inquiry concerning the past earning capacity of the panorama. Moreover, the testimony of the plaintiff shows further that before he made the full payment of the purchase price, he called upon the defendants, and asked for the return of the $50 deposit paid on account, because, as he said: "I did a very foolish thing to buy that thing. I made a very foolish bargain." It will thus be seen that, notwithstanding an actual demonstration of the earning capacity of the panorama, and knowledge of the fact that he had made a bad bargain, plaintiff completed the contract of sale by paying the balance of $1,050, due on the purchase price.

Under these circumstances, it cannot be fairly said that the plaintiff was deceived into parting with the bulk of his money by the statements of the defendants that the panorama had previously earned for them the sum of $20 per day; and therefore, in so far as the conclusion reached and heretofore expressed upon this phase of the case is concerned, it is immaterial whether the plaintiff gave more than one exhibition prior to the time he made the final payment on the purchase price of the panorama.

The petition for rehearing is denied.

We concur: RICHARDS, J.; KERRIGAN, J.

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25 Cal. App. 108

BAUCOM v. BAUCOM. (Civ. 1388.)

(District Court of Appeal, First District, California. July 6, 1914.)

1. EVIDENCE (§ 598*)—WEIGHT OF EVIDENCE.
Under Code Civ. Proc. § 2061, subd. 5, directing that the decision must be according to the preponderance of the evidence, the weight of the testimony is not determined by the number of the witnesses but their apparent credibility.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450–2452; Dec. Dig. § 598.*]

2. APPEAL AND ERROR (§ 1002*) — TRIAL — FINDING.
A finding by the trial court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action for divorce by Thomas Baucom against Hester B. Baucom, who cross-complained. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

James A. Hall, of Watsonville, for appellant. Wykoff & Gardner, of Watsonville, for respondent.

LENNON, P. J. In this case the plaintiff prayed for a divorce from the defendant upon the single ground of extreme cruelty. The defendant denied in her answer the acts of cruelty charged against her in the plaintiff's complaint, and, in addition, interposed a cross-complaint, alleging habitual intemperance and extreme cruelty on the part of the plaintiff, and prayed that a divorce be granted to her upon those grounds. All of the material allegations of the defendant's cross-complaint were denied in an answer thereto by the plaintiff. Upon the issues thus raised the court below found against the plaintiff upon the allegations of his complaint, and found for the defendant in substantial accord with the allegations of her cross-complaint. Judgment was accordingly entered, granting the defendant an interlocutory decree of divorce, from which, and from an order denying a new trial, plaintiff has appealed.

In support of the appeal plaintiff relies solely upon the contention that the findings of fact made against him upon the issues raised by his complaint and the defendant's answer are contrary to the evidence, and that the findings of fact made in favor of the defendant upon the issues raised by her cross-complaint and the plaintiff's answer thereto are not supported by the evidence. This contention is rested solely upon the reasoning that because the testimony of the defendant relative to the paramount issues in the case was in one instance contradicted by two witnesses for the plaintiff, and in another instance by the plaintiff and three witnesses, "her testimony is to be disregarded, and there remains no substantial conflict in the evidence."

[1] Perchance this contention is seriously made; but, if so, it need not be seriously considered, further than to say that the settled and generally understood rule of evidence (Code Civ. Proc. § 2061, subd. 5), which directs that when the evidence in a civil case is contradictory the decision must be made according to the preponderance of evidence, contemplates that the court will be controlled by the weight of the evidence, as indicated by the apparent credibility of the witnesses, rather than by their mere numerical preponderance. In brief, it is axiomatic "that witnesses are not counted, but that their testimony is weighed." Jones on Evidence, § 900.

[2] Inasmuch as the very statement of the point presented for a reversal involves an admission of a conflict in the evidence adduced upon the whole case, it will suffice to say that the testimony of the defendant alone, if believed by the court, was sufficient to support the finding that she had not been guilty of the extreme cruelty charged against her. On the other hand, her testimony and the corroborating testimony of other witnesses was, if believed by the trial court, sufficient to support the finding that the plaintiff had been guilty of extreme cruelty towards her. The latter finding alone is in turn sufficient to sustain the judgment in favor of the defendant upon her cross-complaint. The trial court apparently gave full credence to the testimony on behalf of the defendant, and accordingly resolved whatever conflict there may have been in the evidence upon the whole case in favor of the defendant. This the trial court had the right to do; and its decision upon the facts of the case, resting as it does upon conflicting evidence, will not be disturbed here.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

25 Cal. App. 92

Ex parte MASCOLO. (Cr. 339).

(District Court of Appeal, Second District, California. July 3, 1914.)

1. STATUTES (§ 110½*)—SUBJECT AND TITLE—AMENDATORY ACT.

St. 1913, p. 988, entitled an act to amend an act dividing the state into six fish and game districts, by adding a new section thereto, is void; the amendment purporting to divide the state into seven districts and to change every section of the original act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 139, 161, 162, 163; Dec. Dig. § 110½.*]

2. STATUTES (§ 143*)—AMENDMENT—VOID STATUTE.

St. 1913, p. 988, purporting to amend Act March 21, 1911 (St. 1911, p. 425), dividing the state into fish and game districts, being wholly void, Act 1911 remained in force.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 211; Dec. Dig. § 143.*]

3. STATUTES (§ 64*)—PARTIAL INVALIDITY.

St. 1913, p. 979, which added a new section to the Penal Code, making it illegal to use certain nets in the waters of the Sixth fish district and in Monterey Bay, which included part of the Fifth district, is not bad as special legislation, in so far as it applies to the Sixth district, because its application to that part of the fifth district included in Monterey Bay might be special legislation, for a statute though invalid in part will be upheld when the valid portion can be separated from the invalid part.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

4. STATUTES (§ 77*)—SPECIAL LEGISLATION—UNIFORMITY OF OPERATION.

Nor is it in violation of Const. art. 1, § 11, requiring all laws of a general nature to have a uniform operation; the statute not purporting to be a general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79–82; Dec. Dig. § 77.*]

5. STATUTES (§ 110½*)—TITLE OF ACT.

Neither is it in violation of Const. art. 4, § 24, declaring that every act shall embrace but one subject which shall be expressed in its title, because the title was broader than the act, mentioning nets not specified in the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 139, 161, 162, 163; Dec. Dig. § 110½.*]

6. STATUTES (§ 77*)—SPECIAL LAWS—VALIDITY.

Likewise it is not in violation of Const. art. 4, § 25, subd. 2, prohibiting the passage of special laws for the punishment of crimes and misdemeanors, for section 25½ of that article, authorizing the Legislature to create fish and game districts and provide for the protection of fish and game therein, having been adopted subsequently, qualified the earlier provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79–82; Dec. Dig. § 77.*]

7. CONSTITUTIONAL LAW (§ 15*)—CONSTRUCTION—CONSTITUTIONAL PROVISIONS.

The provisions of the Constitution should be construed so as to avoid repugnancy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.*]

8. CONSTITUTIONAL LAW (§ 15*)—CONSTRUCTION—SPECIAL POWERS.

A special provision authorizing the exercise of particular powers will override a general prohibition.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.*]

In the matter of the application of V. Mascolo for a writ of habeas corpus. Application denied.

C. W. Pendleton, of Los Angeles, for petitioner. J. D. Fredericks, Dist. Atty., and John L. Richardson, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, J. Petitioner was arrested and held upon a warrant charging him with a violation of the provisions of section 636½ of the Penal Code.

Section 25½ of article 4 of the Constitution, which was adopted in 1902, provides:

> "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts."

Pursuant to this provision the Legislature adopted an act, approved March 21, 1911 (Stats. 1911, p. 425), entitled "An act to divide the state of California into six fish and game districts." In 1913 this act was amended by an act approved June 16, 1913, entitled "An act to amend an act entitled 'An act to divide the state of California into six fish and game districts,' approved March 21, 1911, by adding a new section thereto." Stats. 1913, p. 988.

[1, 2] Petitioner attacks this act claiming that it is unconstitutional and void. According to the title, the only change proposed in the amendment was the addition of a new section to the act of 1911, otherwise leaving it as originally enacted. Instead of merely adding a new section, the bill purports not only to divide the state into seven fish and game districts, but in fact otherwise materially changes and amends every section of the act of 1911. There was nothing in the title to indicate any such intent or purpose. The act itself is confusing in that the proposed new section is to be numbered seven, while the act which it was proposed to amend contains a section so numbered. The subject of the amendment was not expressed in the title, which, in view of the attempted legislation, was well calculated to mislead and deceive both the public and the members of the Legislature. We therefore hold the act of 1913 to be void. Ex parte Liddell, 93 Cal. 633, 29 Pac. 251; Wood v. Commissioners, 58 Cal. 561. Being void, it was inoperative for any purpose and effected no change whatsoever in the act of 1911 (Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257), whereby Los Angeles county was designated as being in the Sixth fish and game district.

[3, 4] The Legislature, having by the act of 1911 divided the state into six districts, proceeded as authorized by section 25½, art. 4, of the Constitution, to adopt a law deemed appropriate for the protection of fish and game in the counties comprising the sixth district. This act, entitled "An act to add a new sec-

tion to the Penal Code of the state of California, to be numbered six hundred and thirty-six and one-half, to prevent the use or possession of lompara nets, paranzella nets, trawl or drag nets, and providing the penalty therefor" (Stats. 1913, p. 979), provides that:

> "Every person who at any time shall cast, extend, set, draw, use, or continue or assist in casting, extending, setting, drawing, using, or continuing, any paranzella or trawl net, for catching fish, shellfish, shrimp, or crabs in the waters of fish and game district six or in the waters of Monterey bay shall be guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than two hundred and fifty dollars, or by imprisonment in the county jail in the county in which the conviction shall be had, not less than one hundred and twenty-five days, or by both such fine and imprisonment."

Petitioner insists that section 636½, Penal Code, under which he is charged with the offense, is unconstitutional for the reasons: First, that it is special and class legislation; second, that it is not uniform in its operation; and, third, that it is in contravention of certain provisions of the Constitution, to wit: (a) section 11, art. 1, requiring that all "laws of a general nature shall have a uniform operation"; (b) section 24, art. 4, which provides that "every act shall embrace but one subject, which subject shall be expressed in its title"; and (c) subdivision 2, § 25, art. 4, which prohibits the passage of local or special laws "for the punishment of crimes or misdemeanors." These objections to the validity of section 636½ are largely answered by the constitutional provision which in express terms authorizes the Legislature to create fish and game districts and "enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts." The law as passed, in so far as it affects the petitioner, applies with uniformity to all persons within the Sixth district, and, while local in that it applies to such district alone, it is not special, since it applies to the entire district. The validity of the act, in so far as it purports to legislate for that part of the Fifth district consisting of Monterey Bay, is not here involved. Even were it conceded to be special legislation as to the Fifth district, such fact does not affect the validity of that part of the act applicable to the Sixth district. The rule is that, although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from that part which is void. It is not obnoxious to section 11, art. 1, since, as stated, it does not purport to be a general law applicable to the entire state.

[5] Section 24, art. 4, is directed against the omission to express the subject of the legislation in the title, not to the fact that the title is broader than the subject of the act.

> "A law might be invalid for want of compliance with this section, if it contained matter not expressed in the title, but it would not be where the title contains more than is necessary to point out the object of the law." Davis & Bro. v. Woolnough, 9 Iowa, 104.

While the title prohibits the use of lompara, paranzella, trawl, or drag nets, the inhibition in the body of the act is directed to paranzella and trawl nets only. The fact that the title is broader than the act itself does not render the act obnoxious to the section of the Constitution here invoked. Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338.

[6-8] Petitioner insists that by subdivision 2, § 25, art. 4, the Legislature is prohibited from passing local or special laws "for the punishment of crimes or misdemeanors." This provision is general, and in point of time precedes the adoption of section 25½, art. 4, which is special. A construction which raises a conflict between parts of the Constitution is inadmissible when by any reasonable interpretation they may be made to harmonize, and in case of irreconcilable repugnancy the provision last in order of time should prevail. Says Judge Cooley in his work on Constitutional Limitations (page 92):

> "One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

It is clear that in adopting the later provision the intention was to qualify and limit the effect of subdivision 2 of section 25, thus giving the Legislature, as therein stated, the power to enact penal laws, and provide for the enforcement thereof, appropriate to the several fish and game districts throughout the state. Even if the provisions should be deemed repugnant, then the one first in point of time must yield to the later. If in one section a power is specifically conferred or a duty specially enjoined, which in general terms is prohibited by other sections, the power or duty specially conferred or enjoined constitutes an exception to the general rule. The direction to employ the power or discharge the duty in the particular instance is as mandatory as the general prohibition. San Francisco, etc., R. R. Co. v. State Board, 60 Cal. 12.

Petitioner's objections to the validity of the act under which the warrant for his arrest was issued are highly technical and, in our opinion, without merit. It is therefore ordered that the petition be dismissed and petitioner remanded to the custody of the sheriff.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 68

SEALS et al. v. DAVIS. (Civ. 1332.)

(District Court of Appeal, First District, California. July 1, 1914.)

1. Evidence (§ 445*)—Documentary Evidence—Parol Evidence to Vary.

Where plaintiffs, who purchased land under a written agreement, claimed that the agreement had been subsequently changed by parol, parol evidence of the change was admissible; there being no attempt to vary the terms of the written agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052–2065; Dec. Dig. § 445.*]

2. Judgment (§ 251*)—Conformity to Issues Raised by Pleadings.

Where the first count of the complaint seeking recovery of sums paid under a contract for the purchase of land alleged defendant's breach and plaintiffs' performance, and the second sought recovery for money received, a judgment for plaintiff may be sustained despite his own breach of the contract, where defendant consented to a modification of the contract and they breached his agreement.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

3. Vendor and Purchaser (§ 334*)—Remedies of Purchaser.

Where a landowner, after selling upon installments, breaches his contract, the purchaser may recover money which he has paid in an action for money received.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959–980; Dec. Dig. § 334.*]

4. Vendor and Purchaser (§ 341*)—Remedies of Purchaser—Recovery of Payments Made—Pleading.

In an action for money received, where plaintiff contended that defendant wrongfully rescinded a contract for the sale of land upon installments, plaintiff need not negative in his complaint the defense of his own default by pleading a modification of the contract and an estoppel on the part of defendant to rely on the default, but may rely on the implied denial of the allegations of the answer raised by the statute, and give evidence of the waiver and estoppel at the trial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008–1017; Dec. Dig. § 341.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Clem H. Seals and another against O. W. Davis. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. L. Cory and M. B. Harris, both of Fresno, for appellant. Geo. Cosgrave and L. B. Hayhurst, both of Fresno, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs for the recovery of the sum of $1,250, claimed to be due from the defendant as the result of the rescission of a contract for the sale of a certain piece of real estate by the defendant to the plaintiffs; the amount so recovered by the plaintiffs being the first payment made by them on account of said transaction.

The evidence, which is practically uncontradicted, shows the following state of facts: On April 10, 1911, the plaintiffs and the defendant entered into a contract for the purchase and sale of a tract of land, embracing 80 acres and lying in Merced county, for the purchase price of $6,000, of which the plaintiffs were to pay, and did pay, the sum of $1,250 cash. They also assumed the payment of an outstanding lien of $1,600, secured by a deed of trust upon the property executed by the seller, and bearing interest at 6 per cent. per annum. The balance of the purchase price was to be paid in annual installments of $500 each, beginning March 15, 1912. There were also certain water assessments accruing during 1911, which the purchasers agreed to pay. In case of default of any payments to be made under the contract, the seller could declare the contract at an end and retake possession of the property, in which case all payments which had been made by the purchasers were to be retained by the seller as reasonable compensation for the use and rental of the property during its incumbency by the purchasers. The plaintiffs took possession of the land in April, 1911, and remained until the fall; but apparently did not make much of a success at farming, and hence were not able to make the payments of interest upon the obligation secured by the deed of trust and of the water assessments, and were on the point of leaving the property when the parties to the contract met and, according to the plaintiffs' testimony, had an oral agreement, by which the defendant was to keep the interest on the trust deed and the water assessments paid up until the following March, and that the plaintiffs were not to be in default until that time. That some such arrangement was made can be gathered from the terms of a letter which the defendant wrote the plaintiffs during October, 1911, which contained the proposition that the plaintiffs should execute a release of their contract and place the same in escrow with a Fresno bank, in consideration of which they were to have possession of the land until the following March in order to allow them to dispose of the property and get their money out of it. Upon receipt of this letter the plaintiff C. H. Seals saw the defendant and agreed to its terms. It was understood that the defendant was to have his own lawyer draw up the form of the document to be placed in escrow, and he got from the plaintiffs their copy of the original contract for that avowed purpose. Thereafter on several occasions during the next few weeks the plaintiff C. H. Seals came to Fresno and saw the defendant with respect to having the escrow papers signed, but the defendant put him off on various pretexts, and quieted his fears of losing his interest in the land by assuring him that he could not be beaten out of what interest he had in it so long as his name was on the contract. The plaintiffs also wrote the defendant one or possibly two letters in regard to the papers so to be prepared and signed, but got no reply; and finally during December came over from Coalinga, where they were living, and met the defendant, when he told them that he would have nothing more to do with them, and when they also learned that he had sold the property to another purchaser for a larger sum than their original purchase price. Thereupon they brought this action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There are some slight conflicts in the evidence with reference to the foregoing facts, but these were resolved by the lower court in favor of the plaintiffs, and with its discretion in that respect we shall not undertake to interfere.

[1] The first contention of the appellant relates to the alleged error of the court in the admission of the testimony of the plaintiffs with respect to the oral understandings with the defendant affecting their liability under the written contract, and referring especially to the time of performance of certain of its obligations. It is the theory of the appellant that this oral evidence was offered in an effort to change or modify the terms of a written contract, and that it was inadmissible for such purpose under many authorities cited by his counsel, stating well established rules of law. There can be no quarrel with the authorities cited by appellant to sustain this legal proposition; but the difficulty lies in the fact that the evidence was not offered or admitted for the purpose indicated by appellant, but was offered by the respondents, and properly admitted by the court, as evidence tending to show that the appellant had waived the performance of those portions of the plaintiffs' obligation under the written contract, the failure to do which was later held by the appellant to have put them in default; and also as evidence of acts and conduct on the part of the defendant which, if true, would operate as an estoppel to his claim of forfeiture of the plaintiffs' first payment under such contract, based upon their default in the performance of its terms. It requires no authorities to sustain the proposition that the proof of such waiver and estoppel may be made by parol.

[2] The plaintiffs brought their action in two counts, the first of which was based upon allegations to the effect that the plaintiffs had performed all the obligations of the written contract to be by them performed; and that the defendant, having attempted to work a rescission of the contract through the sale of the property to a third person, in the absence of any default on their part, the plaintiffs were entitled to accept such rescission and bring suit to recover their payment. The second alleged cause of action was in the form of a common count for money had and received by the defendant to the plaintiffs' use. The appellant contends that the findings of the court to the effect that the averments of the first count were true, was not supported by the evidence. This might seem to raise the question as to whether proof of the waiver of certain terms and conditions of the contract would operate to justify a finding that the plaintiffs had performed such obligations. But conceding this to be true under the cases cited by appellant, the presence and proofs of the plaintiffs' second cause of action would seem to make that question immaterial to this case; for even if the court erred in its aforesaid finding as to the facts proven in support of the first count, its judgment would still be sustainable under the second count based, as it evidently is, upon the accepted proofs of the plaintiffs establishing a waiver of their unperformed obligations, and an estoppel against the assertion of their default therein by the defendant as a ground of forfeiture of the money payment which the plaintiffs seek to recover.

[3, 4] In this connection, however, the appellant urges that the plaintiffs were not entitled to offer proof of either a waiver of their unfulfilled obligations under the contract, or of the estoppel of the defendant's right to insist upon them, because of the plaintiffs' failure to tender either of these issues by direct averments in their complaint. The answer to this proposition again is that in the second count of the plaintiffs' complaint consists the saving grace of their pleading. When a plaintiff seeks to recover money which he has paid upon a contract which the defendant has attempted to rescind, he may accept such rescission, and bring his action in the form of the common count for money had and received by the defendant to his use and benefit. Glock v. Howard, etc., Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Duncanson v. Walton, 111 Cal. 516, 44 Pac. 174; Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839; Carter v. Fox, 11 Cal. App. 67, 103 Pac. 910. In such an action the plaintiff is not bound to anticipate the defendant's plea of his right to work a rescission of the contract, with the resultant right of forfeiture of the payments which were made under its terms, based upon the plaintiff's failure to perform certain of its conditions, and to plead in advance of these affirmative defenses matter of waiver or estoppel; but in such a case the plaintiff may rely upon the replications which the Code makes for him, and proffer his proof of waiver or estoppel upon the trial of the case. Sutherland on Code Pleading, § 235, and cases cited. In the case at bar there is sufficient evidence to have justified the court in finding that the defendant was estopped by his own acts and conduct, especially with reference to the matters referred to in the letter of the defendant regarding the placing in escrow by the plaintiffs of their quitclaim deed to the property, and hence that the defendant could not be heard to assert that the plaintiffs had not performed the conditions of the contract to be by them performed; and if this be true, the finding of the court as to whether the plaintiffs had or had not per-

formed the conditions of the contract becomes an immaterial factor in the case.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 84

JOHNSTON et al. v. TEJUNGA ROCK CO.

(Civ. 1409.)

(District Court of Appeal, Second District, California. July 3, 1914.)

BROKERS (§ 43*)—ACTION FOR COMMISSIONS—DEFENSES.

Where plaintiffs, though not authorized in writing as required by statute, sold rock for the defendant corporation, and it was actually delivered and paid for, the corporation is estopped from questioning the contract, after performance, on the ground of plaintiffs' want of written authority or the lack of authority of the road supervisors to enter into the contract for the district which purchased the rock.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by John T. Johnston and George W. McComber, copartners as Johnston & McCumber, against the Tejunga Rock Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Flint, Gray & Barker, Gray, Barker & Bowen, and William A. Bowen, all of Los Angeles, for appellant. Wm. G. Griffith, of Santa Barbara, for respondents.

CONREY, P. J. The plaintiffs as partners bring this action against the defendant, a corporation, to recover money claimed as commissions for the sale of personal property. Defendant appeals from the judgment which was rendered in favor of the plaintiffs, and also appeals from an order denying a motion for a new trial.

In the complaint it is alleged that from the 19th day of May, 1911, until on or after the 1st day of September, 1911, the plaintiffs were agents employed by the defendant to sell and contract for the sale of crushed rock for the defendant for an agreed compensation of 10 cents per ton; that on September 1, 1911, the plaintiffs as such agents contracted for the sale of and sold on behalf of the defendant to one Deaderick, supervisor of the first supervisor district of the county of Santa Barbara, acting under authority of the board of supervisors of said county, all of the road material, consisting of certain sizes of crushed rock, to be used on 5½ miles of macadam road thereafter to be built in the Montecito valley in said district at the price of $1.30 per ton, to be delivered as specified, which contract was in writing and was signed on behalf of said defendant by Ben C. Brock, its superintendent thereunto duly authorized, and by the said Deaderick on behalf of said county; that thereafter, commencing on or about September 9, 1911, the defendant began delivery to said Supervisor Deaderick of said crushed rock under and pursuant to said agreement, and continued such delivery until the road was fully completed; that the total amount of rock so furnished was 15,890 tons, and the amount of the agreed compensation of plaintiffs thereof at said rate of 10 cents per ton was $1,589. The answer of defendant contains a denial of the employment of plaintiffs and of the agreement for compensation and of the alleged agreement for sale of rock; denies that Ben C. Brock was authorized to execute any such agreement on behalf of the defendant; denies that the defendant delivered any material to said Deaderick under or pursuant to the alleged agreement; and denies that defendant agreed to pay any compensation to plaintiffs, or that any commission is due from defendant to plaintiffs on account of said transaction. The findings of the court on each of the disputed issues are in favor of the plaintiffs, and the defendant contends that the evidence is insufficient to support those findings.

During the year 1911, until about September 15th, one Frank G. Hogan was president and general manager of the Tejunga Rock Company and owned all of the stock, except a few shares which were distributed among four other persons to qualify them for the office of directors of the corporation. S. M. Crawford was a director and was secretary; Ben C. Brock was a director and was employed as superintendent at the quarry of the company which is located in the county of Los Angeles. The company was active in the business of selling crushed rock, and the duties delegated to Brock and Crawford were described in the testimony of Mr. Hogan as follows:

> "The management, or rather the handling of the orders, was left jointly to Mr. Brock and Mr. Crawford, as my representatives, with instructions that if anything came up of any magnitude at any time that they would consult with me before taking any action; in fact, I was consulted with time after time over the telephone and by repeated visits to the office. I told them to go ahead and make the business pay and to get out rock as cheap as they could, and sell it as high as they could. I never at any time gave to Mr. Brock authority to sell material independent of the approval of Mr. Crawford. The usual course of business in the sale of material called for the approval both of Mr. Crawford and Mr. Brock of all orders. The course of business, with reference to the sale of material prior to September 15, 1911, was, the material was to be gotten out and sold to the best possible advantage by Crawford or Brock. My understanding is that they were both endeavoring to sell material and were acting in full knowledge of each other and consulting regarding the sales. That was the actual course of business."

In May, 1911, and thereafter, the defendant was selling rock in Santa Barbara county, and on and after May 19th the plaintiffs acted as its local agents, engaged for that purpose by the defendant through Brock with the knowledge and consent of Crawford, and at an agreed commission of 10 cents per ton on material sold through the agency of the plaintiffs. Sales to various purchasers were made from time to time and settled for on this basis. In August plaintiffs conducted certain negotiations with Supervisor Deaderick, having in view the furnishing of rock for the road work above mentioned. This was known to both Brock and Crawford. On September 1st the plaintiffs prepared in duplicate the document of which a copy is attached to the complaint and brought it to the office of defendant at Los Angeles. There it was signed in duplicate by Brock who mentioned that fact to Crawford, but Crawford did not read the papers. These were taken back by Johnston to Santa Barbara, and on the next day were delivered by plaintiffs to Deaderick.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

No record of the proceedings of the board of supervisors of Santa Barbara county concerning the Montecito road were shown in evidence, but Supervisor Deaderick was permitted to testify, without objection thereto, that prior to September 1st the board of supervisors had advertised for bids for the proposed work and received no bids; had then re-advertised for two weeks, and on the first Monday in September (September 4th) all bids were rejected, and Deaderick, who was supervisor for the district in which the Montecito road was located, was ordered by the board to proceed and complete that work. Within two or three days after September 4th Deaderick signed the alleged contract in duplicate and returned both copies to the plaintiffs. One of these copies remained in the possession of plaintiffs until the trial of this action. The other copy was delivered by Brock to an officer of the defendant on September 26, 1911. The evidence does not show when it was received by Brock, but does show that Brock's employment by the defendant ceased on or about September 15th, at which time Hogan completed a sale of all the stock of the corporation to new owners who were stockholders of a rival concern known as the Acton Rock Company. On September 15th one W. S. Heaton became vice president of defendant and was employed as its sales agent. Both prior and subsequent to that time Heaton was sales agent for the Acton Rock Company.

The alleged contract provided that the vendor would furnish at least 150 tons per day during the time of construction of the Montecito road. The evidence indicates that this would be approximately three full car loads per day. On September 6th the plaintiffs sent to the defendant an order for the first shipment and accompanied the same by a letter dated the previous day, referring to the same as "our order for the county of Santa Barbara, Miramar Switch; three (3) cars each day, until ordered stopped, beginning shipment at your earliest convenience." The letter then refers to Mr. Deaderick as supervisor in charge and gives further instructions as to the desired course of business respecting the shipments. There were some further orders and shipments made during the next few days. On September 23d Mr. Heaton went to Santa Barbara in response to a suggestion from A. R. Edmondson, the Santa Barbara agent of the Acton Rock Company who had now been engaged by Heaton as the Santa Barbara agent of both companies. A meeting then occurred at the office of the district attorney at which there were present, among others, Supervisor Deaderick, Edmondson, McComber, Heaton, and District Attorney Squier. Deaderick made some complaint that his orders for rock were not being filled, and Heaton stated:

> "We are not going to deliver the rock on any contract. We are not delivering you rock on any contract, * * * nor do we propose to pay 10 cents to McComber & Johnston."

The alleged written contract was not produced, and Heaton's uncontradicted testimony is that he had no knowledge of such contract at that time, except that Edmondson had told him that he had heard that "somebody had signed up," and that defendant had been paying 10 cents per ton to the plaintiffs on rock sold by them. At that interview on September 23d it was arranged that the defendant would proceed to deliver rock for the Montecito road for 70 cents, f. o. b. at the quarry. This was practically the same as $1.30 at point of delivery, as the current freight rate was 60 cents per ton. Subsequently in December, Deaderick obtained a reduction of 5 cents per ton on the freight rate of which reduction the county obtained the benefit. Deliveries continued to be made until January, when the road was completed, and the total amount of rock delivered was as charged in the complaint and found by the court. Some of this rock was furnished by the Acton Rock Company from its plant at Acton, 43 miles from Tejunga, and for some of it of a certain quality an additional price of 5 cents per ton was paid. The court found, and there is evidence to support the finding, that the rock furnished from Acton was so furnished at the request of the defendant. In view of this fact, there is no doubt of the correctness of the amount of the judgment, if the defendant is liable at all for these commissions.

The plaintiffs have alleged, and the court finds, that plaintiffs as agents of the defendant contracted for the sale of said road material by a contract in writing, signed on behalf of the defendant by Ben C. Brock, its superintendent. It is contended on behalf of the defendant that this finding is wrong, because Brock had no authority to bind the defendant by the execution of such a contract. Section 2309 of the Civil Code provides:

"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Under section 1624, subd. 4, Civil Code, the following must be in writing:

"An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels or the evidences, or some of them, of such things in action, or pays at the time some part of the purchase money."

While no definite amount or total price is mentioned in the writing in question, the magnitude of the work as described and the rate per ton that was to be paid clearly establish that the contemplated price was many times $200. The evidence shows that no written authority was ever given by the corporation to Brock or to the plaintiffs authorizing either of them to make sales. Such authority as they had with respect to sales of rock must be derived from the oral instructions given by Hogan to Brock and the oral agreement of agency resulting from conversations between Brock and the plaintiffs and from the course of business established by the transactions connected with plaintiffs' agency on and after May 19, 1911, and the course of business of the defendant with respect to the transaction of business for it by Brock and Crawford.

It is next contended that the writing in question did not constitute a contract because it was not delivered to the defendant and because the fact that it had been signed by Deaderick was never brought to the knowledge of the defendant until after the above noted transactions of September 23d. This point is of no importance, unless it be first held that Brock had authority to enter into such contract. If he did have such authority, then we think that the return of the writings by Deaderick to the possession of plaintiffs and the subsequent transactions to which Brock, as representing the defendant, was a party, were such that the writings must be considered as delivered to the defendant at least as soon as the time when the defendant began to deliver orders of material for the Montecito road, which, as we have seen, was prior to September 15th.

It is next contended by appellant that there was no sale, because Supervisor Deaderick had no authority to represent the county of Santa Barbara in purchasing such materials. We will assume from the record, as shown by the testimony above noted, that the board of supervisors had acted regularly and in accordance with law in its proceedings with reference to the Montecito road down to and including the time when, on September 4th, it rejected bids and ordered that Supervisor Deaderick proceed and complete the work. Pol. Code, § 2643, subd. 11; section 2645, subd. 1; section 4041, subd. 4. The road work involved in this case was in a permanent road district, and for this reason the defendant contends that the board of supervisors had no authority except to let the work to the lowest responsible bidder, as provided by sections 2767, 2768, Political Code. But considering section 2767 with section 2643 to which it refers, it is reasonably indicated that the board may order such work done by the road commissioner when, after due publication and posting of notices inviting bids, the bids have been rejected for the reasons given in section 2643, subd. 11.

The evidence in this case shows that Supervisor Deaderick and all other officers of the county of Santa Barbara concerned in the matter at all times considered said writing of September 1, 1911, as a valid contract. The district attorney and the supervisor insisted upon the contract. Changes were made from time to time in the rate of delivery of the rock; and for convenience, in arranging for freight payments, the freight charges were paid by the county and 70 cents per ton paid to the defendant. Until the slight reduction in freight rates that was obtained by the county in December, the 70 cents per ton plus the freight rate was exactly the same as the $1.30 per ton provided in the contract. Without any objection whatever by Supervisor Deaderick to the terms of the contract, he received the materials and the county paid the consideration therefor. We find in the evidence no sufficient reason for declaring that the purchaser did not act pursuant to the contract, or that the contract was not fully performed. As already noted, it is a fact that at least until as late as September 15, 1911, plaintiffs were the agents of the defendant for the sale of rock in Santa Barbara county at an agreed commission of 10 cents per ton; that a purchaser was found by them for rock to be delivered for use in building 5½ miles of Montecito road; that some deliveries of rock were made by the defendant after the writings had been signed by Brock with the knowledge of Crawford and before plaintiffs had been dismissed from their agency; that Brock and Crawford were the active representatives of the corporation in the transaction of its business under direct authorization from the president and general manager of the corporation, who was also the real owner of the entire business; that on or about September 15th said owner caused the stock to be transferred to other parties who attempted to repudiate the contract as a contract without repudiating the substantial part of the transaction which was delivery of the rock and receiving the price therefor; that the principal advantage which the defendant and its new owners sought to obtain by such repudiation was that they might avoid the payment of this commission; that their representative, Mr. Heaton, had heard of a contract, but did not take the trouble to inquire for it and ascertain its exact terms; that thereupon the plaintiffs within a reasonable time gave notice that they would demand their commission, and at the proper time commenced this action to enforce such demand.

It is true that on September 13, 1911, in a letter to the defendant, the plaintiffs, referring to a statement made to them by Mr. Brock that "two car loads a day, to begin would be all this company of men could handle," said:

> "So please fill the order for the county with 2 cars each day, and only 2 cars until further orders. * * * Please allow this written order to supersede all conversations and writings."

But this was nothing more than a request referring to the rate of deliveries. In our opinion, it was not an attempt to cancel the alleged written contract. Such cancellation could not be made by a writing between the principal and agent on one side of a contract, and the subject-matter of the letter is not such that it should be construed as superseding the entire contract, if such contract existed.

Under the circumstances above noted, this case should be determined upon the assumption that Superintendent Brock had authority to make the contract which he undertook to make on behalf of the defendant. The defendant accepted the benefits of that contract and performed it; also accepted the benefit of the services of the plaintiffs, who were its agents, with reference thereto. The statements and actions of Mr. Heaton on September 23d and the defendant's claim that it was not delivering rock under the contract do not neutralize the fact that the defendant proceeded to deliver the same quantities of rock, and for the same compensation, that had been provided for in that contract. Even if it were conceded that defendant might have refused to deliver the rock, and might have exacted different terms, basing its position upon Brock's lack of authority, yet it is estopped to deny such authority, as against these plaintiffs, who as actual and undenied agents relied upon Brock's due authorization and obtained for defendant the benefits which it has accepted. The same reasoning and the same conclusion apply to defendant's claim that Supervisor Deaderick had no authority to represent the county of Santa Barbara in purchasing rock for the Montecito road. The county recognized his authority by accepting and paying for the rock as delivered by the defendant, and that is sufficient for all purposes of the present case.

Some exceptions to the rulings on evidence are discussed in the briefs of appellant, but, so far as they have importance, they are involved in the foregoing discussion and are determined thereby.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

25 Cal. App. 80

UNION LUMBER CO. v. J. W. SCHOUTEN CO. (Civ. 1353.)

(District Court of Appeal, First District, California. July 3, 1914. Rehearing Denied July 31, 1914.)

1. PLEADING (§ 248*)—AMENDMENT.

Where the original complaint seeking recovery of the purchase price of lumber sold to defendant was merely for goods sold, an amended complaint, which added a count for an account stated, alleging that owing to a mistake the item for the goods sold was not inserted in the account stated, does not state a new cause of action; both counts being for the same matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 708½, 709; Dec. Dig. § 248.*]

2. LIMITATION OF ACTIONS (§ 127*)—STARTING OF RUNNING OF STATUTE.

An action is begun when the original complaint is filed, and hence though an amended count, upon which plaintiff recovered and which was on a different theory from the original, was not filed until after the action would have been barred, defendant cannot defeat recovery by plea of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

3. ACCOUNT STATED (§ 8*)—EFFECT.

Where, through mistake, plaintiff did not include in an account stated all of the items due from defendant, and defendant must have either been party to the mistake or have paid the account suspecting it, plaintiff is not estopped to claim the omitted amount; an account stated, which is an account examined and accepted by the parties, not working an estoppel.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 50–56; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 1, pp. 93–98; vol. 8, p. 7561.]

Appeal from Superior Court, City and County of San Francisco; J. O. Moncur, Judge.

Action by the Union Lumber Company, a corporation, against the J. W. Schouten Company, a corporation. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

L. H. Brownstone, of San Francisco, for appellant. Charles A. Strong, of San Francisco (Charles E. Wilson, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an appeal by the defendant from the judgment and from an order denying its motion for a new trial.

These are the facts of the case: For several years prior to the 18th day of April, 1906, the plaintiff and defendant were engaged in the lumber business, plaintiff as a manufacturer, and defendant as a retailer, in the San Francisco market. Prior to the 11th day of April, 1906, the plaintiff had sold the defendant at various times large quantities of lumber, and on that date sold and delivered to it a further quantity amounting in value to the sum of $1,121.06. June 9, 1906, the defendant, being unable to meet its obligations as they matured, made an assignment for the benefit of its creditors of its entire business.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

About the time of the assignment, the plaintiff presented its claim to the committee of creditors to whom the assignment had been made, for the sum of $5,553.53, which was $1,121.06 less than the defendant actually owed plaintiff. This mistake and omission occurred by reason of the fact, so it was alleged and proved, that plaintiff's books were not completely written up or posted on said 9th day of June, 1906, owing to the confusion resulting from the fire and earthquake on the 18th day of April of that year. The creditors' committee paid plaintiff the sum of $5,553.53, and thereafter, the plaintiff, learning of the mistake just referred to, and the defendant having again resumed control of its business, requested of defendant payment of said sum of $1,121.06, which payment the defendant having refused to make, this action was commenced, resulting in the judgment indicated. The original complaint was for goods sold and delivered; and subsequently, a few months before trial, plaintiff, over an objection of the defendant, filed an amended complaint, setting forth two causes of action, the first being identical with that pleaded in the original complaint, and the second alleging an account stated, that there was an error therein, subsequently discovered, amounting to the sum claimed to be due under the first cause of action, and praying for equitable relief and judgment for said sum.

[1] Defendant now asserts that permission to file the amended complaint containing the second cause of action should have been denied, for the reason, so it is stated, that it was wholly a new and different cause of action, and also for the reason that it appears that it was filed more than two years after the filing of the original complaint.

Neither of these objections is good. The amended complaint did not set up wholly a new and independent cause of action. Both causes of action were to recover the value of the same consignment of lumber, the charge for which, through an inadvertence, was omitted from the account as stated. Both causes of action had the same and identical purpose; hence the amended complaint cannot be held to have set forth a new cause of action. The authorities abundantly support this position. Born v. Castle, 16 Cal. App. Dec. 1051, 134 Pac. 347. The test as to what constitutes a new cause of action is laid down in Anderson v. Wetter, 103 Me. 268, 69 Atl. 110 (15 L. R. A. [N. S.] 1003), as follows:

> "The new count, offered under leave to amend, must be consistent with the former count or counts, that is, it must be of the like kind of action, * * * and such as might have been originally joined with the others. It must be for the same cause of action, that is, the subject-matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing."

[2] As both complaints were for the recovery of the price of the same lot of goods, the action itself, irrespective of the theory on which the right to recover is based, must be regarded as having been commenced when the original complaint was filed. There is no merit therefore in defendant's point that the statute of limitations had run against the cause of action set forth in the amended complaint. Bogart v. Crosby & Van Haren, 91 Cal. 278, 281, 27 Pac. 603; Smullen v. Phillips, 92 Cal. 408–411, 28 Pac. 442.

[3] The evidence clearly sustains the view that the omission to include the amount herein sought to be recovered in the claim originally presented was due to an oversight and mistake, which was either mutual or suspected by the defendant. In either event, the account stated did not work an estoppel, and the court was warranted in surcharging the account.

An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. Waldron v. Evans, 1 Dak. 11, 46 N. W. 607; Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138; Pavie v. Noyrel, 5 Mart. N. S. (La.) 92; Fox v. Sturm, 21 Tex. 407.

> "The 'account stated' is defined by Bouvier to be 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' * * * It does not, however, operate as an estoppel, and it may be impeached for fraud or mistake. Judge Story says: 'If there has been any mistake, or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined.'" Green v. Thornton, 96 Cal. 67, 71, 30 Pac. 965, 966.

Defendant's points that the books of account were improperly admitted in evidence, and that the court failed to find on the third and separate defense, are without merit, and for that reason will not be discussed.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 124

DRESSER v. ALLEN et al. (Civ. 1526.)

(District Court of Appeal, Second District, California. July 8, 1914. Rehearing Denied Aug. 5, 1914. Denied by Supreme Court Sept. 2, 1914.)

1. QUIETING TITLE (§ 52*)—ENFORCEMENT OF JUDGMENT—WRIT OF POSSESSION—MATTERS TO BE DETERMINED.

Upon proceedings to put in possession the party who recovered in a suit to quiet title, the court cannot try or determine any proprietary rights which persons other than defendant may assert in the land.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 99, 102, 103; Dec. Dig. § 52.*]

2. LIS PENDENS (§ 24*)—PERSONS ENTERING PENDING SUIT—PRESUMPTIONS.

One who enters into possession of land after the institution of a suit to quiet title is presumed to have come in under the former occupant, and he has the burden of showing that his possession is not collusive.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38–40, 42–46; Dec. Dig. § 24.*]

3. Appeal and Error (§ 1002*)—Review—Finding.

While a finding by the trial court on conflicting evidence will not usually be disturbed on appeal, yet where it is in conflict with the admissions in respondent's answer it may be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

4. Abandonment (§ 2*)—What Constitutes.

Abandonment cannot be made in favor of a particular individual nor as a means of transfer from one party to another. Hence where respondent acquired a tax deed to property upon which his mother entered under a contract to purchase, and which was used as the family home, and the mother informed respondent that she relinquished the property to him, but the family continued to use the premises as before, there was no abandonment by her, and, the son's title being based on that of his mother, he cannot, after the vendor's recovery of judgment against her in a suit to quiet title, assert his rights by reason of the tax deed and adverse possession against the successful party.

[Ed. Note.—For other cases, see Abandonment, Cent. Dig. § 1; Dec. Dig. § 2.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Mary E. Dresser against Sylvester Kipp and others. There was a judgment for defendants, and, a writ of possession being issued against plaintiff, the property was claimed by James S. Dresser. From an order vacating an order upon James S. Dresser to show cause why an alias writ of possession should not issue against him, defendant Kipp appeals. Order reversed and remanded with directions.

See, also, 17 Cal. App. 508, 120 Pac. 65.

Sylvester Kipp and Haines & Haines, all of San Diego, for appellant. E. S. Torrance, of San Diego, for respondents.

CONREY, P. J. The defendant Sylvester Kipp presents this appeal from an order made and entered on August 2, 1912, whereby the court vacated a certain order of date April 29, 1912, upon James S. Dresser to show cause why an alias writ of possession should not issue against him on the judgment entered in said action, in so far as said order to show cause related to or affected the right of said James S. Dresser to the possession of the premises described in the judgment in this action; and whereby the superior court ordered that said alias writ of possession against said James S. Dresser should be denied and that he should recover his costs.

This action was commenced by Mary E. Dresser against Levi Allen, Sylvester Kipp, and H. F. Weis for the purpose of quieting plaintiff's title against the defendants. Defendant Kipp answered claiming title to the property described in the complaint, and the judgment of the court established his title against the plaintiff and awarded him a writ of possession against her. That judgment was affirmed in this court on November 20, 1911 (17 Cal. App. 508, 120 Pac. 65). A writ of possession having been issued on February 21, 1912, the same, with the sheriff's return indorsed thereon, was filed on April 20, 1912. The return shows that on March 16, 1912, the sheriff entered upon said premises and found said Mary E. Dresser upon the same and notified her that if she did not vacate said premises within ten days after said date he would dispossess her of said premises by forcibly removing her from the same; that on the 26th day of March, 1912, the sheriff again entered upon said premises described in said writ for the purpose of executing the same, and found that said Mary E. Dresser had vacated the said premises and that James S. Dresser and M. C. Dresser were upon said premises and claimed that they had adverse possession of said premises under a tax title, and claimed that such title was not derived from the plaintiff in said writ named. For said reasons the sheriff did not place the defendant Kipp in possession of the premises. In response to the order to show cause, which was issued against Mary E. Dresser, James S. Dresser, and Mary Caroline Dresser, the said Mary E. Dresser answered that within ten days after March 16, 1912, she did wholly vacate and abandon said premises and does not claim any right to the possession thereof; and Mary Caroline Dresser answered that she has never claimed and does not claim any possession or right of possession of said premises. The questions at issue herein rest wholly between the defendant Kipp and the respondent James S. Dresser.

The respondent was not a party to the action, and his claim of right to retain possession of the premises is based upon the contention that he is, and since a time long prior to the commencement of this action (which was on October 20, 1909) he has been, in possession of the described real property adversely to the plaintiff and all others; that ever since the 19th day of November, 1900, he has been in the exclusive possession of said premises for himself in his own right under a claim of title thereto made by him in good faith under a certain tax deed presented to the court as a part of his answer to the order to show cause.

[1, 2] It is conceded that in this proceeding the court could not try or determine any proprietary rights which the respondent may have under his claim of title. We are here concerned only with the matter of right to possession under the writ. If respondent came into possession at any time after the commencement of this action, it is presumed that he came in under the plaintiff, and upon the issue pertaining to his right to remain in possession the burden is upon him to show affirmatively that his possession is rightful and under a title that has not been determined in the action, and that such possession was not taken by collusion with the plaintiff. The fruits of a successful litigation cannot be wrested from the prevailing party and the process of the courts evaded upon a mere claim set up under suspicious circumstances, resting upon affidavits alone, unless the case made by that kind of proof is reasonably satisfactory. Baum v. Roper, 1 Cal. App. 435, 439, 82 Pac. 390, and cases there cited.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The order of the superior court made after hearing on the order to show cause carries with it the implied finding that the respondent's possession began prior to the commencement of this action, or that, if it began subsequent thereto, he has satisfactorily shown to the court that his possession has been taken and maintained in good faith without collusion with the plaintiff and adversely to her.

[3, 4] On his application for the order to show cause the appellant presented a typewritten transcript (not certified) of the official court stenographer's minutes of the trial of this action, the said transcript being attached to an affidavit of the applicant in which he stated that he was present at the trial, heard all of the evidence and proceedings therein, and has a clear and distinct recollection of the same, and that said transcript is a true and correct statement of the evidence given by the witnesses Mary E. Dresser, James S. Dresser, and Mary Caroline Dresser, and of the whole thereof, "as affiant now remembers the same." Counsel for respondent insists that this affidavit is not sufficient to establish the transcript as a correct statement of the evidence, and that at all events the testimony then given by Mary E. Dresser and Mary Caroline Dresser is not binding upon him. Giving the respondent the full benefit of his objection to the testimony of others than himself, we have for consideration the testimony given by the respondent and his explanation thereof as contained in his affidavit filed in this proceeding. Mary E. Dresser is the mother of respondent, who is an unmarried man. In 1896 Mrs. Dresser made a contract of purchase of the land in controversy whereby, upon certain payments being made, the land was to be conveyed to her. Full payment never was made, and a deed of conveyance has never been made to the purchaser or any one claiming under her. Mrs. Dresser obtained possession from the agent of the vendor in 1896. She established her home upon the premises with her son, the said James S. Dresser, then about 27 years of age. Various improvements were made, in which the respondent took an active part, and in his affidavit he admits that his mother went into possession under the contract and remained in possession thereunder until the delivery to him of the tax deed under which he claims; said deed having been delivered to respondent in November, 1900. At the trial of this action and while the plaintiff was endeavoring to establish the fact of her long-continued possession of this property, the respondent (on December 13, 1909) testified as a witness in her behalf and stated, among other things, that he was a member of his mother's family and had been such for the last 14 years; that in making sundry improvements on the premises in controversy he did that work for his mother and was acting for her; "she bought the place for her home and I was fixing it up for her;" that his mother had gone into possession under the agreement of 1896; "Q. And she has been in possession ever since? A. Yes, sir. Q. Under that contract? A. Yes, sir."

The present claim of the respondent is that, ever since November 19, 1900, when said tax deed was delivered to him, he has been in the exclusive possession of said premises for himself and in his own right under a claim of title thereto made by him in good faith under said deed; that in the summer of 1900 his mother, the plaintiff, informed him that she intended to abandon said contract and would not make any further payments thereunder; that he purchased said tax title after receiving such information from his mother, and that his intention was that he "would endeavor to obtain a tax title to said premises and acquire title thereunder by adverse possession"; that, having purchased the certificate of sale from the original purchaser at the tax sale, the respondent, on October 9, 1900, made service upon Mary E. Dresser of a written notice to redeem and thereafter in due time said tax deed was issued to him; that upon receiving said deed respondent informed his mother of his intention as above stated, and that he then claimed and would continue to claim possession of said premises adversely to all persons whomsoever; "that thereupon his said mother declared to him that she had abandoned her right to possession of said premises under her contract with H. S. Mulford, and that she recognized the right of said James S. Dresser to the exclusive possession of said premises as against herself, based on his claim of title under said tax deed; that his mother then agreed to live with him on said premises as his housekeeper." Respondent further stated in his sworn answer and in his affidavit certain other facts slightly tending to support his claim of adverse possession since November, 1900. As the testimony is shown to be conflicting and inconsistent, we are bound to accept the conclusion of the superior court thereon, unless this result is controlled by admissions contained in respondent's said answer. But in our opinion the facts stated by the respondent in his answer contain admissions which preclude him from holding possession against the writ awarded to the appellant by the judgment herein. When Mrs. Dresser declared to respondent that she "had abandoned her right to possession" and that she "recognized the right" of respondent to "exclusive possession as against herself," she did not in fact abandon her actual possession in any manner whatever, except this, that without removing from the premises she attempted to abandon the same to the respondent. Abandonment cannot be made in favor of a particular individual, nor as a means of transfer from one party to another. Stephens v. Mansfield, 11 Cal. 363; Richardson v. McNulty, 24 Cal. 339, 344. Relinquishment by one to another is not abandonment. Nothing more than this was done or attempted in the present case. It being thus established that Mary E. Dresser's possession of the land was never abandoned by her until on or after March 16, 1912, and that the only possession obtained by respondent was by means of and subordinate to that of his mother, he cannot be permitted to resist the enforcement of the judgment in favor of appellant.

The order appealed from is reversed, and the superior court is directed to enter an order granting appellant's application for the alias writ.

We concur: JAMES, J.; SHAW, J.

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25 Cal. App. 97

LUMMER v. UNRUH et al. (Civ. 1581.)

(District Court of Appeal, Second District, California. July 3, 1914.)

1. ADVERSE POSSESSION (§ 85*)—EVIDENCE—SUFFICIENCY.

In a suit to quiet title to land, which plaintiff claimed by adverse possession, evidence *held* sufficient to support a finding that plaintiff had, during most of his occupancy, paid rent to defendant's testator.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498–503, 656, 657, 660, 668, 688–690; Dec. Dig. § 85.*]

2. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT.

An appellate court will not, where the evidence is substantially conflicting, weigh the credibility of the witnesses in determining whether the verdict was supported by the evidence, and it must stand if there be substantial evidence in its favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

3. ADVERSE POSSESSION (§ 60*) — HOSTILE CHARACTER OF POSSESSION—ACQUIESCENCE.

Though plaintiff entered upon land believing it to be unappropriated property, his subsequent acquiescence in the assertion of title by defendant's testator and his payment of rent to the testator creates the relation of landlord and tenant between them.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282–312, 323, 328; Dec. Dig. § 60.*]

4. ADVERSE POSSESSION (§ 95*)—EVIDENCE—ADMISSIBILITY.

In a suit to quiet title, the return of land for assessment and payment of taxes on the land as therein described by defendant's testator is admissible in evidence, where the designation was sufficient to identify the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 530–532; Dec. Dig. § 95.*]

5. DEEDS (§ 192*)—EXCEPTIONS—EFFECT.

Notwithstanding Civ. Code, § 3538, providing that that is certain which can be made certain, one, relying upon a deed containing an exception, to show his title to the land in controversy, is bound to show that the land did not fall within the exception.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 562, 563; Dec. Dig. § 192.*]

6. APPEAL AND ERROR (§ 854*)—REVIEW—HARMLESS ERROR.

Where the evidence clearly showed that defendant's testator had acquired title to the land in suit by adverse possession, if he did not have a good title otherwise, the fact that the paper title offered by defendant was insufficient is immaterial, and judgment for defendant, though based on his paper title, will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. § 854.*]

7. DEEDS (§ 192*)—PROPERTY CONVEYED—PRESUMPTION.

In a suit to quiet title, where it was not shown that the land in controversy did not fall within the exception in defendant's deeds, proof that defendant's testator had been in possession of and had paid taxes on the land for over 30 years raises a presumption that it was not included in the exception.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 562, 563; Dec. Dig. § 192.*]

Appeal from Superior Court, Los Angeles County; C. A. Raker, Judge.

Action by Frederick Lummer against H. A. Unruh, as executor of Elias J. Baldwin, deceased, and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Sidney Dell, of Glendale, and Scarborough & Bowen, of Los Angeles, for appellant Bradner W. Lee and Force Parker, both of Los Angeles (Gavin McNab, Garrett McEnerney, and Andrew F. Burke, all of San Francisco, of counsel), for respondents.

SHAW, J. Action to quiet title to real estate. Judgment went for defendants, from which, and an order denying his motion for a new trial, plaintiff prosecutes this appeal.

Defendant Unruh was sued as executor of the last will and testament of Elias J. Baldwin, deceased, who died March 1, 1909, and defendants Stocker and McClaughry were sued as the residuary legatees under the will of said deceased, all of whom, with the other defendants named, it is alleged, claim some interest, right, or title to the property in dispute.

The land involved, comprising 80.35 acres, is situated in and constitutes a part of the west two-thirds of the San Francisquito Rancho in Los Angeles county. Plaintiff's claim thereto is based solely and alone upon the adverse possession thereof; it being alleged in the complaint filed September 12, 1910, that on or about the 25th day of November, 1887, at which time the said tract was wild and uncultivated, covered with cactus and other desert growth, he entered into possession thereof, claiming it as his own property, since which time he has been in the open, notorious, exclusive, continuous, peacable, and adverse possession of the same, claiming title thereto, which, up to the 1st day of January, 1909, at which time he was in possession, had not been disputed; that by virtue of the premises plaintiff became and was the owner of the legal title to the same on and prior to the 1st day of January, 1896, and ever since said date has been and now is the owner of said land. The answer of defendants Unruh, Stocker, and McClaughry alleged that at the time of his death, and for many years prior thereto, Elias J. Baldwin was the owner in fee simple of all the lands and property described in plaintiff's complaint and claimed title thereto adversely to plaintiff, and that at the time of the death of said decedent defendants Stocker and McClaughry, as residuary devisees of said decedent, became entitled to said property and the whole thereof in fee simple, subject to the administration of the estate of said Baldwin, deceased; and that plaintiff during all of the time that he occupied said land did so as a tenant of said Baldwin and said Unruh as executor, from whom said plaintiff leased the same from year to year and up to the year ending October 1, 1909, paid a crop rental therefor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Among other things, the court in substance found that at the time of the commencement of the action, and on Jaunary 1, 1909, plaintiff as a tenant, and not otherwise, of said Elias J. Baldwin and the estate of said Elias J. Baldwin, deceased, occupied the tract of land in controversy, but never was in the possession thereof, except as a tenant of said Elias J. Baldwin during his lifetime, and of his estate since his death; that on October 13, 1875, and up to and at the time of his death, said Elias J. Baldwin was the absolute owner, seised in fee simple, in the possession and entitled to the possession of said real property, and from said date up to November 25, 1887, in the actual occupation of said premises; that, while in the occupation and possession thereof, plaintiff, on November 25, 1887, with Baldwin's permission and consent, and as the tenant of said Baldwin, and not otherwise, entered into the occupation of said property as a yearly tenant of said Baldwin, which occupation and relation continued up to the time of his death, and thereafter as a tenant of the estate of said Baldwin, deceased; that during said time plaintiff paid yearly rents to said Baldwin for the use and occupation of said real property, except for the year ending October 1, 1909, when he refused to pay rent for that year and for the first time asserted an adverse claim of ownership to said real property; that at no time was plaintiff in possession of the real estate or any part thereof other than as a tenant of Elias J. Baldwin; that it is not true that said tract of land was uncultivated at the time the plaintiff entered into the occupation thereof, but small portions of said land were at said time covered with cactus and other growth. These findings are vigorously assailed upon the ground that the evidence is insufficient to support the same.

[1, 2] The evidence offered in behalf of respondents and upon which the findings are based clearly tends to prove that in 1867 one Henry Dalton, by United States patent, acquired the entire Rancho San Francisquito; that on March 8, 1873, Dalton by deed conveyed to Lewis Wolfskill "all the unsold portion of that certain tract of land known as San Francisquito Rancho"; that on October 13, 1875, Wolfskill by deed conveyed to Elias J. Baldwin "the westerly two-thirds portion of the Rancho Francisquito, * * * excepting those portions heretofore sold and conveyed by John O. Wheeler and Henry Dalton, or Dalton and F. L. A. Pioche, or Lewis Wolfskill, the conveyances of which are of record in the county recorder's office in and for said county of Los Angeles." The parcel of land involved is an irregular-shaped tract containing 80.35 acres, uninclosed by a fence and conceded to be a part of the westerly two-thirds portion of the San Francisquito Rancho; and it is likewise conceded that from 1875 down to the date of his death Baldwin made return thereof and paid the taxes assessed against the property, though appellant claims the assessment upon which the tax levy was made was void for uncertainty of description. Prior to plaintiff's entry upon the land, November 25, 1887, it was occupied by some Mexicans, who farmed it as tenants of Baldwin. There is no direct evidence that plaintiff's entry in 1887 was under and by virtue of any contractual relations with Baldwin, or his agents; but it does clearly appear from a preponderance of the evidence that, commencing with the year 1887, down to 1908, and every year during said period, plaintiff as to the land in dispute recognized Baldwin as his landlord by annually paying him, through several superintendents and rent collectors, a certain portion of the crop grown thereon, as rental for the use of the property; that at times he sublet portions of it, and these subtenants paid to Baldwin a rental for such portion as they farmed. There was also testimony to the effect that plaintiff had stated he was paying rent to Baldwin for the use of the property, and plaintiff admits that Baldwin contributed a considerable sum towards the construction of a well in developing water upon the premises. Evidence was introduced that in 1908 plaintiff failed to pay the rent; whereupon Baldwin served notice upon him to quit and vacate the premises, pursuant to which plaintiff moved a part at least of his effects from the property, when, due to the intercession of a friend, Baldwin consented that plaintiff might continue as tenant in the occupation of twenty acres of

the land, and leased the remainder of the tract to other parties made defendants herein. As against this testimony, and other established facts to which we have made no reference, but from which inferences favorable to respondents' contention are fairly deducible, plaintiff, to some extent corroborated by his wife, testified that he never at any time paid rent to Baldwin, or any other person, for the use of the land in dispute; that in 1890 or 1891 he did lease from Baldwin 60 acres of land adjoining the tract claimed by him, separated by an imaginary line only, which, up to 1908, he farmed and for the use of which he paid Baldwin a yearly crop rental. Appellant, while admitting the fact that plaintiff's testimony upon the vital point, as found by the court, is opposed to that of a half dozen or more witnesses testifying on behalf of defendants, strenuously insists that such testimony should for various and sundry reasons assigned be disregarded by this court. His counsel devote much of the greater part of a voluminous brief to what he terms an analysis of the testimony, in his effort to show why certain witnesses who gave evidence for plaintiff should be credited with telling the truth, while those testifying for defendants should be discredited. No purpose could be subserved by an extended review of the evidence. Suffice it to say that from a careful reading of the entire record we are forced to the conclusion that, while plaintiff may have entered upon the land or a part thereof believing, as he stated, that it was no man's land, he nevertheless, upon learning of his error, commencing with 1887, recognized Baldwin as the owner thereof and that his occupation was in subordination to the rights of Baldwin, and during all of the time down to 1908, at which time Baldwin caused to be served upon him notice to quit and vacate the premises, he annually paid to Baldwin a yearly crop rental for the use of the premises. Where the evidence is substantially conflicting, it is not the province of this court to weigh the same, or determine whether or not witnesses have sworn falsely. If there is any evidence upon which the court could have made the findings, or a jury could have found a verdict, the action of the trial court must be upheld. Meyer v. Great Western Ins. Co., 104 Cal. 387, 38 Pac. 82; Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720; Carteri v. Roberts, 140 Cal. 164, 73 Pac. 818.

[3] As stated, there was no direct evidence that plaintiff entered upon the land pursuant to the terms of a lease, and it may be conceded that, as testified by him, he squatted thereon, believing it to be government land. A formal letting, however, is not necessary to create the relation of landlord and tenant.

> "After a person has entered upon land without right, the relation of landlord and tenant, of course, subsequently arises by implication." 18 Am. & Eng. Encyc. of Law, p. 165.
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> "Where a person in the possession of land pays rent to one claiming as owner, a presumption of the relation of landlord and tenant arises." 24 Cyc. p. 888; Doe v. Jefferson, 5 Houst. (Del.) 477; Cressler v. Williams, 80 Ind. 367.

Under the evidence adduced, the payment of rent, as found by the court, could not be attributed other than to the fact that plaintiff's occupation was in subordination to the title recognized by him as vested in Baldwin, whose title, under the circumstances, he will not be permitted to deny. Section 1962, Code Civ. Proc. The case is to be distinguished from one where the owner in possession of land accepts a lease thereof from another, in which case his title is unaffected by such act. Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008.

[4] It is conceded that plaintiff never at any time made return of the property for assessment purposes, or paid any taxes thereon. On the other hand, it is conceded that Baldwin paid the taxes, but appellant insists that the assessment of the property was void for uncertainty of description therein. It appears that in 1869 John Goldsworthy made a survey and map of the westerly two-thirds of the rancho, subdividing it into lots designated thereon by number. While Baldwin had no interest in the property at the time this map was made, it appears that after the execution of the Wolfskill deed in 1875, whereby he claims to have acquired the property therein described, he, on August 3, 1901, filed and had recorded in the county recorder's office a full, true, and correct copy of the Goldsworthy survey and map, on which, among other lots delineated thereon, was a lot numbered 14 containing 80.35 acres, which is shown to be identical with the tract of land claimed by plaintiff. In 1891 to 1896, both inclusive, the assessment described the property as, "Lot 14 in San Francisquito Rancho, containing 80.35 acres." For the years 1897 to and including 1910, it was, with some slight variation, described as, "Lot 14, western ⅔ of Rancho San Francisquito, containing 80.35 acres." Prior to the filing of the map, and commencing with 1880, it was described as, "Lot 14 of Tract Rancho San Francisquito, county of Los Angeles, being subdivided and designated on map made by John Goldsworthy in January, 1869." It was shown without contradiction that this was the only map on file purporting to be a map of the rancho, and that it had delineated thereon a lot designated as lot 14. It was further conclusively shown that long prior to the filing thereof the Goldsworthy map was a well-known and generally recognized subdivision of the west two-thirds of the rancho, frequently referred to in deeds made by conveyancers as a means of describing lands located in the rancho. Other testimony was to the effect that as described the boundaries of the land could be readily located. Says Mr. Cooley, in his work on Taxation:

> "The designation of the land will be sufficient if it affords the owner a means of identification and does not positively mislead him, or is not calculated to mislead him."

To the same effect are the decisions of the Supreme Court of this state. See Best v. Wohlford, 144 Cal. 736, 78 Pac. 293; San Francisco v. Pennie, 93 Cal. 465, 29 Pac. 66; San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264. Leaving out of consideration any question as to whether or not Baldwin, by reason of having made the return, could have been estopped from pleading uncertainty in the description of the assessment in an action to enforce a lien for the taxes, we are clearly of the opinion that the assessment sufficiently described the property, and the objection urged by plaintiff to the admission of the evidence is therefore without merit.

[5] Appellant also insists that the court committed grave and prejudicial errors of law in admitting certain documents in evidence. These documents consisted of: First, a deed from Henry Dalton, who in 1867 by patent acquired the entire rancho from the United States government, which deed was executed March 8, 1873, by Dalton to Lewis Wolfskill, whereby the former conveyed to the latter "all the unsold portion of that certain tract of land known as the San Francisquito Rancho; second, a deed dated October 13, 1875, executed by Lewis Wolfskill and others whereby they conveyed to Elias J. Baldwin the "westerly two-thirds portion of the Rancho San Francisquito, * * * excepting those portions heretofore sold and conveyed by John O. Wheeler and Henry Dalton, or Dalton and F. L. A. Pioche, or Lewis Wolfskill, the conveyances of which are of record in the county recorder's office in and for said county of Los Angeles." The purpose of this evidence was to show that title of record to the land in question was vested in Baldwin. Appellant's contention is that, in the absence of evidence showing such fact, the deeds cannot be construed as embracing the land in controversy, and, while conceding that that is certain which can be made certain (Civ. Code, § 3538), no evidence was offered touching the question as to whether or not the lands in dispute had at the time of the execution of the Dalton deed been sold, nor whether they were included in the conveyance referred to in the Wolfskill deed. Since by introducing these deeds defendants sought to establish the fact that Baldwin was the record owner of the property, they must be deemed to have assumed the burden of showing that the tract of land was not within the exceptions therein contained. The deeds did not purport to convey the entire tract of land, the boundaries of which were specified therein, but excepted from the operation thereof such portions as had been sold and conveyed. True it may be that no sales had been made at the time of the execution of the Dalton deed, and likewise true that no conveyance of any of the lands had been made by the parties designated which were of record at the time of the execution of the Wolfskill deed; nevertheless, by reason of the language employed, a presumption arises that sales and conveyances had been made, and it was therefore incumbent upon defendants to either overcome such presumption by showing that no sales and conveyances had been made of lands within the exterior boundaries described, or, if sales and conveyances thereof had been made, to prove that the tract of land in controversy was not included therein. No evidence, however, was offered touching these questions. We conceive the law to be that, where a party claims under a deed describing a tract of land, the granting clause of which contains an exception, he must, if he relies upon such deed as establishing his title to land in controversy, show that the land claimed is not within the exception; otherwise the deed is ineffectual for the purposes offered. From the fact that certain lands within the exterior boundaries of the general clause contained in the deed were excepted from the operation thereof, it cannot be said, in the absence of proof, that the land in dispute is not within the exception. That such is the well settled law is supported by ample authority. See Harman v. Stearns, 95 Va. 58, 27 S. E. 601; Logan v. Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. Ed. 279; Hawkins v. Barney, 5 Pet. 457, 8 L. Ed. 190; Reusens v. Lawson, 91 Va. 226, 21 S. E. 347; Corinne Mill, Canal & S. Co. v. Johnson, 156 U. S. 574, 15 Sup. Ct. 409, 39 L. Ed. 537. In the case of Maxwell Land Grant Co. v. Dawson, supra, it is said:

> "An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed."

The deeds in themselves and standing alone were insufficient to show a record title vested in Baldwin.

[6, 7] If, however, we are correct in holding that during the period extending from 1887 down to 1908 Baldwin, claiming to be the owner, was in possession of the land through plaintiff as his tenant, paying all taxes levied thereon, then it may be assumed that he acquired a title by prescription. Hence the fact that the deeds on their face were insufficient to constitute a paper title would be immaterial, since in no event could plaintiff have been prejudiced by defendants' failure to prove a record title. Moreover, as stated, the evidence clearly tends to establish the fact that, until plaintiff in 1909 asserted his adverse claim thereto, Baldwin had for a period of 33 years been in the undisturbed possession of the land, exercising all the rights of ownership therein without challenge or question from any sources, during all of which time he had, as stated, paid all taxes levied thereon. Under these circumstances, if necessary to sustain the judgment, the law will presume the land was not within the exceptions made in the deeds. The fail-

ure of any person during this long period of time to make claim of ownership based upon a sale made by Dalton prior to his conveyance to Wolfskill, and like failure of any one claiming under a conveyance executed by Wolfskill prior to his conveyance to Baldwin was a strong circumstance indicating that no such sales or conveyances had been made of the tract here involved. Herndon v. Burnett, 21 Tex. Civ. App. 25, 50 S. W. 581; Cahill v. Cahill, 75 Conn. 522, 54 Atl. 201, 732, 60 L. R. A. 706. While it is unusual to invoke such presumption, since the statute of limitations generally constitutes a sufficient defense, nevertheless, if the circumstances of the case justify it, such presumption will be indulged regardless of whether or not the statute has run. "There is no absolute bar against the presumption of a grant, within a period short of the statute of limitations." Ricard v. Williams, 20 U. S. (7 Wheat.) 59, 5 L. Ed. 398. Therefore, upon the principle that when the possession and use of real property under a claim of right thereto have been long continued they create a presumption of lawful origin (Fletcher v. Fuller, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; Attorney General v. Horner, 2 Ch. Div. [C. A.] 140), the court is justified in indulging the presumption that the tract of land in dispute was not within exceptions specified in the deeds, and, notwithstanding the failure of defendants to make direct proof as to the land being without the exception, such fact, in the absence of any evidence to the contrary, will be presumed.

In discussing the case we have throughout the opinion assumed that the tract of land in controversy consisted of said lot 14, comprising 80.35 acres. It appears that at the close of the evidence plaintiff amended his complaint by adding to the description of land therein contained as claimed by him, another tract the boundaries of which were conceded to be identical with lot 13 delineated upon the Goldsworthy map, and it was stipulated that all of the evidence applicable to the case as alleged in the original complaint should be deemed to apply to the case as amended. Hence whatever is said with reference to lot 14, comprising 80.35 acres, is likewise applicable to the land as described in the amended complaint.

We find no prejudicial error in the record. The judgment and order denying plaintiff's motion for a new trial are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 798

UNRUH v. LUMMER. PERRY v. LUMMER (UNRUH, Intervener). ROGERS v. SAME. (Civ. 1407.)

(District Court of Appeal, Second District, California. July 3, 1914.)

Appeal from Superior Court, Los Angeles County; C. A. Raker, Judge.

Actions by H. A. Unruh, as executor of E. J. Baldwin, deceased, against Fred Lummer; by Carrie Perry, as administratrix of John Perry, deceased, against Fred Lummer, in which H. A. Unruh intervened; and by L. C. Rogers against Fred Lummer, in which H. A. Unruh intervened. From several judgments for H. A. Unruh as executor, and orders denying new trial, Fred Lummer appeals. Affirmed.

Sidney Dell, of Glendale, and Scarborough & Bowen, of Los Angeles, for appellant. Bradner W. Lee and Force Parker, both of Los Angeles (Gavin McNab, Garrett McEnerney, and Andrew F. Burke, all of San Francisco, of counsel), for respondents and intervener.

SHAW, J. The above-entitled actions grew out of the fact that defendant therein claimed ownership by adverse user to certain lands the title to which was involved in the case of Lummer v. Unruh et al. (Civil No. 1581), 142 Pac. 914, an opinion in which on appeal to this court was this day filed, affirming a judgment rendered by the trial court in favor of defendants therein.

During the trial of said case of Lummer v. Unruh, it was stipulated in open court by the attorneys for the respective parties that the above-entitled actions should abide and be controlled by the determination of the court in said case of Lummer v. Unruh, and that, upon judgment being rendered in said last-mentioned case, judgment in each of the above-entitled actions should, without trial, be rendered therein in accordance with said decision. The court having rendered a judgment in favor of defendants in the Lummer-Unruh Case, likewise, pursuant to said stipulation, rendered judgments in favor of plaintiffs in each of the above-entitled actions, from which, and orders denying his motions for new trial, the defendant has appealed. No briefs are filed herein by any of the parties to said actions; it being understood and agreed that said appeals shall be disposed of by this court in accordance with its decision in the case of Lummer v. Unruh et al., above referred to.

It is therefore ordered that the judgments and orders denying defendant's motion for new trial in each of the above-entitled cases be and the same are hereby affirmed.

We concur: CONREY, P. J.; JAMES, J.

(168 Cal. 310)

LAPIQUE v. PLUMMER. (L. A. 3332.)

(Supreme Court of California. Aug. 19, 1914. Rehearing Denied Sept. 18, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION OF ESTATE—DECREE—JUDGMENT AGAINST DEBTOR.

A decree distributing to an heir or legatee a claim against one indebted to the decedent, while a judgment sufficient to pass title to the distributee, is not a judgment against the debtor for the money or property due on the claim on which the heir or legatee could sue as assignee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

2. APPEAL AND ERROR (§ 1043*)—JUDGMENT—ATTACHMENT — DISMISSAL — JURISDICTION —PREJUDICE.

Where plaintiff on his own showing had no case entitling him to an attachment, he was not prejudiced by an order discharging the attachment after he had appealed from a judgment of nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.*]

Department 2. Appeal from Superior Court, Los Angeles County; H. C. Gesford, Judge.

Action by John Lapique against E. R. Plummer. From a judgment for defendant, plaintiff appeals. Affirmed in damages.

John Lapique, of Orange, in pro. per. Shirley E. Meserve and J. D. Taggart, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff brought this suit, and in his complaint alleged that he was the assignee of a judgment rendered on the 25th day of January, 1911, by the superior court, in favor of Dolores U. de Marquez against Eugene R. Plummer, for the sum of $3,700. His proof showed that to his said assignor had been distributed, as a part of the estate of Manuel Marquez, a claim against said Plummer for $3,700, and this claim had been assigned by her to plaintiff. There was no showing and no attempt to show that the claim had been reduced to a judgment. Indeed, it was the theory of the plaintiff that the decree of distribution itself operated as a money judgment against Plummer and in favor of Mrs. de Marquez. Defendant moved for a nonsuit at the conclusion of the testimony on behalf of plaintiff. The motion was granted, and from the judgment, as well as from an order discharging an attachment, plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The learned judge of the superior court, who presided at the trial, carefully, courteously, and repeatedly explained to the plaintiff that a mere claim distributed to an heir or legatee in a probate proceeding was not a judgment for the money or property mentioned therein. Realizing that the plaintiff was not a lawyer, the learned judge took great pains to demonstrate that the theory which plaintiff had adopted was absolutely a false one. A few brief quotations from the record will serve to illustrate how thoroughly he analyzed the matter so that the most untrained and immature mind might easily have grasped the true situation. He said:

> "The superior court of this county, acting in the exercise of its jurisdiction as a probate court, has settled and distributed this estate, and in the distribution of that estate it has decreed, not that there is anything due from Mr. Plummer to this distributee, not a dollar, but has decreed that that claim that the estate has urged, and which has been inventoried possibly against this party, is distributed to the distributee. There is the distinction. Not that any claim has been adjudged to be a valid and existing claim against Mr. Plummer, but it has been adjudged that that claim be distributed to this party, so that the party may take such proceedings afterwards as she sees fit, to reduce that claim to a judgment, because, if it was a judgment, all you would have to do in this court would be simply to introduce the judgment roll and that would end it, and then it would be upon the other side to attack it for lack of jurisdiction or fraud, or on some other ground."

The plaintiff stoutly insisted that the decree of distribution was a judgment, and the court replied:

> "It is a judgment, but you want to make it a judgment for property that the law does not permit. It is a judgment decreeing that whatever that claim is against Mr. Plummer belongs to this distributee rather than to John Doe or Richard Roe or anybody else. If this distributee brought suit to reduce that claim to a judgment, you would have to introduce the decree to show that the probate court adjudged that that was a claim, whatever it amounted to; it may be worth $1 or $5 or $3,700 after it had been threshed out before a jury."

In granting the motion for nonsuit, this language was used by the court:

> "You have simply brought suit upon a wrong theory of the case. Mr. Plummer never had any day in court to contest that claim. He was not a party to that probate proceeding; never had any opportunity in any way to show any defense to that claim, either on the merits or otherwise, and there never has been a judgment in this case on which you could sue. Motion for a nonsuit granted."

In spite of the court's careful explanation of these elementary matters, the plaintiff has taken this most frivolous appeal from the judgment. It is unfair to litigants prosecuting appeals in good faith to have our time and a place on the calendar taken up by such an appeal, based on a theory so absurd as that which appellant affects to entertain. We are not unmindful of the fact that the plaintiff is a layman, but we cannot think that he believes, in good faith, that he is the owner of a *judgment* against Plummer, on which he has sued in this case.

[2] It is unnecessary to consider at length the appeal from the order discharging the attachment. It is asserted by appellant that the court was without jurisdiction to make the order because he had perfected his appeal. But it is really immaterial whether the court acted with or without jurisdiction. On appellant's own showing this was not a case in which an attachment ever was properly issued, as its facts did not bring it within the provisions of section 537 of the Code of Civil Procedure. He cannot be injured, therefore, because he is deprived of something to which he never was entitled.

The judgment and order are affirmed, and, as it appears to us that the appeals are frivolous and were made for delay, we direct that damages in the sum of $100 be added to the costs of appeal.

We concur: LORIGAN, J.; HENSHAW, J.

(168 Cal. 307)

ROBERTS v. ROBERTS. (L. A. 3363.)

(Supreme Court of California. Aug. 18, 1914. Rehearing Denied Sept. 17. 1914.)

1. EVIDENCE (§ 594*)—WEIGHT AND SUFFICIENCY.

In a suit to quiet title to real property, the court was not bound to find in accordance with plaintiff's evidence, because there was no direct evidence opposing it, especially where there were circumstances shown by which it was discredited.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

2. WILLS (§ 205*)—UNPROBATED WILL—EFFECT AS EVIDENCE—TITLE TO LAND.

Where, in a suit to quiet title, plaintiff claimed under an alleged deed, deposited in escrow to carry out the will of his mother, since deceased, a paper purporting to be the mother's will, which had never been offered for or admitted to probate, was inadmissible to prove title to the land in plaintiff.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 507, 509–512, 561, 928; Dec. Dig. § 205.*]

3. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—EVIDENCE INADMISSIBLE FOR OFFERED PURPOSE.

Where evidence offered for a particular purpose, is inadmissible for that purpose, its exclusion is not error, though it may have been admissible for a different purpose.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Edward A. Roberts against Margerie M. Roberts. Judgment for defendant, and plaintiff appeals. Affirmed.

Randall & Gaines, of Los Angeles, for appellant. Stephens & Stephens, of Los Angeles, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HENSHAW, J. Plaintiff brought this action to quiet title to lots 9 and 11, block 137, in the city of Long Beach, and lot 190 in the town of Willowbrook, all in the county of Los Angeles. The defendant is his stepmother. Judgment passed for defendant, and plaintiff appeals.

Hulda R. Roberts, mother of this plaintiff and then wife of his father, Charles Roberts, owned lots 5 and 6 of block 10 of the California Co-Operative Colony Tract. She conveyed this property to her husband by deed, reciting a consideration of love and affection. Thereafter she died. Charles Roberts married Margerie M. Roberts, defendant herein. He and defendant conveyed away lots 5 and 6 of block 10 in consideration of the conveyance to Charles Roberts of lots 9 and 11, block 137, of the city of Long Beach, two of the lots title to which is here in controversy. Charles Roberts, by conveyance from the Willowbrook Company, obtained title to lot 190 in the town of Willowbrook. Thereafter Roberts conveyed to Margerie M. Roberts, his wife, lots 9 and 11 in the city of Long Beach and lot 190 in the town of Willowbrook. Plaintiff pleads an equitable title to the Long Beach lots and the Willowbrook lot, growing out of the following asserted facts: That they were taken by his father in exchange for lots 5 and 6 of block 10 of the California Co-Operative Colony Tract; that these lots in the colony tract were in fact the separate property of his deceased mother; that by her will she left all her real and personal property to plaintiff, with a life estate to her husband; that the better to consummate the purposes declared in her will she made the forementioned deeds to lots 5 and 6 to her husband, plaintiff's father, with the understanding that he in turn should make his deed to these lots in favor of plaintiff, and deposit this deed in escrow, to be delivered to him upon the death of his father; that his father did so place the deed in escrow, and thereafter, in violation of plaintiff's rights, made his deed conveying away these same lots, and receiving in return therefor the lots described in the complaint, which thus equitably belong to plaintiff.

[1] The findings of the court, and consequently its judgment, were against plaintiff upon all these matters. Upon his appeal he advances the argument that as he himself testified to the existence of these facts, and there was no opposing evidence, it was the duty of the court to have found in his favor, and its findings against him are unsupported. But the court was not under compulsion to accept the testimony of plaintiff, and while from the nature of the case it would be difficult to present direct evidence against plaintiff's positive statements, there were circumstances which manifestly to the mind of the court discredited plaintiff's evidence. Thus, as set forth by plaintiff in his original verified complaint, the nature of the deed was that it conveyed the fee to the plaintiff, reserving to the father a life estate, "with the right to trade said property." In his evidence he denies that the deed contained such provision. He testifies that the deed was acknowledged by his father upon a day certain and before a named notary. No deed was acknowledged by his father before any notary upon that day, and the deed, which had a different date, and which was acknowledged, in so far as the notarial entry bears evidence of its contents, was not to the lands in question. Again he declares that this deed was placed in escrow by his father at the Los Angeles National Bank with one F. G. Howes, an officer of the bank. Howes was dead at the time of the trial and evidence of the bank is that no such deed and no record of such an escrow could be found. We need not, however, pursue this further. Enough has been already set forth to show that the court was not under compulsion to accept the evidence of plaintiff.

[2, 3] Plaintiff's offer of introduction in evidence of the will of his mother was rejected. The offer was for the single and sole purpose of proving title to the land in plaintiff. Objection was made that title could not be proved in this way, in that the will had never been offered for or admitted to probate. The objection was properly sustained, and if for any conceivable purpose the will might have been admissible in evidence, it was not admissible for the offered purpose, and it was not therefore error upon the part of the court to refuse it admission for the single and specific purpose for which it was offered, even though it might have been admissible for some other purpose not indicated in the proffer. 1 Wigmore, Evidence, § 17b.

For these reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(168 Cal. 306)

In re PEOPLE ex rel. McKEON.

(Cr. 1867.)

(Supreme Court of California. Aug. 17, 1914.)

HABEAS CORPUS (§ 112*) — DISMISSAL — GROUNDS.

Where an order committing an alleged delinquent minor to custody had been vacated, the legality of the custody of the minor ceased to be in issue under a writ of habeas corpus issued to determine the question, which should therefore be discharged.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 101; Dec. Dig. § 112.*]

In Bank. Application by the People, on relation of Carrie McKeon, for a writ of habeas corpus to determine the legality of relator's custody. Writ discharged.

Philaletha Michelsen and William M. Sims, both of San Francisco, for petitioner. J. R. Pringle, of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PER CURIAM. It appearing to the satisfaction of the court that the order of the superior court of the city and county of San Francisco and of Frank J. Murasky, judge thereof, committing Carrie McKeon, an alleged delinquent minor, to the custody and care of the probation officer of the city and county of San Francisco, has been vacated and set aside by order of the same court, and the legality of the custody of the alleged delinquent minor thus ceasing to be an issue under the writ of habeas corpus heretofore issued for the determination of that question, it is ordered that the writ of habeas corpus heretofore issued in the above entitled matter be discharged.

25 Cal. App. 110

MACKEY et al. v. MOTT et al. (Civ. 1333.)

(District Court of Appeal, First District, California. July 7, 1914.)

1. MUNICIPAL CORPORATIONS (§ 187*)—POLICE PENSION FUND—OAKLAND CHARTER—CONSTRUCTION.

Oakland City Charter (St. 1911, pp. 1608, 1609) §§ 94, 95, provide for pension of aged, infirm, and disabled members of the police force, and section 96, subd. 1, provides relief for the family of an officer killed in the performance of duty, and declares: (a) That should he be married, the amount shall be paid to his widow so long as she remains single; and (b) if the officer left no widow, but left an orphan child or children under 16 years, or the widow die without marrying while the child or children were under 16, they should receive the pension; and (c) that if there was no widow or orphan child or children, parents dependent solely on the decedent for support should receive the pension during the time of necessity. *Held*, that sections 94 and 95 did not exclude the members of the family of an officer who had been retired and was receiving a pension at the time of his death from benefits under section 96, subd. 2, nor limit the benefits of the latter section to relatives of officers who had never received a pension.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 518–521; Dec. Dig. § 187.*]

2. MUNICIPAL CORPORATIONS (§ 187*) — POLICE OFFICERS — PENSION FUND — "CHILDREN."

Oakland City Charter (St. 1911, p. 1609) § 96, subd. 2, provides that when a member of the police department shall die from causes other than those specified in subdivision 1, after 10 years of service, then his widow, and, if none, his children, and if there be no widow or children, then his mother, if dependent on him for support, shall be entitled to $1,000. *Held*, that the word "children" as so used did not mean heirs or descendants, but was limited to children under 16 years of age, specifically mentioned and provided for in subdivision 1 of the same section (citing Words and Phrases, vol. 2, pp. 1115–1141; vol. 8, p. 7601).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 518–521; Dec. Dig. § 187.*]

Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

Action by Sydney E. Mackey and others against Frank E. Mott and others, constituting the Board of Trustees of the Police Relief and Pension Fund of the City of Oakland. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. S. Angwin, of Oakland, for appellants. Ben F. Woolner and William H. O'Brien, both of Oakland, for respondents.

KERRIGAN, J. This action was brought to obtain a writ of mandate directed against the defendants, constituting the board of directors of the police relief and pension fund of the city of Oakland, requiring defendants to issue to plaintiffs a warrant for the sum of $1,000 against the police relief and pension fund of said city. A demurrer to the original complaint was sustained, and upon the filing of an amended complaint a demurrer was again interposed, and sustained by the court. Plaintiffs declined to further amend, and judgment was accordingly rendered in favor of defendants. This appeal is taken from the order of the court sustaining defendants' demurrer to plaintiffs' amended complaint.

The recitals in the amended complaint disclose the following facts: John S. Mackey was appointed a regular police officer of the city of Oakland on the 20th day of August, 1883, and was retired and pensioned on October 3, 1903, in accordance with the provisions of section 3 of the act creating a police relief, health, life insurance and pension fund in the several counties of the state, approved March 4, 1889, and amended 1891 (Stats. 1891, p. 287), and further amended on March 2, 1897 (Stats. 1897, p. 52). This act, so far as the city of Oakland is concerned, was thereafter superseded by provisions governing the retirement and pensioning of police officers, contained in a charter adopted by the city of Oakland, and which became the organic law of said city on July 1, 1911. The general provisions of the police pension fund act of 1889, as enacted into the city charter of Oakland, are found in sections 93, 94, 95 and 96 of that instrument (Stats. 1911, p. 1608). From the date of his retirement as aforesaid, John S. Mackey drew a pension from said fund until the date of his death, which occurred on the 25th day of December, 1911, at which time, under the terms of the charter, the pension ceased. At the time of his death he left surviving him as members of his family, two children, plaintiffs herein, both of whom are over the age of majority; and as he left no surviving widow, plaintiffs claim that, in accordance with the provisions of section 96 of the charter of the city of Oakland, by reason of the death of their father, they are, as surviving children of said deceased and as members of his family, entitled to receive the sum of $1,000 out of the police relief and pension fund of the city of Oakland. The respondents resist this claim; and in support of their contention that the decision of the lower court should be sustained urge: (1)

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

That under the charter of the city of Oakland the family of service-pensioned police officers are not entitled to participate in the police pension fund after the death of such officers; (2) that, even conceding this right to them, the appellants are not children of the deceased police officer within the meaning of subdivision 2, section 96, of the charter of Oakland; and (3) that a proper construction of subdivision 2 of section 96 of said charter limits its provisions to children under 16 years of age.

The charter provisions governing the retirement and pensioning of police officers are found in sections 94 and 95 of that act.

Section 94 provides for the retirement of any aged or infirm or disabled member who has arrived at the age of 60 years upon a pension of half his salary, provided he has been an active member of the department for 20 years preceding his retirement, such pension to cease upon his death.

Section 95 provides a similar pension to any member of the department disabled by any bodily injury received in the performance of his duty, the said pension to cease at his death.

Subdivision 1 of section 96 makes provision for the relatives of deceased officers who may be killed in the performance of their duty, and provides as follows:

Paragraph A declares that, should the deceased officer be married, his widow shall, so long as she remains unmarried, be paid a monthly pension equal to one-half of the salary attached to his rank at the time of his death.

Paragraph B under said subdivision provides that, under certain contingencies, "the orphan child or children under the age of 16 years" shall receive a pension, and concludes with the words, "provided that no child shall receive any such pension after attaining the age of 16 years."

Paragraph C of this same subdivision makes provision for pensioning the parent or parents of said officer if they are dependent upon him solely for support, in the event that such pensioner leaves no orphan child or children.

The above paragraphs of subdivision 1 of section 96, it will be noticed, refer to the relief granted in cases where the officer has been killed while in the performance of his duty. Then follows subdivision 2 of section 96, under which appellants claim, and which reads as follows:

> "When a member of the department shall die from causes other than those specified in subdivision (1) of this section after ten years of service, then his widow, and if there be none, then his children, and if there be no widow or children, then his mother, if dependent upon him for support, shall be entitled to the sum of one thousand dollars."

To sustain their first contention that, under the charter of the city of Oakland, the family of service-pensioned officers are not entitled to participate in the police pension fund after the death of such officers, respondents have cited the case of Edwards v. Sweigert, 15 Cal. App. 503, 115 Pac. 256. In that case the construction of the police pension fund provisions of the city and county of San Francisco (chapter 10, art. 8, Stats. 1899, p. 332) was under consideration. By section 3 of that charter, provision is made for the retirement and pensioning of any member of the department disabled by reason of any bodily injury received in the performance of his duty; the pension "to be paid to him during his life and to cease at his death." Section 6 thereof provides for the pensioning of certain dependent relatives of any member who, after 10 years' service, shall die from natural causes, and concludes as follows:

> "But the provisions of this section shall not apply to any member of the department who shall have received any pension under the ten terms of this charter."

It will thus be seen that the San Francisco charter in express terms denied the right of a pension to the family of an officer who had received a pension during his life; and it is upon these provisions that the decision in the Edwards Case was based. It is true that the charter of the city of Oakland provides that service pensions shall cease at the death of the member, but nowhere is there a provision similar to the one contained in section 6 of the San Francisco charter, denying the family the right to a pension for the reason that the officer had received one during his life.

[1] Here the appellants are not claiming a continuation of the pension received by the officer during his lifetime, but are seeking the benefit provided for under an entirely different section, which makes no reference to the fact as to whether or not the deceased officer had been in his lifetime the recipient of a pension. The only theory upon which the claim of the respondents can be upheld is that the charter of the city of Oakland, in providing, under sections 94 and 95, for the pensions therein specified, has the effect of excluding the members of the family of such officer from the benefits provided for under subdivision 2 of section 96 of the act, and limits this benefit to relatives of such officers who have never received a pension. This position cannot be maintained. The only purpose of the use of the phrase "and to cease at his death" was undoubtedly to restrain some relative from claiming the monthly pension provided for in subdivision 1 of section 96, where the officer was killed in the performance of his duty. Edwards v. Sweigert, supra.

[2] Irrespective of this conclusion, however, we are of the opinion that appellants are not entitled to the relief demanded, for the reason that they are not children within the meaning of subdivision 2, section 96, of the charter of the city of Oakland. The meaning of the word "children" in its primary significance is generally understood to

have reference to minor sons and daughters of a person, and in cases where the word has received a larger and more extended construction, it has been based upon the intention of the lawmaking power to so extend it. In such cases the construction of the term depends upon the context and surrounding circumstances. Of course the word when used as expressive of relationship includes sons and daughters of whatever age, but when used in reference to age is confined to minors. There are, however, numerous cases where the exact meaning of the word has been questioned, and it has required judicial interpretation to determine in what sense it was used. This uncertainty has arisen in such actions as those prosecuted for the death of a person by wrongful act, under exemptions; statutes against the sale of liquor; poor laws; questions of heirship; adoption proceedings; citizenship; actions for injury to children; questions concerning descent; actions permitting a recovery in cases of homicide; actions by infirm and indigent children; and numerous other actions.

Courts of various jurisdictions are not in entire harmony in the construction to be given to the term when used in the particular character of cases above enumerated. Volume 2, Words and Phrases, p. 1115, etc. To arrive at the legislative intent the original purpose and object of the legislation must be considered. The term as contained in the act under consideration, in our opinion, was not intended to be used in the larger sense of sons and daughters, for it was certainly not contemplated by the framers of the charter that provision should be made for grown sons and daughters. Unmistakably the purpose of the whole act was to make provision for aged and infirm officers and certain necessitous relatives and minor children.

To permit adult children to enjoy or participate in a limited fund such as this is inconsistent with the general idea and purposes of its creation. Legislation of this character is designed to protect minors and necessitous dependents, rather than to create a system of benefactions for the advantage of relatives, and such design is indicated by the different provisions of the act, to which we must look for the legislative intent. Sections 94 and 95 of the act make provision for aged, infirm, and disabled members by providing for a pension. Section 96, subdivision 1, provides for relief for the family of an officer killed in the performance of his duty, and, as before stated, is as follows: (a) Should the decedent be married, his widow shall, as long as she remains single, be paid a pension equal to one-half of his salary. (b) Where decedent leaves no widow, but leaves an orphan child or children under the age of 16 years, and the widow dies without marrying while such child or children are under the age of 16 years, such child or children collectively shall receive a pension equal to one-half the salary attached to the decedent's position, provided that no child shall receive any such pension after attaining the age of 16 years. (c) Where there is no widow or orphan child or children but a parent or parents dependent solely upon decedent for support, they are entitled to a pension during such time as the board shall determine its necessity. And then follows subdivision 2 of section 96, under which appellants claim, which provides that where a member dies from causes other than those specified in subdivision 1, section 96, then his widow, and if there be none, then his children, and if there be no children, then his mother, if dependent upon him for support, shall receive $1,000.

It will be noticed in paragraph B provision is made for an orphan child or children under 16 years where there is no widow, while in subdivision C, in making provision for dependent parents, and referring expressly to such child or children in the preceding subdivision, the proviso that they shall be under 16 years of age is omitted. Subdivision 2 of section 96, under which appellants claim, merely refers to this class of relatives as "children." Clearly the meaning that the framers of the charter had in mind was that only minor children under 16 years of age as indicated in the preceding paragraphs should receive the benefits of the act. This interpretation is the only one that is consistent with the purpose of the act.

The order is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 130

HOGAN LUMBER CO. v. CITY OF OAKLAND. (Civ. 1360.)

(District Court of Appeal, First District, California. July 10, 1914. Rehearing Denied by Supreme Court Sept. 8, 1914.)

1. Property (§ 4*)—Personalty or Realty—Temporary Wharf.

Where a temporary wharf built on piles was constructed between the land and a quay wall in process of construction, solely to pass materials over to facilitate the construction of the wall, and intended to be removed as soon as the wall was constructed, the wharf was personalty and not real estate.

[Ed. Note.—For other cases, see Property, Cent. Dig. §§ 4–6; Dec. Dig. § 4.*]

2. Fixtures (§ 5*)—What Constitutes Fixtures—Temporary Structure.

A temporary wharf constructed on piles by contractors, and used to facilitate the construction of a sea wall was not a fixture under the rule that whether a structure is a fixture depends on the nature or character of the act by which it is erected, and the purpose it was intended to serve.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. § 5.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. Fixtures (§ 5*)—Materials Attached to Building—Contracts—Failure to Perform—Statutes—Construction.

Code Civ. Proc. § 1196, provides that whenever materials shall have been furnished for use in the construction or repair of any building or other improvement, such materials shall not be subject to attachment or legal process, to enforce any debt due from the purchaser, except a debt due for the purchase money, so long as in good faith the same were about to be applied to the construction, alteration, or repair of such building or improvement. Section 1200 declares that if a contractor abandons his contract before completion, then from the value of the work and materials already done and furnished, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the contract, etc., and the remainder shall be deemed the portion of the contract price applicable to liens. *Held*, that such sections applied only to materials furnished and intended to become a part of the structure or improvement, but did not operate to transfer to the owner of the improvement materials of which a temporary wharf was constructed to facilitate the contractor's work in constructing a sea wall; it being the contractor's intent to remove the wharf when the wall was completed.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 4; Dec. Dig. § 5.*]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by the Hogan Lumber Company against the City of Oakland. From a judgment in favor of defendant and from an order denying plaintiff's motion for a new trial, it appeals. Reversed.

Stetson & Koford, of San Francisco, for appellant. Ben F. Woolner and Chas. A. Beardsley, both of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment and from an order denying a motion for a new trial in an action of claim and delivery.

Very briefly the facts are these: Hansbrough Brothers Company entered into a contract with the city of Oakland to build a quay wall along a certain portion of the Oakland water front. For use in the construction of the quay wall, this company, with materials furnished by it, built a temporary wharf or platform on the land side of said wall, which was used to pass materials over, and to facilitate the work of construction. When the work was partially completed, the Hansbrough Bros. Company became insolvent and abandoned the work, and were adjudged bankrupt by the United States District Court. Upon abandonment, the city of Oakland took possession of the work, including the wharf, runway, or platform, as it was variously called, advertised for bids, and ultimately let a contract for the completion of the work to the Healy-Tibbetts Construction Company. The trustees in bankruptcy, under regular proceedings, sold to the plaintiff herein a quantity of lumber on the premises, including the lumber in the wharf or runway. Upon demand defendant refused to give up possession of the part of the lumber in controversy, whereupon this proceeding was commenced.

[1, 2] It is not claimed that the material of the wharf was to become a part of the quay wall; but defendant does claim that by reason of the manner of the construction of the wharf, it became real property, and that therefore an action in claim and delivery will not lie. It also claims that, under the terms of section 1200 (since repealed) and section 1196 of the Code of Civil Procedure, the materials, having been erected "on the ground," became the property of the defendant. Neither of these contentions commends itself to us with much force. As to the first contention, it is true that the wharf or substructure was built on piles driven into the ground; but it was plainly the intention of the parties, and conceded to be the fact, that it was of a temporary nature, and that, when the quay was finished, the wharf was to be cleared away, and the materials constituting the wharf were to be taken possession of by whoever at that time might be the owner thereof. Under these circumstances, the authorities support the conclusion that the materials are to be regarded as personal property. Whether a structure is a fixture or not depends upon the nature or character of the act by which it is erected and the purpose for which it was intended to be used. Hopewell Mill v. Taunton Savings Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; 19 Cyc. 1045–1048; Lavenson v. Standard Soap Co., 80 Cal. 245, 250, 22 Pac. 184, 13 Am. St. Rep. 147; Jordan v. Myres, 126 Cal. 565, 569, 58 Pac. 1061; Stimson v. Los Angeles Traction Co., 141 Cal. 30, 74 Pac. 357.

[3] As to the other point, little need be said. Sections 1196 and 1200, Code of Civil Procedure, apply, and make the materials furnished the property of the owner of the structure when they are to become part of the structure, but where, as here, they are not to be used in and incorporated into the structure to be built, they cannot be said to belong to the owner. Steiger, etc., Pottery Works v. Sonoma, 9 Cal. App. 698, 100 Pac. 714; California P. C. Co. v. Wentworth Co., 16 Cal. App. 692–701, 118 Pac. 103, 113; Hamilton v. Delhi Mining Co., 118 Cal. 148, 50 Pac. 378.

Under the circumstances of this case the defendant, it would seem, has no more right to these materials constituting the temporary wharf than it would have to the tools or machinery of the contractor and mechanics. The circumstance that the wharf was to be wrecked and the materials taken away by the original contractor or his assignee shows, not only that they were not a fixture, but also that no property right therein passed to the defendant. The original contract was not incorporated in the record, and there is no circumstance in the case that will warrant the conclusion that there was any implied understanding between the contractor who erected the wharf and the defendant that the wharf was to remain on the premises any longer than its use was required by such contractor. Nor is there any ground in the record for the argument that the contractor abandoned the materials contained in the wharf and left them on the premises under such circumstances that he or his assignee would be estopped to claim them before the quay wall was finished.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The judgment and order are reversed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 134

EINERTSEN v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 1381.)

(District Court of Appeal, First District, California. July 14, 1914. Rehearing Denied Aug. 13, 1914. Denied by Supreme Court, Sept. 11, 1914.)

1. Appeal and Error (§ 1010*)—Review—Findings by Court—Rate of Speed.

Where plaintiff, injured while standing on the step of a street car in collision with a truck extending from the curb into the street, testified that the car was moving at a "terrible speed," while another witness estimated the speed at eight or nine miles an hour, a finding that at the time of the collision the car was being operated at a speed which was unsafe and dangerous to plaintiff, was not erroneous as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. Carriers (§ 318*)—Passenger—Injuries—Operation of Car—Negligence—Contributory Negligence—Evidence.

In an action for injuries to a street car passenger by being struck by a truck extending from the curb into the street, evidence *held* to sustain the trial court's finding that the car, as it passed the truck, was moving at a dangerous speed, that the carrier was negligent in permitting the steps of the car to become crowded, so that plaintiff when he boarded the car had to stand on the step, and that he was not therefore guilty of contributory negligence in assuming such position.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. § 318.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Ernest Einertsen against the United Railroads of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley W. Cannon, of San Francisco, of counsel), for appellant. McNair & Stoker, of San Francisco, for respondent.

KERRIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff, and this appeal is from a judgment rendered in his favor and from an order denying a new trial.

The injuries were sustained by plaintiff while a passenger on one of the cars of the defendant company. The complaint recites: That, on the 21st day of October, 1907, plaintiff boarded a car at a point on Mission street, near the foot thereof, in the city and county of San Francisco, said car being operated by defendant for the convenience of passengers; that plaintiff tendered and the conductor of said car accepted and received his fare; that at the time plaintiff was standing at the bottom step of the rear platform on the northerly side of the car, which was west-bound, the steps and platform of which were crowded with passengers to such an extent that plaintiff was unable to enter the interior of the car, although he attempted so to do; that there was sufficient space in the interior of the car for all of the passengers thereon; and that, at the time of receiving his injuries, plaintiff was making an effort to gain an entrance therein from the outside step upon which he was standing; that, while still standing upon said step, and while attempting to gain an entrance to the interior of the car, plaintiff observed a truck or van backed up against the curbing of Mission street, with the front end thereof projecting out into said street, toward the track upon and over which the car was passing, and the plaintiff, realizing that he would be struck with the projecting end of said truck or van if the employés in charge of said car should attempt to pass thereby without stopping, the said car being operated at such a rapid rate the plaintiff could not with safety to himself alight therefrom, called upon the conductor in charge to stop the car, but the conductor did not heed his request; that, by reason of the car going at such a rapid rate of speed, which was not slackened in passing the projection, plaintiff was caught between the rear end of said car and the projecting front of said truck, and received the injuries which formed the basis of this action. Plaintiff further alleged the negligent operation of the car at the rapid rate of speed, and the negligence of the defendant in permitting the rear steps and platform of the car to remain crowded and congested with passengers when there was sufficient space within the interior thereof. The injuries received by plaintiff were alleged to be permanent, and to consist of a displacement and contusion of the liver, stomach, kidneys, and other abdominal organs, and the bending and dislocation of the ribs, the bruising of his body in various places, and a violent shock to his nervous system. A jury trial was waived, and the court rendered judgment in favor of the plaintiff and against the defendant for the sum of $1,000, and his costs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] It is the claim of defendant that the judgment and order appealed from should be reversed for the reason that the evidence is insufficient to support the decision, and he argues: (1) That the evidence is insufficient to show that the defendant operated his car at a dangerous rate of speed; (2) that the evidence is insufficient to show actionable negligence in permitting the steps of the car to become crowded and congested; (3) that the evidence affirmatively and indisputably shows that the plaintiff was himself guilty of negligence, proximately contributing to the injuries. The evidence relating to the circumstances under which the injuries were received is practically free from conflict upon the question of the speed of the car. The court found that defendant operated the car by and past the wagon at a rate of speed unsafe and dangerous to plaintiff in the position he occupied, and the defendant knew of the danger to which passengers were submitted by reason of the car being thus operated by and past said wagon. The question as to whether or not the rate of speed was unsafe and dangerous was one, considering all the surrounding circumstances, for the trial court to determine. Plaintiff testified that the car was moving at a "terrible speed"; another witness, a police officer, estimated the speed at eight or nine miles an hour. The reasonableness of the rate of speed at which a car is run is to be measured by the surrounding circumstances. A rate of speed may be dangerous or excessive under one set of circumstances, where it would not be so under others. We cannot say, as a matter of law, that a finding as to the rate of speed under a given set of circumstances is not warranted by the evidence, this being a fact for the trial court to determine from all the evidence presented. The close proximity of the wagon to the track was a very material circumstance to be considered in determining whether or not the rate of speed was excessive. From all the evidence produced at the trial, we feel convinced that the court was amply warranted in finding that the car was operated at an unsafe and dangerous speed, considering that the truck occupied a position so near to the car as to be dangerous to occupants of certain parts of the car.

The further contentions of appellant, that the evidence is insufficient to show actionable negligence in permitting the steps of the car to become crowded, and that the evidence indisputably shows that the plaintiff was himself guilty of negligence proximately contributing to his injuries, are so intimately connected that we will discuss them together.

Upon these questions the court found that there was sufficient space in the interior of the car for all passengers then upon it, and that the defendant negligently permitted the platform and steps of the car where plaintiff was standing to remain in a congested condition, so that plaintiff could not obtain access to the interior of the car and thereby escape being injured, and that the injuries sustained by plaintiff were not directly or proximately caused by his own negligence or by any want of care on his part, but were the result of carelessness and neglect of the servants and employés of the defendant. Testimony of plaintiff shows that at the time he boarded the car there were passengers occupying the platform and steps, and that this crowded condition of that portion of the car prevented him from reaching its interior, although he endeavored to do so. Defendant sought to disprove this testimony by showing that another passenger boarded the car at another point on Mission street, further west than did plaintiff, and that he proceeded up the steps of the car, and past the passengers standing thereon, and took a position at the rear of the platform, and defendant argues that if this witness could thus pass to a place of safety, plaintiff could have done likewise, and, not having done so, he was guilty of negligence to ride thus situated, and did so at his own risk. The plaintiff in his testimony showed a lack of certainty as to the intersecting street at which he boarded the car, but his testimony is positive to the point, and is uncontradicted, that no one got on or off the car from the time he boarded it, and that the car did not stop from that time until the accident occurred.

At the rate of speed the car was traveling, it was a very short time after plaintiff boarded the car till the occurrence of the accident. Plaintiff testified that the car had only traveled two short blocks from his boarding point to where the accident occurred, and that, during this time, he had paid his fare and was seeking to gain access to the interior of the car. He certainly could not know until he boarded the car that he would be prevented from gaining access to its interior, which the testimony shows was not crowded. Under these circumstances it cannot be said that his presence upon the step of the car, crowded though it was, constituted negligence. That plaintiff was exercising due care is shown by his undisputed testimony that, when within quite a distance of the wagon, realizing his danger, he called upon the conductor to stop the car, and at the same time endeavored, although unsuccessfully, to reach a place of safety.

The question as to whether or not the plaintiff exercised care to avoid the injuries was a question of fact for the trial court to determine. Seller v. Market St. Ry. Co., 139

Cal. 269, 72 Pac. 1006; Hoff v. Los Angeles Pacific Ry., 158 Cal. 596, 112 Pac. 53; Holloway v. Pasadena Ry. Co., 130 Cal. 177, 62 Pac. 478; Kimic v. San Jose & Los Gatos Ry., 156 Cal. 379, 386, 104 Pac. 986. The same may be said as to the question of whether or not defendant was negligent in permitting the steps of the car to be crowded and congested. Both of these questions were determined adversely to the defendant by the trial court, upon evidence sufficient to sustain the findings; therefore the findings must be upheld.

For the reasons stated, the judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 139

SPENCER v. BARNES. (Civ. 1560.)

(District Court of Appeal, Second District, California. July 16, 1914. Rehearing Denied by Supreme Court, Sept. 11, 1914.)

1. Partnership (§ 5*)—Creation—Single Venture.

Where plaintiff and defendant contracted to co-operate in obtaining options on certain mining property and selling the property at a profit, which they agreed to divide, their agreement was none the less a partnership because it was limited to a single venture.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. § 5.*]

2. Partnership (§ 330*)—Accounting—Decree—Dissolution.

Where a partnership was organized for the purchase and sale of particular mining properties, and its purpose had been fully accomplished prior to suit between the partners for an accounting, the decree need not adjudge a dissolution, under the rule that equity will not decree an accounting between partners without also adjudging dissolution of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 787; Dec. Dig. § 330.*]

3. Partnership (§ 317*)—Purpose—Illegal Profits—Accounting.

Where plaintiff and defendant formed a partnership to sell a group of mining claims, agreeing to share equally in the profits, and defendant, to facilitate the sale, entered the employ of the purchaser in order to induce a belief that he was obtaining the properties for the purchaser at the lowest possible price, and in this connection made a secret and illegitimate profit in transferring certain of the properties, defendant could not escape liability to account for one-half of such profits to complainant on the ground that they had been illegally obtained; the partnership having been created for a lawful purpose and complainant having been entirely innocent of misconduct.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 733; Dec. Dig. § 317.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by A. B. Spencer against Legene S. Barnes. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

Oscar Lawler, of Los Angeles (James E. Degnan, of Los Angeles, of counsel), for appellant. Lewis R. Works and Andrew M. Strong, both of Los Angeles, and Francis Marion Etheridge, of Dallas, Texas, for respondent.

SHAW, J. This action grew out of an alleged agreement between plaintiff and defendant whereby, as copartners, they consummated a sale of certain iron mining properties, defendant receiving and appropriating to his own use the commission or profits derived from the making of such sale. The suit is to recover a specified sum and for an accounting. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

It appears that in June, 1907, plaintiff was a resident of Tucson, Ariz., where he was engaged in some mining venture. Defendant resided in Long Beach, Cal., where he was engaged in the real estate business. There existed a relationship of some intimacy between their respective wives, between whom there was an interchange of letters, in which there were mutual complaints of dull times. The wife of plaintiff wrote the wife of defendant to have her husband come to Tucson, where she felt sure defendant and plaintiff could find some properties to sell and make some money. Following this letter defendant went to Tucson, spending several days with plaintiff in looking over and inspecting certain mining properties (not involved in this action, but referred to in order to obtain a proper understanding of the situation), known as the Papago, Wilson, and Rumple properties. The prospect of a sale of these mines appears to have been the only subject of mutual interest during the first days of defendant's visit, neither at that time being cognizant of the iron properties, the commissions for the sale of which constitute the subject of this suit. While plaintiff and defendant were inspecting the Papago and other properties the latter took some photographic views thereof, and on their return to Tucson they went to the studio of a photographer, with whom plaintiff was acquainted, to have these views developed. On the occasion of this visit, and while discussing these photographic views, the photographer, W. B. Parker, stated that he was interested in some iron properties in Riverside county, Cal., and exhibited samples of ore therefrom, together with a blueprint of the properties, comprising some 70 claims, and mentioned the names of the owners thereof, with whom he and Walter W. Brown, who resided in Los Angeles, had been corresponding in an effort to get them together in order to make a sale thereof. Of these claims Parker owned 15, Walter W.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Brown owned 30, and the Colorado Fuel & Iron Company and Stevens, Dofflemyer and McGregor owned 25, which were patented. The profits derived from a sale of the Brown claims is the subject around which the controversy revolves. During the interview Barnes asked Parker if the properties were for sale, to which the latter replied in the affirmative, but stated they were not yet in shape to present to any one, owing to the fact that the parties had not all fixed a price upon their respective holdings, and, further, that some of the properties were held under an option to purchase which would expire about September 1st. Defendant then said to Parker:

> "If anything comes up on this and you get ready to do business on it, just speak to Mr. Spencer and it will be all right. He will let me know."

Plaintiff testified that after this interview with Parker, it was agreed that plaintiff was to do all he could in Tucson in getting papers and things ready and send them to defendant, who was, at his own expense, to do the negotiating with prospective buyers, and if a sale was effected the profits should be divided. Mrs. Spencer testified that the evening preceding his departure for Long Beach he, in a conversation with plaintiff, said:

> "I will leave everything at this end of the line for you to look after and I will bear the expense, and then what is left of the profit we will divide."

Defendant left Tucson about July 2d, returning to Long Beach, and plaintiff took up negotiations with Parker, transmitting to defendant by letter such information as he obtained. On August 28th defendant wired plaintiff to "get option and papers on Parker's property to me as soon as possible," which telegram was confirmed by letter of the same date, wherein defendant stated: "I believe that is a property that we can handle." On September 9th defendant wrote to plaintiff, saying:

> "I will take Parker's proposition up this afternoon with that man Brown, of Los Angeles, as you suggest. * * * I have some people who have the money and will do business if we can only get it into shape so we can handle it. I believe I have received all your letters, and I appreciate your work in this. You have made the deal plain to me and I will go and see Brown this afternoon."

On October 8th defendant wrote a lengthy letter to plaintiff upon the subject of the proposed deal saying that he had seen Dofflemyer and stating:

> "I have his interest tied up, also Brown's Stevens', and in fact all of them except Parker and his people. * * * I have had to change the deal in regards to prices and terms, but I feel confident that we can make a sale now. I am selling a three-quarters interest in the twenty-five patented claims for $262,500, on which we will get a ten per cent. commission. * * * I am selling Brown's 30 claims for $100,000 net to him. * * * Brown signed the same kind of a paper as the one which I shall send you to have Mr. Parker and his people sign. * * * Now I am selling Parker's 15 claims for $65,000, but I want you to tell him that is $50,000 net to him; the $15,000 goes to you and I, and I would like you to draw up some kind of an agreement that Mr. Parker can sign, showing that if the sale is made the $15,000 is to be paid to us in the same manner as he gets his payments."

The letter also refers to the Rumple and Wilson property, defendant suggesting that plaintiff endeavor to get a 30-day extension of their option on the same, and in reference to the deal generally, states:

> "I have already spent over $300 on this deal and expect it will cost me about $500 more before it is closed, but it is worth the money if we get it closed."

There was an option contract for the purchase of Parker's claims at a price of $50,000, transmitted to plaintiff with the request that plaintiff obtain Parker's signature thereto. In this he failed for the reason, as stated by Parker, he would not sell for less than $65,000, which price he eventually received upon the deal being consummated; defendant having procured from him a contract for a sale at said sum. It is unnecessary to quote further from the correspondence.

[1] That the parties entered into a copartnership for the purpose of securing a contract with the owners and effecting a sale of the properties is not only shown by the answer, which admits that defendant and plaintiff entered into a verbal agreement to co-operate in selling the properties in question and agreed in the event of so doing to divide the profits, but is clearly shown by reference to the evidence. The fact that the subject of the agreement was a single venture only as alleged in the answer, was immaterial; it was none the less a copartnership for such venture.

The court found the allegations of the answer, to the effect that plaintiff abandoned the copartnership enterprise long prior to the consummation of the sale, to be untrue. The claim of appellant that this finding is unsupported by the evidence is chiefly based upon a letter written by plaintiff to defendant on August 19th, wherein he says:

> "Please return to me by express all the maps, reports, and etc., which I sent you, and we will go out of the mining business. If you care to do so, you can tell me what you wrote or wired south, for unless I know I am placed in a bad light with those people."

Plaintiff testifies that this letter referred solely and alone to what was known as the Papago property, the owners of which resided in the south; that he was manager of said property and represented the owners thereof; that defendant was to write to the owners of the property, giving references as to his standing and aid him in assembling the stock in escrow. The inference to be drawn from the testimony is that defendant in writing to the owners of the property had placed plaintiff in an embarrassing position with his employers. That it was intended to refer to this deal only is corroborated by the fact that at the date of the letter, August 19th, nothing whatsoever, other than what occurred in the first interview with Parker, as heretofore stated, had been done by the parties towards securing a sale of the iron properties. Not only this, but the correspondence hereinbefore referred to and the conduct of the parties after August 19th clearly tend to show that plaintiff and defendant were jointly engaged in an effort to secure contracts, options or escrows which would enable them to negotiate a sale of the iron properties, either for a commission or at a price in excess of that fixed by the owners thereof, which, in case of the consummation of a sale, would afford them a profit, and that defendant understood the letter had reference solely and alone to the Papago property, of which plaintiff was manager, and the maps, reports, etc., of which, mentioned therein, had been placed in possession of defendant.

The answer alleged that the sole consideration for the contract of copartnership made with plaintiff was an agreement on the part of the latter to secure from the owners of the properties options thereon which defendant could use in negotiating sales of the property, and further alleged a failure on the part of plaintiff to secure such or any options for the sale of the properties. The record discloses a conflict of evidence touching this issue. Hence the finding of the court that it was not agreed that plaintiff was to secure the options, as alleged, is conclusive upon this appeal. Anglo-California Bank v. Cerf, 147 Cal. 384, 81 Pac. 1077.

The court found that it was agreed between the parties that all expense incurred by defendant in the consummation of a sale of the property should be paid by defendant, and further found that all moneys expended by him in negotiating said sale were provided and advanced by R. H. Sayers and S. H. Roberts, who were reimbursed for such advances by the vendors of the property out of the proceeds of the sale thereof. These findings are attacked for want of evidence to support them. The contention is without merit. The finding to the effect that defendant was to advance all expenses is clearly supported by the testimony given by plaintiff. While there is some evidence tending to show that defendant incurred expense in negotiating the sale, the record is silent as to what sum or sums he paid out, other than the $300. Moreover, it appears, with little if any conflict of evidence, that Sayers and Roberts advanced the money to finance the making of the sale, each receiving from the proceeds of the sale of the Black Diamond group of mines, owned by Walter W. Brown, the sum of $50,000 as compensation for such advances.

[2] Appellant insists the judgment must be reversed for the reason that there was no prayer in the complaint for a dissolution of the copartnership, and no decree rendered dissolving the same. The general rule is, as contended by appellant, that where one partner as against another seeks an accounting of profits against his copartner, a court of equity will not decree an accounting without also adjudging a dissolution of the copartnership. Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303. In our opinion, the case at bar presents an exception to this general rule. By the terms of the agreement, as alleged in the complaint and admitted by the answer, the parties entered into a partnership having for its sole purpose the sale of certain property described in the complaint. It appears from the pleadings that the sale was fully consummated prior to the institution of this action. Upon the making of the sale the purpose contemplated by the agreement was fully accomplished, save and except the payment to plaintiff of his share of the profits. The finding of the court to the effect that the partnership had never been abandoned was in response to an allegation of the answer which alleged an abandonment prior to the consummation of the sale. In our opinion, the pleadings must be construed as showing the copartnership had terminated, and hence there was no occasion for a decree of dissolution. No objection was made by defendant to the complaint upon the ground that it did not ask for a dissolution, nor was any exception taken to the judgment as rendered upon such ground. The complaint did pray "for such other relief as to this court may seem just and proper." Under the facts presented, we think the court was justified in assuming that the copartnership was terminated, and therefore it was unnecessary to decree a dissolution. See Pettingill v. Jones, 28 Kan. 749; Meason v. Kaine, 63 Pa. 335; Myers v. Winn, 16 Ill. 135.

The court further found that in pursuance of the agreement of copartnership defendant, with the assistance of plaintiff, secured options on the properties in his own name for the joint benefit of plaintiff and himself, and on August 10, 1909, consummated a sale thereof to a corporation known as the Iron Chief Mining Company; that included in the properties sold to said Iron Chief Mining Company were 30 claims, known as the Black Diamond group, a five-sixths interest in which was owned by Walter W. Brown, whose interest was sold by defendant to said Iron Chief Mining Company for the sum of $337,500; that the other sixth interest in said Black Diamond group was owned by defendant, he having acquired it from Brown as a commission for promoting the sale of Brown's interest in said property, and that the value of defendant's one-sixth interest so acquired from Brown in the Black Diamond group as a commission was the sum of $17,500. The court further found that, in addition to this sum of $17,500 so received by defendant for the one-sixth interest in the Black Diamond group, he received from Walter W. Brown out of the $337,500, proceeds so received by Brown from the sale of his interest in the Black Diamond group of mines, a secret commission and profit in the sum of $121,250.

[3] As to this secret profit of $121,250, ap-

pellant pleads his own fraud and iniquity as a defense to the participation therein by plaintiff. A statement of the manner in which it was obtained is, briefly, as follows: Defendant had been for some time negotiating a sale of the properties to Edward H. Harriman. On May 17, 1909, these negotiations culminated in a contract made with Harriman which, after reciting that defendant and his assigns were the owners of certain interests in iron properties which Harriman was desirous of buying, provided that defendant was to make conveyances and assignments of options covering such interest held by him personally, which should be placed in escrow, and enter the employ of Harriman or his assigns, and as such employé make every reasonable effort to purchase for his employer the remaining properties and interest therein at the lowest possible figure and co-operate in every way with Harriman to attain the end designated, the intention of the agreement, as stated, being "that the party of the first part [Barnes] shall proceed to acquire for the party of the second part [Harriman], or his assigns, at the lowest possible cost, the properties and rights hereinbefore mentioned and described," for which interest and service Barnes was to receive the sum of $100,000 and a salary of $1,000 per month, the employment to be terminated at any time at the option of Harriman. Thereafter a corporation, designated the Iron Chief Mining Company, was created, and defendant became a director and manager thereof, which position he held during the period covered by the purchase of the properties, and particularly that known as the Black Diamond property owned by Brown. Under the contract made with Harriman, and as a director and manager of Harriman's assignee, the Iron Chief Mining Company, defendant had charge of the negotiations for the purchase of the properties, and particularly the Brown property which, for and on behalf of the Iron Chief Mining Company, he purchased from Brown, agreeing to pay him therefor the sum of $337,500. This sum was paid to Brown by draft issued by the Iron Chief Mining Company, and, in accordance with an agreement made between Brown and Barnes, was distributed as follows, to wit: To R. H. Sayers, $50,000; to S. Horace Roberts, $50,000; to W. L. Holland, $121,250; Brown retaining the sum of $116,250 for his interest in the Black Diamond property. Holland testified that he was an employé of defendant, that he had no interest in the properties; and that whatever he did in the matter was as an employé of Mr. Barnes, as well as the other parties, by mutual agreement. The entire sum of $121,250 was by Holland transferred to defendant. The contention of appellant is that this large sum of money was obtained by means of his unconscionable act in violating the trust imposed in him by Harriman and the Iron Chief Mining Company, of which he was a director and manager, and that hence, owing to it having been obtained illegally, plaintiff is not entitled to share therein.

Appellant cites a number of cases to the effect that by virtue of his relation to the Iron Chief Mining Company he occupied a fiduciary position, and as such trustee he could not lawfully make any profit for himself out of the transaction between Brown and the Iron Chief Mining Company, unless such fact was known and approved by the latter. This proposition is too well recognized to require citation of authorities. The principle, however, is not applicable to the facts in the case at bar. The Iron Chief Mining Company is not, so far as shown, suing Barnes to recover the money which he received from Brown; indeed, so far as disclosed by the record, it may have approved his act. There was nothing illegal or immoral in the business for the conduct of which the partnership was established. No taint attaches to the contract made by plaintiff, and no act of his can be the subject of condemnation. He is innocent of participation in the design by means of the consummation of which the profits were gained. Hence the proposition presented is whether or not an innocent member of a copartnership created for conducting a lawful business is entitled to share in a profit which his copartner has realized by misconduct in carrying on the business. While courts will not lend their aid to one who founds his cause upon a contract having for its purpose the doing of an illegal act, nevertheless, "when the plaintiff is blameless, and the contract on which he stands is legal and moral, no court has ever permitted a defendant to escape responsibility because of his own misconduct." Pennington v. Todd, 47 N. J. Eq. 569, 21 Atl. 297, 11 L. R. A. 589, 24 Am. St. Rep. 419. In the case of Jones v. Davidson, 2 Sneed (Tenn.) 448, the partnership contemplated the business of collecting claims against the federal government. The defendant in the action in the collection of one of the claims procured the making of a false affidavit, by reason of which fact the transaction was held to be illegal. It appeared, however, that the plaintiff who brought the suit for a share of the profits of the transaction in no wise participated in the illegal manner whereby the claim was collected. The court, in holding that he was entitled to participation in the profits arising from this illegal transaction, said:

> "But the plaintiff was no party to this illegal contract, so far as anything appears, and therefore could not be affected by it. In this view, we cannot permit the defendant to allege his own inequity to the prejudice of an innocent person."

As stated in the Pennington Case, the refusal of the court to aid plaintiff in compelling defendant to disgorge the ill-gotten gains would furnish an incentive to such frauds as he had perpetrated, "for if a partner, by showing that he has cheated the customers of the partnership in all his dealings with them, can retain all the profits, instead of only half, his temptations to iniquity are doubled." The authorities cited, together with Van Tine v. Hilands (C. C.) 131 Fed. 124, and Thwaites v. Coulthwaite, Law Repts. (1896), 1 Ch. Div. 496, leave no question in our minds as to the right of plaintiff to participate in the ill-gotten profits of the transaction to the same extent that defendant is benefited thereby.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 60

PEOPLE v. STRICKLER. (Cr. 226.)

(District Court of Appeal, Third District, California. June 30, 1914. Rehearing Denied by Supreme Court Aug. 28, 1914.)

1. INTOXICATING LIQUORS (§ 134*) — LOCAL OPTION LAW — CONSTRUCTION — "EJUSDEM GENERIS."

Under the Wyllie Local Option Law (St. 1911, p. 599), which forbids the sale of intoxicating liquor in dry territory, and provides in section 21 that the term "alcoholic liquors" shall include spirituous, vinous, and malt liquors and any other liquor which shall contain 1 per cent. or more of alcohol, the sale of malt beverages which do not contain 1 per cent. of alcohol is not prohibited, the specification of malt liquors, under the rule of ejusdem generis, which requires general and specific words capable of an analogous meaning and associated together to be construed together, being obviously intended to include only those containing more than one per cent. of alcohol (citing Words and Phrases, vol. 3, p. 2328. See, also, volume 8, p. 7647; volume 4, pp. 3736–3746; volume 8, p. 7692).

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142–144; Dec. Dig. § 134.*]

2. STATUTES (§ 194*)—CONSTRUCTION.

Statutes should be construed so as to give effect to the legislative intent, and the rule of ejusdem generis cannot be used to overthrow such intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. § 194.*]

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

H. L. Strickler was charged with a violation of the Local Option Law, and from a judgment entered on sustaining a demurrer to the information the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People. Ben Berry, of Stockton, for respondent.

HART, J. The information in this case, purporting to accuse the defendant of a violation of the so-called Wyllie Local Option Law (St. 1911, p. 599), reads as follows:

> "The said H. L. Strickler on the 7th day of March 1913 at and in the county of Colusa, state of California, and prior to the filing of this information did willfully and unlawfully keep and conduct in the town of Arbuckle and within the boundaries of First supervisor district of said Colusa county, state of California, a certain place where alcoholic liquors were by him then and there sold, served and distributed within the boundaries of said district; that said First supervisor district was then and there no-license territory; that said place was not then and there the home of said defendant; that said alcoholic liquors were not and none of them was then and there manufactured by defendant or by any other person on the said premises and place; that said alcoholic liquors were not then and there sold, served or distributed to or by a registered pharmacist, nor for medicinal purposes only upon a prescription by a duly licensed physician, nor for sacramental purposes; that said alcoholic liquors were then and there malt liquor containing less than 1 per cent. by volume of alcohol, to wit, ninety-five hundredths of 1 per cent. per volume of alcohol."

The defendant demurred to said information on the ground that the same does not state a public offense under the law referred to. The court sustained the demurrer and dismissed the information, and this appeal is by the people from the judgment thereupon entered.

Section 13 of the local option law declares it to be unlawful "for any person, corporation, firm, company, association, or club, as principal, agent, employé or otherwise, within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof."

Although not material to this inquiry, it may be stated that the exceptions provided in section 16 include the permission to serve intoxicating liquors in one's home to the members of his family or to his guests as an act of hospitality; the sale of such liquors by pharmacists for medicinal purposes; the use of wine in religious services, and the sale thereof by pharmacists for such use; the storage of such liquors, provided they are not distributed in no-license territory, and the keeping of such liquors on premises where manufactured, and the shipping of the same into territories where the liquor traffic is permitted by law to exist.

[1, 2] Section 21 of said act provides that:

> "The term 'alcoholic liquors' as used in this act, shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain 1 per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

The contention of the defendant is that, inasmuch as the information declares that the malt liquors, with the alleged illicit keeping and selling of which he is charged, contained a less quantity of alcohol than that specified in section 21 of said act as applied to "any other liquor or mixture of liquors," etc., to wit, 1 per cent. by volume, or more, no offense under said law is stated against him. The argument is that the general language of section 21, to wit, "and any other liquor or mixture of liquors," etc., must be examined by the light of the maxim, noscitur a sociis, and that, as so viewed, it must be held that the provision as to the quantity of alcohol that must be present in such liquors to bring them within the interdictions of the statute, includes those liquors ejusdem generis, specially enumerated by the language immediately preceding it.

The position of the Attorney General is that the special language of said section is not qualified or in any degree controlled by the general language thereof, but that, by the specific enumeration in said section of spirituous, vinous, and malt liquors, the Legislature intended such liquors to fall under its ban regardless of whether they do or do not in fact contain alcohol. In other words. it is the contention of the people that the intoxicating character of "spirituous, vinous, and malt liquors," as so enumerated in the statute, has been established by the Legislature itself, and that it is not for the jury to revise the judgment of the Legislature upon that matter and so determine whether such liquors are or are not in fact intoxicating. State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the case of People v. Mueller (No. 231) this court was called upon to consider the propositions above stated, and we there expressed the opinion that, while in charging the offense of selling or keeping for sale spirituous, vinous, or malt liquors, it was not necessary to allege that such liquors contained the amount of alcohol specified in section 21, a conviction could not be sustained under such an indictment unless such liquors were shown to be intoxicating. This conclusion was reached mainly from the proposition, declared in the opinion in said case, that the terms "spirituous," "vinous," and "malt," as generically designating certain kinds of liquors, must have been used by the Legislature in their popular sense—that is to say, that they were used to describe, generically, those alcoholic liquors commonly known as "spirituous," "vinous," and "malt," and which, it is known, will produce intoxication. The Mueller Case was, after judgment here, ordered transferred to the Supreme Court for hearing, and it is now pending in that court. Therefore, whether the intoxicating character of spirituous, vinous, and malt liquors must be alleged in an indictment or information, where the charge is of selling or keeping them for sale and the accusatory pleading. following the language of the statute, designates them by their generic names, is a question which will doubtless be definitively determined by the Supreme Court in the case referred to (143 Pac. 750), and which, therefore, need not be considered here.

We are still of the opinion, however, that the Legislature did not intend to make it unlawful for one to engage in the business of selling nonintoxicating liquors. In other words, it is not reasonable to suppose that it was the legislative intent to contraband the traffic in spirituous, vinous, or malt liquors possessing no intoxicating quality. To the contrary, it seems very clear, when we consider the ultimate object of the local option law, that the Legislature thus aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and that, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and did establish a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. This conclusion is arrived at by a view of section 21 of the act by the light of the rule of construction, ejusdem generis, above referred to. In its practical application, this rule simply means that:

> "General and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general." 3 Words and Phrases Judicially Defined, p. 2328.

Or, as this maxim was stated by Lord Tenterden (21 Am. & Eng. Ency. of Law, p. 1012):

> "Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to or different from, those specifically enumerated."

This rule of construction is by no means of universal application, and its use is to carry out, not to defeat, the legislative intent. It must yield to another salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force. Misch v. Russell, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125. But, in this case, since it is plainly manifest, as stated, that the purpose of the local option law is to suppress drunkenness and consequently the traffic in intoxicating liquors in those subdivisions where its operation is properly and legally invoked, the rule of ejusdem generis may be applied to the construction of section 21 without doing violence to or rendering inoperative any part of said section or of the law. Indeed, a construction of section 21 by the light of that doctrine will manifestly lead to the upholding of all the provisions of the law agreeably to the evident legislative design at the bottom of its enactment.

Thus, in a written opinion, the learned trial judge viewed the proposition submitted here and so concluded that the information, by reason of its declaration that the liquor therein charged to have been kept for sale by the defendant contained less than the quantity of alcohol specified in section 21, failed to state an offense under the statute. Said opinion is appended to the brief of the defendant. We approve the opinion, both for its reasoning and its conclusion, and we, therefore, adopt the following part thereof as a part of this opinion:

> "A great many cases from other jurisdictions are cited in support of the contention that the words 'spirituous, vinous, and malt liquors' have a fixed, definite meaning and are conclusive of the fact that such liquors contain alcohol, and hence are alcoholic and intoxicating within the contemplation of the statute.
>
> "I find some conflict in the authorities upon this question. For example, the courts are in conflict as to whether beer is per se a malt or intoxicating liquor.
>
> "It seems to be an open question in many jurisdictions as to whether courts will take judicial notice that pure alcohol is an intoxicating

liquor within the meaning of the laws regulating and prohibiting sales of various classes of liquor. The weight of authority, however, seems to be that beer is malt and an intoxicating liquor. The cases cited by the district attorney seem to be fairly distinguishable from the case before us. Whether such cases may be considered as in point will depend somewhat upon the statutory provisions under consideration. Had the statute stopped with the words 'spirituous, vinous and malt liquors' without any general or qualifying words added thereto, then the authorities referred to would clearly be in point, and the sale of such liquors would be prohibited regardless of the alcoholic content of the liquor. But the following words just quoted, separated by only a comma, and this separation may be dispensed with, are the words 'and any other liquor, which contains one per cent. by volume, or more, of alcohol.' Shall these concluding words be treated as an wholly independent clause of the statute, having no reference to the immediately preceding language of the same section, or shall they, as general words, be considered as relating back to and, in a sense, limiting and qualifying the particular words preceding them?

"These provisions and all other provisions of the statute must be taken together and be considered as a whole in order to arrive at the true intent and meaning of the law and lawmakers. This is a fundamental rule of statutory construction.

"Grammatical construction and punctuation may be ignored, and even clauses of the statute may be transposed and rearranged, in order to ascertain and give effect to the true intent and meaning of statutory enactments.

"The act is a local option law; its operation and enforcement are made to depend upon the vote of the people in a given territory. The first clause of the title of the act is, 'An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option.' The proposition petitioned for and to be submitted to the electors is, 'Shall the sale of alcoholic liquors in this (supervisorial) district be licensed?' If a majority vote on this proposition be in the negative, it is then made the duty of the board of supervisors to declare that the given territory is 'no-license territory,' and thereafter it shall be unlawful for any person in such territory (with certain exceptions, not material here) to sell alcoholic liquors. After all these (and other) provisions, is section 21 of the act, as above quoted, which defines the term 'alcoholic liquors,' and provides they shall include spirituous, vinous and malt liquors and any other liquor containing one per cent., or more, of alcohol.

"From all these provisions, and from the means provided for making them effective, it seems clear that the act was intended to close saloons and to prevent drunkenness. While one purpose of the act, as disclosed in its title, is to regulate the traffic in alcoholic liquors, its main and chief purpose is to close saloons and prevent drunkenness. Alcohol is the intoxicating element or ingredient in spirituous liquor.

"If not intended to close saloons and to prevent drunkenness why submit the proposition to the electors of local territory under the proposition of license or no license? What the petitioners for the election desired, and what the electors, in fair contemplation of the act, believed they were voting upon, was 'Shall the sale of intoxicating (alcoholic) liquors which contain more than one per cent. of alcohol be licensed?'

"It is not believed that the law, or lawmakers or electors, intended to permit the sale of one kind of liquor which contained less than 1 per cent. alcohol and to prohibit the sale of another and equally harmless liquor (malt) which contained no greater quantity of alcohol.

"No reason can be found why such discrimination should be made as between two equally harmless liquors, that is to say, harmless as to alcoholic content. To so hold would be to make the provisions of the statute inconsistent and inharmonious.

"Under the principles and authorities above stated a statute should receive such consideration, if possible, without doing violence to its terms, as will render its provisions consistent and in harmony with each other, and at the same time to give effect to the real purpose and intent of the enactment.

"This is a criminal prosecution, and it is believed the law should receive a liberal construction, according to its true import and purpose and within the spirit of its provisions, rather than a strict technical construction. The spirit and not the letter of the law should control in such cases."

For the reasons herein stated, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 149

BALLAGH, City Clerk, v. SUPERIOR COURT OF KERN COUNTY et al.

(Civ. 1603.)

(District Court of Appeal, Second District, California. July 17, 1914.)

1. Appeal and Error (§ 83*)—Decisions Reviewable—"Special Proceeding."

An application for a writ of mandate is a "special proceeding," within Code Civ. Proc. § 939, authorizing appeals from final judgments in actions or special proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 523–527; Dec. Dig. § 83.*

For other definitions, see Words and Phrases, vol. 7, pp. 6586–6590; vol. 8, pp. 7802, 7803.]

2. Contempt (§ 22*)—Violation of Order—Effect of Stay of Proceedings by Undertaking.

Under Code Civ. Proc. § 949, providing that, in cases not otherwise provided for, the perfecting of an appeal by giving an undertaking on appeal, pursuant to section 941, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property, etc., the giving of such an undertaking on an appeal from a judgment granting a peremptory writ of mandate stayed the proceedings, and the superior court had no jurisdiction to punish the defendant for contempt in refusing to obey the peremptory writ.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 67; Dec. Dig. § 22.*]

Original application by E. E. Ballagh, City Clerk of the City of Maricopa, for a writ of review directed to the superior court of the state of California in and for the county of Kern, and another. Order of the superior court adjudging the petitioner guilty of contempt set aside and annulled.

Davis, Kemp & Post, of Los Angeles, E. L. Foster, of Bakersfield, Charles A. Barnhart and L. R. Godward, both of Maricopa, and Geo. E. Whitaker, of Bakersfield, for petitioner. H. H. Bell, of Maricopa, and Joseph H. Tam, of Bakersfield, for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SHAW, J. This is an application for a writ of review to annul an order of the court below adjudging petitioner guilty of contempt for the disobedience of its judgment.

Petitioner is city clerk of the city of Maricopa. On March 23, 1914, certain proceedings were instituted in the superior court, in and for the county of Kern, the purpose of which was to secure a writ of mandate directed to petitioner, as said city clerk, commanding him in his official capacity to place and print upon the official ballot to be used in the municipal election held in the city of Maricopa on April 13, 1914, the name of Frank Minium as a candidate for city trustee. Upon trial the court gave judgment in favor of the plaintiff in said action, and ordered that a peremptory writ as prayed for in the complaint be issued and served upon defendant, all of which was duly done. Defendant in said action, who is petitioner here, refused to comply with the order and appealed from the judgment so rendered, and executed an undertaking in the sum of $300, conditioned in accordance with the provisions of section 941 of the Code of Civil Procedure. Thereupon the Hon. Milton T. Farmer, judge of the superior court of Kern county, issued an order requiring petitioner herein to show cause why he should not be adjudged guilty of contempt for failing to obey the order of said superior court commanding him to place the name of said plaintiff upon said municipal ballot, in response to which defendant appeared and showed that he had duly perfected an appeal from said judgment so rendered by the court. Notwithstanding this fact, the court adjudged him guilty of contempt in refusing to obey the order.

[1, 2] The contention of petitioner is that his appeal duly had and taken deprived the court of jurisdiction to make the order adjudging him guilty of contempt. This appears to be the settled law of the state. The action was a special proceeding, from the judgment in which an appeal lies, as provided in section 939, Code of Civil Procedure; and section 949, Code of Civil Procedure, provides in such case, it not being a case specified in sections 942 to 945, both inclusive, that the giving of the undertaking specified in section 941, Code of Civil Procedure, stays proceedings in the court below upon the judgment. In the case of Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563, where an injunction issued was in form mandatory, it was held that an appeal from the judgment, accompanied by a bond as provided by section 941, operated as a supersedeas to stay execution of the writ. In the case of Palache v. Hunt, 64 Cal. 473, 2 Pac. 245, a judgment was rendered against petitioner wherein a writ of mandate was issued and from which judgment he prosecuted an appeal, giving an undertaking in the sum of $300, and wherein the petitioner applied to the Supreme Court for a writ of mandate to be issued to the lower court compelling it to fix the amount of an additional undertaking. The court denied the writ upon the ground that the $300 undertaking, given in accordance with the provisions of section 941, was sufficient to stay the proceedings. The court says:

> "We are therefore of opinion that an appeal may be taken to this court from a judgment of a superior court, granting or denying an application for a writ of mandamus, and that an undertaking in the sum of three hundred dollars, executed and conditioned according to the provisions of section 941, Code of Civil Procedure, stays the execution of the judgment pending the appeal."

We think the court below exceeded its jurisdiction in adjudging petitioner guilty of contempt. It is therefore ordered that the order of the lower court, whereby petitioner was adjudged guilty of contempt and sentenced to pay a fine of $150, be and the same is hereby set aside and annulled.

We concur: CONREY, P. J.; JAMES, J.

(25 Cal. 133)

MORGRAGE v. NATIONAL BANK OF CALIFORNIA. (Civ. 1475.)

(District Court of Appeal, Second District, California. July 14, 1914.)

Appeal and Error (§ 1218*)—Remittitur—Recall—Correction as to Costs.

Under Code Civ. Proc. § 1027, as amended in 1913 (St. 1913, p. 1033), providing that the prevailing party on appeal shall be entitled to costs, excepting when the judgment is modified, where a judgment was affirmed, but the remittitur contained no provision that the respondent should recover its costs on appeal, it will be recalled on motion, and a new remittitur issued containing such provision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.*]

On motion to recall remittitur. Motion granted and modified remittitur issued.

For former opinion, see 140 Pac. 300.

PER CURIAM. The judgment herein was, on appeal to this court, affirmed in an opinion filed herein on the 26th day of February, 1914. 140 Pac. 300. At the expiration of 60 days the clerk of the court issued to the court below a remittitur which contained no provision to the effect that respondent should recover its costs on appeal. On June 16, 1914, respondent moved the court for a recall of the remittitur and the issuance of a new one containing a judgment in its favor for such costs. No doubt exists that under the provisions of section 1027, Code of Civil Procedure, as amended in 1913 (St. 1913, p. 1033), respondent is entitled to costs as therein provided, and which, as stated, were omitted from the judgment of this court. Upon authority of the opinion of the Supreme Court, filed May 26, 1914, in the case of Estate of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Charles Prager, 141 Pac. 369, which involved the identical question here presented, it is ordered that the remittitur heretofore issued be recalled, and the clerk is directed to issue in lieu thereof a new remittitur, inserting therein a provision that respondent recover its costs on appeal.

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TOPLITZ et al. v. STANDARD CO.

(Civ. 1508.)

(District Court of Appeal, First District, California. Oct. 7, 1914. Rehearing Denied Dec. 5, 1914.)

LANDLORD AND TENANT (§ 290*)—"UNLAWFUL DETAINER"—RIGHT TO MAINTAIN ACTION.

A tenant, who defaulted in payment of rent, had given a mortgage as security. Before resorting to the mortgage, the landlord instituted an action of unlawful detainer. Code Civ. Proc. § 726, provides that there can be but one action for the recovery of any debt or for the enforcement of any right secured by mortgage. Sections 1161 and 1174 provide that a tenant of real property is guilty of an unlawful detainer where he continues in possession after failure to perform the covenants of the lease, and authorize, in case the circumstances justify it, an award to the landlord of a sum equal to three times the rent due as a penalty. *Held*, that the fact that the landlord had security for his rent did not preclude a recourse to the remedy of unlawful detainer, for that is a possessory action, and it was not intended by the Legislature that the taking of security should deprive the landlord of the rights conferred by the statute.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207–1215; Dec. Dig. § 290.*

For other definitions, see Words and Phrases, First and Second Series, Unlawful Detainer.]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Melville S. Toplitz and others against the Standard Company. From a judgment for defendant, plaintiffs appeal. Reversed, with directions.

Stratton, Kaufman & Torchiana, of San Francisco, for appellants. Leon Samuels, of San Francisco, for respondent.

LENNON, P. J. This is an appeal upon the judgment roll alone from a judgment entered in favor of the defendant in an action of unlawful detainer. All of the material allegations of the plaintiffs' complaint were admitted by the failure of the defendant's answer to deny them. The defendant, however, as a defense to the action, pleaded the existence of a mortgage executed by the defendant to the plaintiffs as security for the rent reserved in the lease under which the defendant held and occupied the premises in controversy. The court below, in substantial accord with the admitted allegations of the complaint, made its findings of fact in favor of the plaintiffs in so far as concerned the execution of the lease and the breach of the covenant to pay the rent reserved, but further found that a mortgage given as security for the payment of the rent had not been resorted to and exhausted by the plaintiffs prior to the institution of the present action, and from the latter finding deduced the conclusion of law "that by reason of the provisions of section 726 of the Code of Civil Procedure of the state of California the action is barred and cannot be maintained."

The Code section referred to provides that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property * * *" (Code Civ. Proc. § 726). The lower court's conclusion of law cannot be sustained. Unlawful detainer is primarily a possessory action, which cannot be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the Legislature (Code Civ. Proc. § 1161) to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement. Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease, and in addition may, if the circumstances of the case justify it, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due (Code Civ. Proc. § 1174); but in no sense is an action of unlawful detainer one of debt. Consequently it cannot be said that the present action is one for the recovery of a debt or the enforcement of a right secured by the mortgage in controversy.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It follows that the defense interposed and relied upon was not as a matter of law available to the defendant. The finding with reference to the execution and existence of the mortgage was therefore immaterial, and may be disregarded. The defendant having admitted, and the lower court having found, the execution of the lease and the failure of the defendant to pay the rent reserved therein after the statutory notice to pay or surrender possession of the leased premises, judgment should have been entered for the plaintiffs.

The judgment is reversed, with instructions to the lower court to render and enter judgment in favor of the plaintiffs upon and in keeping with the findings as made relating to the execution and breach of the lease.

We concur: RICHARDS, J.; KERRIGAN, J.

CAIN v. FRENCH. (S. F. 6965.)

(Supreme Court of California. May 9, 1914.)

COURTS (§ 212*)—JURISDICTION OF DISTRICT COURTS OF APPEAL—EQUITY SUIT.

Where the District Court of Appeal affirmed a judgment upon direct appeal to it in a suit in equity, of which the District Court of Appeal had no direct appellate jurisdiction, the judgment of the District Court of Appeal will be vacated and the cause transferred to the Supreme Court, and may then be transferred by the Supreme Court to the District Court of Appeal for its consideration and decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515; Dec. Dig. § 212.*]

In Bank. Action by Annie Cain against Henry French. Judgment for the defendant, and plaintiff appealed directly to the District Court of Appeal, which affirmed the judgment. Cause transferred to the Supreme Court and retransferred by the Supreme Court to the District Court of Appeal.

Henry French, of San Jose, in pro. per. E. A. Wilcox, C. F. Crothers, and Fry & Jenkins, all of San Jose, for respondent.

PER CURIAM. It appearing to the court that the plaintiff's action was a suit in equity, of which the District Court of Appeal had no direct appellate jurisdiction, it is ordered that the judgment of that court, affirming the judgment of the court below, be vacated, and that the cause be transferred from the District Court of Appeal of the First District to this court.

It is further ordered that the said cause be now transferred to the District Court of Appeal of the First District for its consideration and decision.

(168 Cal. 313)

CITY AND COUNTY OF SAN FRANCISCO et al. v. JORDAN, Secretary of State. (S. F. 7118.)

(Supreme Court of California. Sept. 4, 1914.)

1. STATUTES (§ 35½*)—SUBMISSION OF QUESTIONS OR PROPOSITIONS TO POPULAR VOTE—FORM OF BALLOT.

Pol. Code, § 1197, subd. 3, as amended by St. 1913, p. 1161, providing that the order in which all questions and propositions, to be submitted to vote, shall appear upon the ballot shall be determined by the secretary of state, and subdivision 9, as amended by St. 1913, p. 1163, providing that, when any question, proposition, or constitutional amendment is to be submitted to the vote of the electors, there shall be printed, at the right of the last column of names of candidates, another column in which such questions shall be designated, refer only to questions and proposed laws of state-wide application, and not to questions of purely municipal or local significance.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

2. STATUTES (§ 35½*)—SUBMISSION OF QUESTIONS OR PROPOSITIONS TO POPULAR VOTE—FORM OF BALLOT.

Pol. Code, § 1197, subd. 3, as amended by St. 1913, p. 1161, provides that the order in which all questions and propositions, including proposed laws and constitutional amendments, to be submitted to vote, shall appear upon the ballot shall be determined by the secretary of state. Subdivision 9, as amended by St. 1913, p. 1163, provides that, whenever any question, proposition, or amendment is to be submitted, there shall be printed, at the right of the last column of names of candidates, another column in which such questions shall be designated. St. 1913, p. 1122, provides that the question of issuing San Francisco harbor bonds shall be submitted to the electors of the state, and that all ballots shall have printed thereon and at the end thereof the proposition to be voted on. *Held*, that the provision of the act of 1913, that the proposition therein referred to shall be printed at the end of each ballot, merely requires that it shall be printed after the names of candidates as provided in the Political Code, but, even if it means more, it merely requires the secretary of state to give it the last place among the propositions to be submitted to the electors of the state, and questions of purely municipal or local significance should be placed on the ballot after such proposition.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

In Bank. Original application by the City and County of San Francisco and others, for a writ of mandate against Frank C. Jordan, as Secretary of State of the State of California. Petition denied.

Percy V. Long, City Atty., Thos. V. Cator, and Wm. McDevitt, all of San Francisco, for petitioners.

PER CURIAM. This is a petition for mandate directed against the secretary of state. It alleges that pursuant to law 48 questions and propositions, including proposed laws and constitutional amendments, are to be submitted to the electors of the whole state at the ensuing general election to be held in November. It alleges that one of these propositions concerns the issue of San Francisco harbor bonds. Stats. 1913, c. 602, p. 1122. This statute in terms provides that this bonding proposition shall be submitted to the electors of the state at the general election to be held in November, 1914, "and all ballots at said election shall have printed thereon and at the end thereof" the proposition in the alternative so to be voted on. The petition further points out that subdivisions 3 and 9 of section 1197 of the Political Code, as amended St. 1913, pp. 1160, 1163, declare (subdivision 3) that:

"The order in which all questions and propositions (including proposed laws and constitutional amendments), which are to be submitted to the vote of the electors, shall appear upon the ballot shall be determined by the secretary of state."

And subdivision 9 that:

"Whenever any question, proposition or constitutional amendment is to be submitted to the vote of the electors, there shall be printed at the right of the last column of names of candidates, another column of sufficient width, with voting squares in which such question, proposition or constitutional amendment shall be designated, which designation shall consist of a statement prepared as hereinbefore provided for and opposite such question, proposition or constitutional amendment to be voted on, in separate lines, the words 'Yes' and 'No' shall be printed."

Further it is shown that, acting under the authority so vested in him by subdivisions 3 and 9, the secretary of state, in arranging the order, has placed this harbor improvement bond proposition the last upon the list of state-wide propositions under the designation of "No. 48."

Next it is alleged that certain propositions of local consequence, municipal questions, are to be voted upon by the electors of San Francisco as well as by the electors of other municipalities, and that the secretary of state has failed to designate upon the official ballot the place or places which shall be assigned to such questions of local or municipal cognizance. It is then finally asserted that it is a duty of the secretary of state, imposed upon him by subdivision 9, above quoted, to make such designation, and that it is his additional duty, under the provisions of the harbor improvement act, above quoted, to place this last-named proposition at the very literal end of the ballot following all other propositions of state-wide or local consideration. Wherefore it is contended that the place fixed upon the ballot by the secretary of state for this harbor improvement proposition is illegal, and that the secretary of state has failed in the performance of his duty in neglecting and refusing to fix and determine the place upon the ballot where municipal questions and propositions shall be inserted and printed.

[1, 2] While we are of the opinion that the application for mandate should be denied, as the question of the construction of our ballot law is one of public consequence, it is fitting that the reasons for this denial should be briefly expressed. They are these: The law leaves no doubt as to the general order and arrangement of the ballot which is to be submitted to the people. First upon the ballot shall come the names of all candidates for all offices, whether national, state, district, county, or municipal. Following the names of these candidates, and "at the right of the last column of names of candidates," in "another column of sufficient width," shall be placed, in the order determined by the secretary of state, "all questions and propositions" (including proposed laws and constitutional amendments) "which are to be submitted to the vote of the electors." This means all such questions and proposed laws of state-wide application on the approval or rejection of which every elector may speak. When the harbor improvement bond act declared by its terms that the question of its acceptance or rejection should be submitted "at the end" of the ballot, in our view it meant no more than to designate that it should take its place after the names of candidates, as provided by subdivision 3 of section 1197 of the Political Code. It was equivalent to saying that such proposition should take the place on the ballot provided for it by law. But, even if it be conceded that it means more than that, still it must be construed as containing nothing other than a direction to the secretary of state that he should give it the last place amongst all the propositions to be submitted to the electors of the state. This is the view of the secretary of state, and this is in fact what he has done, so that it appears upon the face of the petition that the secretary of state in this respect has fully and fairly complied with the provisions of the law, and that the contention of petitioners that this proposition must physically be printed as the very last word upon the ballot is untenable.

It follows herefrom that questions of purely municipal or local significance will be placed upon the ballot after the names of all candidates and after the submission of all questions calling for state-wide determination by the electors. Such being the place on the ballot which must be occupied by such questions, and since the secretary of state has so far as appears from this petition properly designated the places of candidates and the places of questions of state-wide cognizance, it necessarily follows that questions of local or municipal significance must follow these on the ballot, and that therefore he has not failed in his duty in this respect.

For these reasons the petition for mandate is denied.

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23 Cal. App. 232

McNUTT et al. v. PABST et al. (Civ. 1402.)

(District Court of Appeal, Second District, California. Nov. 12, 1913.)

Appeal and Error (§ 773*)—Briefs—Failure to File—Nonappearance—Dismissal Sua Sponte.

Where, after a transcript had been filed, the case was placed on the regular calendar for oral argument, but on the call of the calendar neither party appeared and it was ordered submitted, and it appeared that no briefs had been filed, though the time within which they could have been filed under the rules had long since passed and no order had been entered extending the time, the court would not examine the transcript to search for errors, but would presume that the judgment and order were proper, and would affirm the same sua sponte.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108–3110; Dec. Dig. § 773.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Bonnie Elouise McNutt, as executrix of the estate of Cyrus F. McNutt, deceased, and others against Anton Pabst and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Ben Goodrich, of Los Angeles, for appellants. Geo. L. Keefer, of Los Angeles, for respondents.

PER CURIAM. In this cause the transcript on appeal was filed in this court on August 14, 1913. The cause was placed upon the regular calendar for oral argument and on the call of that calendar on October 28, 1913, it was ordered to be submitted, no appearance being made for oral argument by counsel for appellants or respondents. No briefs have been filed and the time within which the same are permitted to be filed under the rules of court has long since expired and no order extending the time for such purpose has been asked for or made. Under such conditions an appellate court is not called upon to examine the transcript in search of errors upon which to order a reversal. The presumption is that the order denying a new trial and the judgment were properly made and entered. While rule 5 (119 Pac. x), governing procedure upon appeal in the Supreme Court and in this court, provides that an appeal may be dismissed, upon notice, for failure to file the transcript or appellant's points and authorities, even though no such motion be urged on behalf of respondent, as here, the court will nevertheless not assume the burden of investigating the merits of the appeal where the same is not supported by any argument, oral or printed.

The judgment and order are therefore affirmed.

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25 Cal. App. 166

JORDAN v. KINGSBURY, State Surveyor General. (Civ. 1347.)

(District Court of Appeal, First District, California. July 23, 1914.)

1. Public Lands (§ 144*)—School Lands—Resurvey—Effect.

Where the federal government ordered a resurvey of the thirty-sixth section of a township, granted to the state for school purposes by Act Cong. March 3, 1853, c. 145, 10 Stat. 244, and by such resurvey the lines were shifted southward and slightly eastward, so as to embrace a considerable tract of land on the southward side and a narrow strip on the eastward side, not theretofore included within the older section lines, the land so included at once became the property of the state, and was subject to purchase under the state laws.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

2. Mandamus (§ 85*)—Ministerial Acts—Sale of School Lands—Surveyor General—Duties—Enforcement.

Pol. Code, § 3498, provides that if it shall appear to the surveyor general that an application to purchase school land is made in good faith, and that all the facts stated in the application are true, and the land applied for is subject to sale, he shall approve the application; otherwise, he shall disapprove the same. *Held*, that the power conferred on the surveyor general by such section is neither judicial nor unlimited, but ministerial only, and hence may be enforced by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 184–188; Dec. Dig. § 85.*]

3. Mandamus (§ 85*)—Compelling Sale of School Lands.

Where, by resurvey of a section of school land, the lines were so changed as to include additional land, and an application to purchase the land so included was properly made and refused, it was no defense, to the applicant's right to mandamus to compel the sale of the land to him, that to do so would cause confusion between the state and federal authorities regarding the boundaries of their respective lands.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 184–188; Dec. Dig. § 85.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Application for mandamus by J. H. Jordan against W. S. Kingsbury, Surveyor General and Register of the State Land Office of California. From a judgment granting the writ, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Malcolm C. Glenn, Deputy Atty. Gen., for appellant. B. M. Aikins, of San Francisco, for respondent.

RICHARDS, J. This is a proceeding wherein the plaintiff sought and obtained in the trial court a peremptory writ of mandate, requiring the defendant, as surveyor general of California and register of the state land office, to approve the plaintiff's application to purchase from the state those certain lands described in his petition. From a judgment to that effect the surveyor general appeals.

The facts of the case are practically undisputed and are quite fully and clearly set forth in the brief of appellant. In the year 1869 an official survey was made by authority of the United States government of those sixteenth and thirty-sixth sections of the public lands which had been granted by the government to the state of California for school purposes, under the act of Congress of March 3, 1853, 10 Stat. 244, c. 145. Between the year 1869 and the year 1893 the state of California had sold and issued patents for all of the lands embraced within the said section 36 in which the lands sought to be purchased by plaintiff are now claimed to be. In the year 1893 the United States government ordered another official survey to be made of the public lands within that region. By this later, and probably more accurate, survey the boundary lines of said section 36 were shifted southward and also slightly eastward, so as to embrace a considerable tract of land on the southward side and a narrow strip on the eastward side not theretofore included within the older section lines. The tract of land now sought to be purchased by the plaintiff lies within these newer boundaries, but outside of the lands originally surveyed. The application of the plaintiff to purchase these lands was disapproved and denied by the surveyor general, upon the chief ground, as expressed in his decision disapproving the same, that the lands sought to be purchased belonged to the United States, and not to the state. In opposing the application for the writ of mandate, the defendant urged two additional reasons why it should be denied. These were: First, that the decision of the surveyor general is final upon an application to purchase state lands, and hence is not reviewable by the courts; and, second, that the granting of the writ of mandate would lead to great confusion between the state and federal governments as to the boundaries of state and federal lands. It is conceded by the surveyor general that the application of the plaintiff to purchase these lands was otherwise regular in form and substance, and that he was and is a qualified person to purchase the same.

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*For other cases see same topic and section NUMBER in Dec. Dig & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It will thus be seen that the first question for determination is the question as to whether, for the purposes of this proceeding, these lands are to be regarded as state lands, lying within the official boundaries of the said thirty-sixth section, and therefore open to purchase by the plaintiff. We think this question must be answered in the affirmative, upon the authority of the cases of Cragin v. Powell, 128 U. S. 691, 698, 9 Sup. Ct. 203, 32 L. Ed. 566; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Knight v. U. S. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Gleason v. White, 199 U. S. 54, 60, 25 Sup. Ct. 782, 50 L. Ed. 87. If, therefore, under these authorities the effect of the second official survey of these lands was to include them within the scope of the act of Congress of March 3, 1853, and transfer them to the state as a part of its school lands, it follows that the action and decision of the surveyor general in disapproving the application of the plaintiff to purchase these lands was erroneous.

[2] The surveyor general, however, contends that, under the authority invested in him by section 3498 of the Political Code, his decision in the matter was final, and hence not the subject of review by the courts upon this form of writ. The section of the Political Code upon which he bases this contention reads as follows:

> "If it shall appear to the surveyor general that the application is made in good faith and that all of the facts stated in the application are true and that the land applied for is subject to sale, he shall approve the application, otherwise he shall disapprove the same." Political Code, § 3498.

The simple reading of this section shows that the power of the surveyor general is neither as judicial nor as unlimited as he claims it to be. The three conditions upon which the section expressly states he shall act in his approval or disapproval of the application were all met by the plaintiff: His application was admittedly made in good faith, and all the facts stated therein were true, and, as we have seen, the lands applied for were, for the purposes of said application, at least, lands of the state, under their last official survey. These things being true, the section of the Code in question expressly says that the surveyor general "shall approve the application." It is quite clear that this language leaves that official no discretion in the premises, and renders his act merely a ministerial one, and as such subject to the compulsions of a writ of mandate. The case of Middleton v. Low, 30 Cal. 596, is in point upon this question, and the industry of counsel for appellant has not produced any later case overruling that early decision.

[3] The appellant's final contention that the writ of mandate ought not to issue, because of its effect in creating confusion between the state and federal authorities regarding the boundaries of their respective lands, is without merit. The clear right of a citizen of the state to acquire public lands open to purchase, in the manner provided by law, must be enforceable by an appropriate proceeding, regardless of such consequences as appellant forecasts. Even if his fears are well grounded, the law has doubtless provided proper remedies for such confusion as might arise, without the need of denying this plaintiff the present right to which he is clearly entitled.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 158

PEOPLE v. PANAGOIT. (Cr. 497.)

(District Court of Appeal, First District, California. July 22, 1914.)

1. INSURANCE (§ 31*) — FIRE INSURANCE — PROOFS OF LOSS—FRAUD—OFFENSES—STATUTES.

Pen. Code, § 549, provides that every person who presents any false or fraudulent claim, or proof in support of any claim, on any contract of insurance, etc., is punishable. *Held*, that the statute is not confined to claims arising in and presented to a court of justice, but includes any or every person, firm, or corporation who may or might be liable under a contract of insurance for the payment of a fraudulent claim or proof of loss presented.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 36; Dec. Dig. § 31.*]

2. INDICTMENT AND INFORMATION (§ 10*)—INSUFFICIENCY OF EVIDENCE.

There being no statute authorizing the court to inquire into the sufficiency of the evidence on which a grand jury returned a verdict, the court has no power to entertain an objection to an indictment on the ground that the testimony taken before the grand jury was insufficient to support it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 50–61; Dec. Dig. § 10.*]

3. Criminal Law (§ 518*)—Evidence—Admissions—Witnesses—Privilege—Statute.

Pen. Code, § 1324, provides that any person offending against any of the provisions of the Code, or against a law of the state, is a competent witness against any other person so offending, and may be compelled to testify; but if the witness demands that he be excused on the ground that his testimony will incriminate him, he shall not be excused from testifying, but shall not thereafter be liable to prosecution based on such testimony. *Held*, that such section has no application to an inquiry which is not based or held on legal authority, and hence where defendant, while in the office of the attorneys of a prosecuting insurance company, made a statement, which was reduced to writing and preserved, the admissions contained therein were not objectionable because accused was not apprised of his privilege under such section.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157–1162; Dec. Dig. § 518.*]

4. Insurance (§ 31*)—Corporate Capacity of Insurance Company—Evidence.

Evidence of the general reputation of a corporation for doing insurance business was sufficient proof of its corporate capacity, in a prosecution for fraudulently presenting to it a false claim of loss in violation of Pen. Code, § 549.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 36; Dec. Dig. § 31.*]

5. Criminal Law (§ 761*)—Trial—Instructions.

In a prosecution for presenting a false claim of loss to an insurance company, defendant having admitted presenting the alleged claim to the company, an instruction that the presentation had been made was a mere statement of the evidence, and not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754–1764, 1771, 1853; Dec. Dig. § 761.*]

6. Criminal Law (§ 369*)—Evidence—Other Offenses.

While ordinarily evidence of another offense cannot be given, yet whenever the case is such that the proof offered in support of the charge tends also to prove the commission of another offense, such proof is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

7. Criminal Law (§ 1037*) — Appeal — Remarks of Counsel—Objections Not Made at Trial.

An objection cannot be made for the first time on appeal to alleged misconduct of counsel in argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

8. Criminal Law (§ 1171*)—Appeal—Harmless Error.

Where, in a prosecution for presenting a false claim of loss by fire to an insurance company, the evidence established defendant's guilt beyond all question, a conviction would not be set aside because of alleged error in remarks of the district attorney at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Peter Panagoit was convicted of fraudulently presenting a false claim of loss by fire to the Liverpool, London & Globe Insurance Company, and he appeals. Affirmed.

Henry B. Lister, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant herein was convicted of fraudulently presenting a false claim of loss by fire to the Liverpool, London & Globe Insurance Company, and this appeal is taken from the judgment of conviction and from the order denying defendant's motion for a new trial.

The indictment charged defendant, together with G. A. Levy and C. G. Patric, with violating the provisions of section 549 of the Penal Code of this state, and recited that on the 17th day of December, 1912, G. A. Levy obtained and procured a contract of insurance against loss by fire to the amount of $3,000, in said insurance company, on a stock of merchandise, household furniture, and other personal property contained in a store and dwelling situated in Albany, county of Alameda; that on the 26th day of December, 1912, the said Levy sold the property so insured to the defendant, and assigned and delivered to him the contract of insurance; that shortly thereafter, and on the 28th day of December, 1912, a fire occurred at the said premises and the property so insured was destroyed. The indictment further alleged that at the time of its destruction as aforesaid the property so insured did not exceed in value the sum of $1,500, and that the defendant well knew this, and that, notwithstanding such fact, and desiring and intending to cheat the said insurance company out of the sum of money exceeding the actual value of the insured property, defendants willfully and unlawfully presented a false and fraudulent claim of loss in the sum of $3,000, knowing at the time that the value of the property did not exceed the sum of $1,500. Defendant Panagoit demanded severance, and was separately tried, convicted, and sentenced to 18 months' imprisonment in San Quentin.

[1] Upon his arraignment, defendant demurred to the indictment, claiming that the facts stated in the indictment did not constitute a public offense, and later the same question was raised on motion in arrest of judgment. It is argued by defendant in support of these contentions that, by reason of the fact that the statute is silent as to the person to whom a presentation of loss should be made in order to constitute the offense, the statute is incomplete, and can only be given the interpretation that the presentation

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*For other cases see same topic and section NUMBER in Dec. Dig & Am. Dig. Key-No. Series & Rep'r Indexes is to be made to a regularly constituted court of justice. The section reads as follows:

> "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes, or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both."

While it is true, as claimed by defendant, that the statute does not expressly designate to what person or persons the presentation should be made, nevertheless it is not meaningless or incomplete for that reason. Respondent argues, and justly so, that the statute broadly includes any and every person, firm, or corporation who may or might be liable under a contract of insurance for the payment of the claim and that the statute is not confined to claims arising in courts of justice, but includes the presentation to any person or persons or any agent of person or persons who might be cheated or defrauded thereby. The intent to defraud is the gist of the offense; and the design of the Legislature was clearly to provide a punishment for the presentation of false fire claims with intent to defraud, irrespective of the person to whom such claim should be presented.

[2] Defendant further contends that the testimony taken before a grand jury was insufficient to support an indictment, for the reason that in no part of the evidence was it shown or testified to, that the presentation of the false claim to the insurance company or to any other person, was made in the city and county of San Francisco, and for that reason there is nothing to confer jurisdiction upon the superior court of Alameda county. This contention cannot be maintained. There is no provision in our law for thus reviewing the action of a grand jury in finding an indictment. The validity of an indictment cannot be attacked upon the mere ground of insufficiency of evidence to support it. Courts cannot, in the absence of a statute permitting it, inquire into the sufficiency of the evidence upon which the grand jury acted, in order to invalidate an indictment returned by them. In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. The indictment cannot be assailed on this ground. Brobeck v. Superior Court, 152 Cal. 289, 92 Pac. 646.

It is also claimed that there was no evidence introduced at the trial to prove this fact. An examination of the record does not sustain this claim. The adjuster for the insurance company testified that, after the defendant had made out the proof of loss upon the blank furnished him by such adjuster, the defendant gave it to the company. He further testified that defendant had informed him that he had so done, and that the company had subsequently sent it to him. Besides this, the defendant himself testified that he took it to the company after he had presented it. From all the evidence upon the subject, it sufficiently appears that defendant presented the proof of loss to the company at its office, which was situated at Leidesdorff and California streets, in the city and county of San Francisco.

[3] Another ground urged for reversal is that a certain so-called deposition was introduced in evidence before the grand jury, which contained nothing to show that the defendant was instructed as to his rights as required by section 1324 of the Penal Code, and that for this reason he should be exempted from prosecution. This so-called deposition consisted of certain voluntary statements made by defendant in the law offices of Goodfellow, Eells & Orrick, attorneys for the insurance company, concerning his claim, which statements were taken down in shorthand by a shorthand reporter; but the examination was not authorized, nor was it ever completed, the defendant having left the state during its progress, and his arrest upon this charge shortly followed.

The Penal Code (section 1324) provides in substance that any person offending against any of the provisions of that Code or against any law of the state is a competent witness against any other person so offending, and may be compelled to testify upon any trial, hearing, proceeding, or lawful investigation or judicial proceeding in the same manner as any other person, and if such witness demands that he be excused on the ground that his testimony will incriminate himself, he shall not be excused from testifying, but shall not thereafter be liable to prosecution based upon such testimony. The section further provides that its protecting parts shall not apply, where the privilege is not claimed; but such privilege is deemed to have been claimed unless the judge, foreman, or other person reads distinctly this section of the Code to the witness. The section was passed by the Legislature in 1911. Prior to its enactment our Supreme Court, in the case of People v. Wieger, 100 Cal. 352, 34 Pac. 826, decided that voluntary admissions made by a witness in a criminal action, when he is not in custody and has not been charged with a criminal offense, are competent evidence against him in a criminal prosecution subsequently inaugurated against him. In Commonwealth v. Bradford, 126 Mass. 42, it is held that on the trial of an indictment the voluntary testimony of a defendant before a fire inquest, reduced to writing and signed, and at a time when no criminal prosecution was pending against the defendant, was admissible against him.

The section of the Penal Code last referred to is in the nature of remedial legislation, and its purpose was undoubtedly to extend protection to witnesses in proceedings other than in the course of criminal prosecutions or other actions, in order that the inquiry for which the tribunals were created might not be impeded or their investigations frustrated through the fear of witnesses that their testimony might incriminate themselves; but it certainly can have no application to an inquiry which is not based or held upon legal authority, such as the one under consideration. The witness was not obliged to answer, and he understood that he could not be compelled so to do, for he refused to answer many of the questions put to him, giving as his reasons for such refusal that his inquisitors had no authority to question him. His statements given in support of his claim were therefore voluntary, and admissible against him. Besides this, the instrument appears to have been admitted in evidence in the trial under stipulation.

[4] The further claim that there is no proof that the insurance company to whom the false claim was made was a corporation is without merit. The witness Eitel testified as to the general reputation of the corporation for doing an insurance business, which is sufficient. 10 Cyc. 241; 7 Am. & Eng. Ency. 661.

[5] Defendant also complains of the action of the court in instructing the jury that a presentation had been made; but this fact the defendant himself admitted. This was a mere statement of the evidence, and is not erroneous. People v. Christensen, 85 Cal. 569, 24 Pac. 888; People v. Casey, 65 Cal. 260, 3 Pac. 874.

[6] Finally, objection is made to the alleged misconduct of the district attorney in referring to the crime of arson in his argument, and to the allowing of questions during the trial tending to show that the fire which destroyed the insured property was of incendiary origin. In attempting to rebut the claim of the defendant that he was unfamiliar with the preparation of claims of loss, the district attorney did offer evidence to show that, on other occasions and under other different names, defendant had suffered losses by fire, and that, on those occasions, he had prepared proofs of loss. The court, in admitting the evidence, instructed the jury to dismiss from their minds all evidence of former fires claimed to have been had by the defendant, and stated that such evidence was confined to and was admitted for the sole purpose of rebutting defendant's testimony as to his lack of knowledge in the preparation of a fire claim. While ordinarily evidence of another offense cannot be given in evidence, yet, whenever the case is such that the proof offered in support of the charge tends also to prove the commission of another offense, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

[7, 8] Assuming that the remarks of the district attorney in his argument would indicate that the defendant had committed the crime of arson, the question then arises whether such error is sufficient to justify a reversal of the judgment. It was the duty of the counsel for the defendant to call the attention of the court to improper remarks then and there, so that the court might have advised the jury to disregard them. It is too late to raise such question for the first time on appeal. People v. Kramer, 117 Cal. 647, 49 Pac. 842; People v. Ruef, 14 Cal. App. 576–619, 114 Pac. 48, 54. The record shows no such objection. Counsel for the defendant insists that the objection was made; but the record does not support him in this assertion, and we are bound by it. Moreover, under section 4½ of article 6 of the Constitution it would be our duty to affirm the judgment of conviction. The evidence shows beyond all question that the defendant and Patric conspired to defraud the insurance company by presenting a false claim of loss. Patric and Levy were one and the same person. Upon the loss of the property Patric solicited and procured from some of the firms where he had purchased merchandise bills representing purchases greatly in excess of the actual deliveries. These, with other bills which falsely represented merchandise purchased of certain firms where none had been purchased, were used and formed the basis of the claim filed by defendant, who testified that he had seen all this property, which had no existence, go into the premises. These, and other facts disclosed upon a review of the entire record, including the evidence, so far from showing that there has been a miscarriage of justice, tend strongly to prove the guilt of the defendant, and that no other verdict could have been reached if the alleged error had not been committed.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

25 Cal. App. 169

HANSON v. PAUSON et al. (Civ. 1352.)

(District Court of Appeal, First District, California. July 24, 1914.)

1. Pleading (§ 339*)—Demurrer—Ruling—Consent.

The overruling of a special demurrer to the complaint with the express consent of the defendant was tantamount to a withdrawal of the demurrer, in so far as it was granted on ambiguities and uncertainties in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1033–1045; Dec. Dig. § 339.*]

2. Corporations (§ 268*)—Insolvency—Action against Stockholders—Amount of Stock Issued.

In an action against an alleged stockholder of a corporation to recover his proportionate share of the corporation's indebtedness, the complaint alleged that at the time the indebtedness was created there was subscribed, issued, and outstanding 9,588 shares, and no more, of the capital stock of the company. *Held*, that such allegation, in the absence of a special demurrer, contained a sufficient statement of the total amount of the corporation's capital stock subscribed for at the time the indebtedness was incurred.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129, 1131, 1133–1147, 2276; Dec. Dig. § 268.*]

3. Trial (§ 396*)—Issues—Findings.

A fact alleged in the complaint and not denied may be found without evidence to establish it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

4. Evidence (§ 471*)—Witnesses (§ 248*)—Examination—Conclusion — Nonresponsive Answer.

On an issue as to whether defendant was a stockholder of a corporation, the vice president was offered as a witness, and asked to state the circumstances under which the stock in question was issued to the defendant. An objection having been overruled, the witness answered that the stock was issued to F., trustee for defendant, as a bonus for a loan of $25,000, which defendant had made to the corporation. *Held*, that the answer was not responsive, but was the conclusion of the witness, and was subject to motion to strike.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471;* Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

5. Corporations (§ 171*) — Ownership of Stock—Evidence.

On an issue as to whether or not defendant was a stockholder in a corporation, evidence of the circumstances controlling the issue of the stock to him is competent, provided it is accompanied with or followed by other evidence to show that the circumstances had been communicated to defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636; Dec. Dig. § 171.*]

6. Evidence (§ 471*)—Conclusions on Facts.

A witness may not testify as to his conclusions concerning the effect of a transaction, even where the facts themselves are disclosed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471;* Witnesses, Cent. Dig. §§ 833–836, 988.]

7. Corporations (§ 171*) — Stockholders—Evidence—List.

On an issue as to whether defendant was a stockholder in a corporation, a list of names with the heading "Notice sent to the following," written on the flyleaf of the corporation's stock journal, which contained defendant's name, among others, which list was not shown to have been brought to defendant's knowledge, was inadmissible, in the absence of any evidence that notices had ever been sent to defendant according to the list.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636; Dec. Dig. § 171.*]

8. Corporations (§ 171*)—Stockholders—Evidence.

It having been admitted that defendant's name was not entered as a stockholder on the books of a corporation, the entry of his name in a list of names written on the flyleaf of the corporation's stock journal, under the heading "Notice sent to the following," did not constitute an entry of his name on the stock book of the corporation as a stockholder, and did not constitute prima facie evidence that he was the owner of stock in the corporation under Civ. Code, § 322, imposing a liability on stockholders for corporate debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636; Dec. Dig. § 171.*]

9. Corporations (§ 171*) — Stockholders — Evidence of Relation.

A charge that defendant was a stockholder in a corporation, made to him in a meeting of stockholders and creditors, was not evidence against him that he was a stockholder in a suit to recover his proportion of corporate indebtedness, unless the truth of the charge was admitted by defendant, either by his express answer or his acquiescence indicated by his silence, or by acts and conduct on his part which could be fairly construed as an assent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 633–636; Dec. Dig. § 171.*]

10. Corporations (§ 244*) — Issuance of Stock—Collateral Security—Ultra Vires—Effect.

Where a corporation illegally issued certain of its stock as a pledge for the repayment of a loan, the issue would be a nullity, and would not be effective to transform the person for whose benefit it was issued from a pledgee to a stockholder so as to render him liable as such for corporate debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960–977; Dec. Dig. § 244.*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Edward J. Hanson against Sherman Pauson and others. From a judgment against defendant Frank Pauson, charging him with an assessment, as a stockholder, to pay indebtedness of the Monadnock Brick Company, Incorporated, he appeals. Reversed and remanded.

A. L. Weil, of San Francisco, for appellant. Vogelsang & Brown, of San Francisco, for respondent.

LENNON, P. J. This is an appeal by the defendant, Frank Pauson, from a judgment entered against him in the sum of $790.50, and from an order denying him a new trial, in an action instituted to determine and enforce his liability as a stockholder for the indebtedness of the Monadnock Brick Company, Incorporated. The plaintiff's complaint proceeded upon the theory that the defendant, Pauson, was a stockholder in the corporation at a time when the corporation had made and delivered its two certain promissory notes in the aggregate sum of $11,500 to the City and County Bank, plaintiff's assignor. The complaint alleged the nonpayment of these notes, and in effect prayed for a judgment against the defendant, as a stockholder of the corporation, for his proportionate share of the unpaid principal and interest due on said notes. The defendant in his answer denied that he was a stockholder in the corporation. The issue thus raised ultimately became the paramount question upon the trial of the case. It was an admitted fact in the case that prior to the execution and delivery of the corporation's notes to plaintiff's assignor, the corporation, in consideration of a loan of $25,000, had executed its promissory note in that amount, indorsed by its three directors, to the defendant, and at the same time issued and delivered to him a certificate for 500 shares of the corporate capital stock in the name of the corporation's then secretary, A. Fieste, as trustee. The action was defended upon the theory that the defendant had merely received the stock in question as security for the payment of the loan made by him to the corporation. The plaintiff, on the other hand, contended and attempted to show that the stock was issued, delivered, and accepted as a bonus for the making of the loan, and that the defendant thereby became a stockholder of the corporation. The trial court found as a fact from the evidence adduced upon the whole case that at the time the corporate indebtedness in suit was incurred, defendant was the equitable owner of 500 shares of the corporation's stock, which stood upon its books in the name of A. Fieste as trustee, and deduced the conclusion of law therefrom that the defendant was liable as a stockholder for his proportionate share of the indebtedness of the corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] At the outset it is contended that the plaintiff's complaint does not state facts sufficient to constitute a cause of action. This contention is based upon the assumption that the complaint does not allege the total number of shares of stock of the Monadnock Brick Company which were subscribed at the time the obligation to plaintiff's assignor was incurred. In this behalf the allegation of the complaint is:

> "That at the time said sum was loaned by said City and County Bank to said Monadnock Brick Company and the aforesaid promissory notes executed therefor, there were subscribed, issued, and outstanding 9,588 shares, and no more, of the capital stock of said Monadnock Brick Company."

The ambiguity and uncertainty, if any, existing in this allegation could have been corrected by the interposition of a special demurrer. Such a demurrer was in fact interposed. The demurrer, however, was overruled with the express consent of the defendant. This was tantamount to a withdrawal of the demurrer, in so far as it was grounded upon the ambiguities and uncertainties of the complaint. Evans v. Gerken, 105 Cal. 311, 38 Pac. 725.

[2, 3] This left the complaint standing as if no special demurrer had been interposed, and in the absence of such a demurrer, we are satisfied that the complaint contained a sufficient statement of the total amount of the capital stock of the corporation that was subscribed for at the time the obligation in suit was incurred. Bashore v. Parker, 146 Cal. 525, 80 Pac. 707; Thomas v. Wentworth Hotel Co., 158 Cal. 275, 110 Pac. 942, 139 Am. St. Rep. 120. The allegation of the complaint in this behalf was not denied by the answer of the defendant; therefore the total number of shares subscribed in the corporation at the time the indebtedness in suit was incurred, was, as pleaded in the plaintiff's complaint, an admitted fact in the case. Consequently no evidence was necessary to sustain the finding of the trial court upon this phase of the case.

[4] F. H. Hilbert, vice president of the Monadnock Brick Company, was a witness for the plaintiff. During the course of his direct examination, he was asked to state the circumstances under which the stock in question was issued to the defendant. Objection was made to the question in effect upon the ground that evidence of the circumstances concerning and controlling the issuance of the stock was incompetent unless such circumstances were shown to have been communicated to the defendant. The objection was overruled and the witness allowed to answer that the stock "was issued by the corporation to Mr. Fieste, trustee, for Mr. Pauson, as a bonus for a loan of $25,000, which he had made to the Monadnock Brick Company." A motion to strike out the answer upon the ground stated in the objection and upon the further ground that the answer stated merely the conclusion of the witness was denied.

[5, 6] Upon the issue of whether or not the defendant was a stockholder in the corporation, evidence of the circumstances covering and controlling the issuance of the stock to him was competent, relevant, and material, provided such evidence was accompanied with or followed by other evidence showing or tending to show that the circumstances of the transaction had been communicated to the defendant. Jones on Evidence, § 517.

The trial court apparently overruled the objection upon the assumption that the defendant's knowledge of the circumstances under which the stock was issued would be subsequently shown by other evidence. If this be so, the objection as made was rightly overruled for the time being, and if the witness had answered the question propounded to him, and his testimony had been followed by competent evidence that the circumstances of the transaction had been communicated to the defendant, no fault could be finally found with the ruling of the trial court. The question as propounded, however, was not answered by the witness. His answer cannot be construed to be even an attempt to narrate the circumstances under which the stock in question was issued to the defendant. At its best, his answer embodied no more than his mere conclusion as to the result of some undisclosed action which may have been taken by the officers of the corporation concerning the issuance of the stock in question. A witness may not testify as to his conclusions concerning the effect of the transaction, even where the facts themselves are disclosed; and surely he should not be permitted to give in evidence his conclusions, adduced from undisclosed facts and circumstances. The legal effect of the issuance of the stock to the defendant was the paramount point in controversy in the present case, and this was a question which should have been decided by the trial court upon a consideration of the facts of the transaction, whatever they may have been, unaided and uninfluenced by the conclusion of the witness. The motion to strike out the answer complained of should have been granted.

[7] Further along in the testimony of the witness Hilbert, it appeared that a list of names with the heading, "Notice sent to the following," was written upon the flyleaf of the corporation's stock journal. This list of names was offered in evidence upon behalf of the plaintiff, whereupon objection was made upon the ground that it was incompetent, irrelevant, and immaterial, that it was not shown that the list of names was made and issued in the regular course of the business of the corporation, and that it did not appear "that the defendant * * * was cognizant of the fact that his name appears there, and it was an attempt to bind him by something not done in his presence." In response to a question from the court as to the purpose of offering the list in evidence, counsel for the plaintiff stated:

> "I am going to follow it up by showing that Mr. Pauson was on the list; (that) he was the party to whom notice was to be given; that the secretary always did send out notices to attend stockholders' meetings to him. I want to show he was a stockholder."

[8] The objection was overruled, and the list, which included the name of the defendant, was received in evidence, presumably for the purpose stated. The question as to whether or not such list was admissible in evidence as a foundation for proof of the further fact that notices to stockholders were usually sent to the parties, including the defendant, whose names appeared thereon, is of no consequence, and need not be decided, in view of the fact that the admission of the list in evidence was not followed by any evidence showing that such notices had been sent to the defendant. The only evidence upon this point is to be found in the testimony of the witness Hilbert, which was to the effect that he knew that the bookkeeper of the corporation had been instructed to send notices of the corporation's affairs to the parties whose names appeared upon the list, but he did not know of his own knowledge that such instructions had in fact been complied with. If the name of the defendant had been entered on the stock book of the corporation as a stockholder, such entry would have been prima facie evidence that he was the owner of stock in the corporation. Civ. Code, § 322. And if such proof had been made, then in this action to enforce his liability as a stockholder, the burden of proving that he was not a stockholder would have been upon him. Jones on Evidence, § 517. But it is an admitted fact in the case that the defendant's name was not entered as a stockholder upon the books of the corporation; and while the preliminary proof received in support of the offer of the list in evidence may have been sufficient to show that it was prepared by the bookkeeper of the corporation for the purpose of forwarding notices to real or supposed stockholders, nevertheless such list cannot be construed and considered as an entry in the books of the corporation within the meaning of section 322 of the Civil Code; and therefore such list in and of itself did not constitute any evidence of the fact that the defendant was a stockholder in the corporation. It follows that the ruling of the trial court was erroneous in so far as the list in question was received in evidence for the purpose of showing that the defendant was a stockholder.

[9] In addition to the evidence erroneously admitted under the rulings previously noted, plaintiff attempted to show that the defendant was present at a stockholders' meeting of the corporation, that he made no reply when asked by a creditor of the corporation "to advance money to the corporation because * * * he was a stockholder—or something to that effect." If the defendant had attended this meeting as a real or ostensible stockholder, and while there had failed to deny the assertion that he was a stockholder, this doubtless would have been some evidence tending to show that he had received and accepted the stock in controversy as a bonus, and not, as he testified, as collateral security for the payment of the corporation's notes to him. But the evidence falls far short of showing any such situation. In the first place, as the evidence shows, the meeting referred to was not composed exclusively of stockholders—to the contrary, it shows that the creditors of the corporation were invited to be present "in order to see what they could do to straighten out" the affairs of the corporation, and in response to that invitation, many of the creditors attended the meeting. The defendant was present at the meeting. Admittedly he was a creditor of the corporation; and the evidence does not show that he attended the meeting in any other capacity. Consequently it cannot be said that the plaintiff's evidence affirmatively shows that the defendant attended the meeting as a real or ostensible stockholder, and his presence in any other capacity will not weigh as evidence against him. The charge that the defendant was a stockholder in the corporation was not evidence against the defendant unless the truth of the charge was admitted by the defendant either by his express answer, or his acquiescence as indicated

by his silence, or by acts and conduct on his part which could be fairly construed as an assent.

While the testimony of two witnesses for the plaintiff is positive upon the point that at the meeting referred to one of the creditors in effect charged the defendant with being a stockholder, yet neither witness testified that the defendant remained silent under the charge. One witness was unable to recall the defendant's reply, and the other refused to say that he made no answer. On the other hand, the defendant as a witness in his own behalf, while admitting that he was in effect charged by a creditor of the corporation with being a stockholder, testified, "I told him positively that I did not own a share of stock in the company." Clearly the evidence upon this phase of the case failed to show that the defendant by acquiescence or otherwise admitted the truth of the charge that he was a stockholder in the corporation.

[10] Incidentally it is contended that the corporation could not legally issue its stock as a pledge for the repayment of a loan, and from this it is argued that it must be presumed as a matter of law that the stock in question was issued and accepted in pursuance of a lawful purpose, and the benefit, as evidence, of the asserted presumption is claimed in aid of the finding of the trial court.

Ordinarily, of course, the issuance and acceptance of corporate stock, regular upon its face, carries with it a presumption that such stock was issued for a lawful purpose, but we apprehend that no such presumption prevails in the presence of proof to the contrary; and, conceding without deciding that the issuance of the stock in question as a pledge was an act ultra vires, such issue would be a nullity, and certainly would not have the effect of transforming the defendant from a pledgee into a stockholder.

The testimony concerning defendant's presence at the meeting of the stockholders, and the charge made there that he was a stockholder, coupled with the testimony hereinbefore referred to in the discussion of the rulings of the trial court, constitutes practically all of the evidence upon which the plaintiff relied at the trial to show that the defendant was a stockholder of the corporation. The evidence adduced upon behalf of the defendant did not develop anything in aid of the plaintiff's case, or which tended in any degree to support the finding in question; and if, as previously indicated, the testimony as to what transpired at the stockholders' meeting did not constitute any evidence against the defendant, it follows that the finding of the trial court that he was the equitable owner of the stock in question is supported only by the evidence which was erroneously admitted. This being so, it is obvious that such finding is not supported by any competent evidence.

For the reasons stated, the judgment and order appealed from are reversed and the cause remanded for a new trial.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 177

McNUTT et al. v. PABST et al. (Civ. 1402.)

(District Court of Appeal, Second District, California. July 24, 1914.)

1. Appeal and Error (§ 1001*)—Review—Verdict—Conflicting Evidence.

Where, in a suit to recover for attorneys' services in defending an action involving the title to certain land, the evidence as to the value of the land was conflicting, and ranged from $200 to $2,000 per acre, a jury's finding as to the value of the land, supported by some substantial evidence, could not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. § 1001.*]

2. Evidence (§ 568*)—Value—Opinions—Effect.

In a suit for attorneys' services in defending an action involving the title to real property, the value of such property furnished only one of the factors to be considered in determining the reasonable value of the services; the jury, notwithstanding any opinion expressed by the witnesses, being authorized to form its own judgment as to the value of the land, considering its location and surrounding conditions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392–2394; Dec. Dig. § 568.*]

3. Evidence (§ 558*) — Experts — Cross-Examination—Attorney Fees—Reasonable Value.

In a suit to recover attorney fees for the defense of an action involving the title to real property, valued by the witnesses at from $200 to $2,000 per acre, it was proper cross-examination of certain attorneys, who were called to testify as to the value of such services, to ask them to fix the value, assuming that the land was worth only from $50 to $200 per acre, though there was no evidence to warrant such assumption, as tending to illustrate the weight the matter of the value of the land had with the witnesses in leading them to conclusions expressed as to the value of the services rendered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2377, 2379; Dec. Dig. § 558.*]

4. Appeal and Error (§ 1056*)—Prejudice—Exclusion of Evidence.

Where, in a suit to recover for attorneys' services, the evidence fully showed all the facts as to what was done before and at the time of the transaction, and one of the plaintiffs testified fully as to having acted diligently according to the view he took of the case for the best interests of his clients, and explained why a cross-complaint had not been filed, as it was insisted by defendants should have been done, plaintiffs were not prejudiced by the court's refusal to allow one of them to testify as to whether he had done everything he thought necessary or proper to do in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

5. Trial (§ 339*)—Verdict—Correction.

In a suit by attorneys to recover fees, defendants took issue as to the value of the services, and by a cross-complaint demanded damages for alleged negligent handling of the suit, which was tried, and in which defendant P. was successful. The jury first brought in two verdicts, one in favor of plaintiffs for $500, and the other in favor of defendants for $325; whereupon the court returned them to the jury room, and thereafter they submitted one verdict in favor of plaintiffs for $175. *Held*, that the verdicts first returned should be regarded as a finding that the full value of plaintiffs' services, had there been no negligence, would have been $500, but that defendants had suffered in the sum of $325 because of their negligence, and that the court therefore properly returned the jury to their room and had the verdict corrected.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No Series & Rep'r Indexes

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 791–794; Dec. Dig. § 339.*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Bonnie Elouise McNutt, as executrix of the estate of Cyrus F. McNutt, deceased, and others, against Anton Pabst and others. Judgment for plaintiffs. From an order denying their motion for a new trial, they appeal. Affirmed.

Ben Goodrich, of Los Angeles, for appellants. Geo. L. Keefer, of Los Angeles, for respondents.

JAMES, J. In the year 1909 Cyrus F. McNutt, Joseph E. Hannon, and Benjamin Balmer, as attorneys at law, were employed by respondents to appear and defend in two actions then pending in the superior court in the county of Los Angeles, in each of which respondents appeared as parties defendant. Cyrus F. McNutt has since died, and his executrix has been substituted herein in his stead. The actions first referred to concerned the question as to the title to a certain lot of land, comprising about eight acres. Pursuant to their employment the attorneys for respondents prepared their defense to the first action, which necessitated a lengthy examination of the records in the county recorder's office, and that action was finally tried, the trial occupying some three days. The city of Los Angeles was also a party defendant, and a disclaimer was first filed on its account, but later, upon application made in that behalf, the court allowed the said city to file an answer, by which it set up title in itself to the land in question. This answer was filed on January 14, 1910, and in May following the plaintiff therein dismissed the action as to the city of Los Angeles. The findings and decree of the court as finally entered were in favor of the respondent Anton Pabst; it being determined that he held, as against the plaintiff there suing, good title to the land then in controversy. No contract had been made between respondents and their attorneys as to payment of any specific sum on account of fees for services rendered by the attorneys in either of the actions to quiet title, and after the first cause had been tried and determined a dispute arose between respondents and their counsel as to what amount it would be proper for the former to pay. The attorneys claimed that the sum of about $1,750 had been earned by them, and respondents objected to paying more than $500. Thereupon the attorneys refused to proceed any further as counsel for respondents in the second action, and brought this suit to recover the sum of $1,720 as for services rendered in the first suit and $250 for services in the second action. The defendants took issue as to the value of the services, and by cross-complaint made a claim for damages by reason of alleged negligent handling of the suit which was tried, and in which respondent Anton Pabst was the successful party. The jury returned a verdict in favor of appellants for the sum of $175, and, judgment being entered thereon, appellants made their motion for a new trial, and appealed from the order denying the same.

[1] Considerable testimony was introduced at the trial touching the value of the land which was the subject of the actions heretofore referred to, this evidence being offered as a basis for the fixing of a reasonable sum to be allowed as compensation to counsel. The testimony in this behalf varied greatly; some witnesses fixing the value of the eight acres at as low as $200 per acre, and others fixing as high a figure as $2,000 per acre. It is contended on behalf of appellants that the evidence preponderated in their favor upon the question as to the land being worth approximately $2,000 per acre. It is not in terms urged that the "preponderance" of the evidence rested in that direction, but such must be the effect to be given to the claim made upon that matter. This contention must be dismissed with but brief comment, for the record discloses that there was some substantial evidence both ways upon the question of the value of the land, and, that being true, this court cannot substitute its judgment for that already declared by the jury.

[2] Moreover, a consideration of the value of the property affected in the actions referred to only furnishes one of the factors to be taken in view by the jury in arriving at a verdict as to the reasonable value of the services rendered by the attorneys; and notwithstanding any opinion expressed by the witnesses, the jury had the right to form its own judgment as to that value, taking into consideration the location and conditions surrounding the land, all of which were described in the evidence.

[3] It is complained that the court erred in allowing questions to be asked of certain attorneys who were called as witnesses and of some of the parties plaintiff, which required the witnesses to fix the amount of reasonable attorney's fees assuming that the land was worth only from $50 to $200 per acre. Whether there was sufficient evidence to warrant this assumption as to values is not material, because as a matter of cross-examination the questions were proper, as

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tending to illustrate just what weight the matter of the value of the land had with the witnesses in leading them to conclusions expressed as to the worth of the legal services rendered. It may be here suggested that in the transcript there are not set out the instructions given by the trial court to the jury, and it may be therefore assumed that those instructions correctly stated the law, and that, if the effect of any of the evidence should have been limited by the instructions, such instructions so limiting it were declared to the jury. Code Civ. Proc. § 2061. This observation is pertinent to be kept in mind in a consideration of most of the points made by appellants relating to the admission and rejection of testimony.

[4] It is contended again that the court erred in refusing to allow appellant Balmer to testify as to whether he had done everything he thought necessary or proper to do in the case which was tried. The evidence showed fully all of the facts as to what was done before and at the trial of the action, and the jury was called upon to determine as to whether counsel had performed their full duty in that behalf. One of appellants, Mr. Hannon, did testify quite fully as to having acted, according to the view he took of the case, diligently for the best interest of his clients. One of the grounds for damages alleged to have been caused to respondents was that appellants should not have permitted the city to be dismissed from the action which was tried, but that a cross-complaint should have been filed, and so caused to be determined in the one action all questions between respondents and the city relating to the title to the land in dispute. Mr. Hannon explained why this was not done, and why in his judgment and the judgment of his associates it was deemed best not to take the affirmative as against the city; but evidently the jury, as it had the right to do, concluded that counsel was negligent in not so acting. Were that question, as a matter of fact, submitted here, and were it a proper one for review, this court might well differ with the jury as to its conclusion. However, that matter is past questioning. It does seem from the record that the work devoted by counsel to the interest of respondents was laborious, and involved a large amount of time and attention to detail. The amount awarded to them by the jury seems very small, considering the services rendered; still upon a careful examination of each of the points made for reversal, and assuming, as has been before suggested, that the jury was fully and correctly instructed as to the law, it cannot be said that any prejudicial errors have been shown which demand that a new trial should be ordered.

[5] From affidavits used on the motion for a new trial it was shown that the jury first brought in two verdicts, one in favor of appellants for $500, and the other in favor of respondents for $325. Upon instruction from the court the jury was returned to the jury room and thereafter submitted one verdict in favor of appellants for the sum of $175. The minute record shows only the return of the verdict for $175. It may be assumed, conceding that the question of irregularity in the action of the jury is properly presented, that the jury intended by their double verdict, first offered, to determine that the full value of the services rendered by appellants, had there been no negligence, was the sum of $500, but that there had been negligence and damage suffered as a consequence, which reduced the value of the services by the sum of $325. It was altogether proper under the circumstances for the court to have the jury returned to the jury room and the verdict corrected.

A discussion has not been made of each point as detailed in the brief of counsel for appellants, but a very careful consideration of the argument in support of the contention that the order denying the motion for a new trial should be reversed does not suggest a conclusion favorable to appellants' view of the case.

The order is affirmed.

We concur: CONREY, P. J.; SHAW, J.

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25 Cal. App. 199

BRAGG v. MARTENSTEIN. (Civ. 1487.)

(District Court of Appeal, First District, California. July 28, 1914. Rehearing Denied by Supreme Court Sept. 26, 1914.)

1. GIFTS (§ 69*)—OBLIGATIONS OF DONEE—ENFORCEMENT.

Where an understanding between testatrix and her father, whom she made her agent to deliver certain stocks and bonds as gifts to her sisters, that the dividends and income should be applied to the cost of administering testatrix's estate, was not a condition affecting the validity of the gifts, it was at most an obligation cast on the respective donees to so apply the income, which could be enforced against them in an appropriate action at law.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 148, 149; Dec. Dig. § 69.*]

2. GIFTS (§ 62*)—WRITINGS—INDORSEMENT OF WRAPPER—ONLY.

Testatrix, being desirous of making a gift of particular stocks and bonds to her four sisters, prepared four envelopes which contained certain of her stocks and bonds, duly indorsed, and on each of the envelopes she wrote the name of one of her sisters, with the statement that the inclosure was her property. She then inclosed each of these envelopes in another, addressed to the sister to whom the inner envelope referred, directing that in case it became apparent that she was about to die her father should put the contents of the envelopes into the possession of the persons to whom their inclosures were addressed. She wrapped the four envelopes in a paper wrapper, on the outside of which was written, "In case of my death, to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein," placing the package in an open desk in her room. When she was about to die, and was conscious, though apparently asleep, her father took the package from the desk and mailed the envelopes to the persons to whom they were addressed. *Held*, that the word "only" in the indorsement of the package was a limitation on the persons who might open it, and not on the time when it should be opened; and hence, in the absence of any instruction as to the delivery of the inclosed documents, such indorsement did not indicate a change in the donor's mind with reference to her direction to her father as to the delivery of the papers.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 122–132; Dec. Dig. § 62.*]

3. CONTRACTS (§ 164*)—WRITINGS—CONSTRUCTION.

Where an indorsement on the wrapper of certain envelopes tied together, containing stocks and bonds intended by testatrix to be given to particular persons to whom the envelopes were addressed, was written contemporaneously with the writings on the inclosures and as part of the same transaction, they were to be construed together, as provided by Civ. Code, § 1642.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746–748; Dec. Dig. § 164.*]

4. CONTRACTS (§ 164*)—CONSTRUCTION—LEGALITY.

Under Civ. Code, § 1643, providing that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties, no part of a writing, or of several contemporaneous writings, should be so construed as to render them unlawful, inoperative, indefinite, unreasonable, and incapable of being carried into effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746–748; Dec. Dig. § 164.*]

5. GIFTS (§ 71*)—EVIDENCE—WRITINGS—CONSTRUCTION.

On an issue as to the validity of certain gifts, it was the duty of the court to construe an indorsement written by testatrix on the wrapper of the package so as to render the gifts valid and carry out the intention of the writer, if possible, and to have recourse to the circumstances under which the indorsement and several contemporaneous writings were made, as disclosed by the undisputed evidence in the case, as provided by Civ. Code, § 1647.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 113; Dec. Dig. § 71.*]

6. TRIAL (§ 136*)—QUESTIONS OF LAW OR FACT—CONSTRUCTION OF WRITINGS.

When a writing requires explanation, and the circumstances surrounding its creation are undisputed, it is a question of law for the court to determine the proper construction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. § 136.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Robert Bragg, as executor of the will of Mary Jane Bragg, deceased, against Rebecca Bragg Martenstein. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Gerald C. Halsey, of San Francisco, for appellant. Randolph V. Whiting, of San Francisco (T. A. Perkins, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an action brought by Robert Bragg, as one of the executors of the last will and testament of his daughter, Mary Jane Bragg, deceased, against Rebecca Bragg Martenstein, another of his daughters, and the coexecutor of the will of his said deceased daughter, to recover damages for the alleged wrongful conversion of certain stocks, the property of the decedent during her lifetime. The case was tried before the court with a jury. Upon the conclusion of the testimony, and upon motion of the defendant, the court directed the jury to return their verdict in defendant's favor; and it is the alleged error of the court in so doing which presents the chief question for consideration upon this appeal.

The facts of the case are practically undisputed, and are chiefly derived from the testimony of the plaintiff himself. They show that the plaintiff was the father of a family of 14 children, among whom were 5 daughters, of whom the deceased, Mary Jane Bragg, was the eldest. For many years Mary Jane Bragg was a teacher in the public schools of San Francisco, during which time she accumulated considerable property, about $40,000 worth of which was invested in the stocks and bonds of various corporations. A number of years ago she retired from teaching, and during the latter years of her life was afflicted with an affection of the heart, from which she was likely to die suddenly at any time, and to which, in fact, her decease was due. In the year 1898, Mary Jane Bragg and her father, the plaintiff herein, entered into an understanding and agreement that each of them should prepare or have prepared papers disposing of their respective properties, which were to be placed in their respective packages, and that, in case it become apparent to either that the other was about to die, the former should put the contents of the package or envelopes of the one about to die into the possession of the parties to whom their inclosures were addressed. In pursuance of this arrangement, and during the month of February, 1910, Mary Jane Bragg prepared four envelopes, which contained certain of her stock or bonds, duly indorsed by her; and upon each of said envelopes she wrote the name of one of her said sisters, with the statement that the inclosure was her property. She then inclosed each of these envelopes in another envelope addressed to that one of her sisters to whom the inner envelope referred. She also at this time made her will, in which she specifically disposed of the rest of her property, but from which she omitted all reference to the stock and bonds which she had thus placed in their respective envelopes. Her father and her sister, the defendant herein, were made the executors of this will. The envelopes above referred to were placed in an open desk in her room, which was at all times open and available to the plaintiff, in whose home she lived and died. The relation between herself, her father, and her sisters was at all times during her life one of unclouded confidence and affection. About four days before her death, in July, 1910, the plaintiff was in her room, having been informed by her physician that she had but a few more days to live, and he himself believing her to be dying, and believing also that the time had come for carrying her wishes with respect to these several envelopes and their inclosures into effect, he went to her open desk, and taking from it the four envelopes addressed by his dying daughter to her four sisters, respectively, went out and mailed each of them to the person to whom each was thus addressed. On the following day he saw the defendant herein, and, learning that she had received her envelope by mail, advised her to have the stocks which it contained transferred at once into her own name upon the books of the several corporations, and he gave the like advice to his other daughters, who acted thereon before their sister's death. At the time the plaintiff took the several envelopes in question from the desk of his daughter, she was lying propped up in bed, in full view of her desk and of himself, but was apparently asleep. He did not speak to her then as to what he was about to do, or thereafter as to what he had done, because of her dying condition, although her mind remained clear up to the time of her death; nor did her sisters, acting on his advice, directly refer to the fact of their receipt of her gifts, apparently for the same reason.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] At the time the plaintiff took these several envelopes from his daughter's desk, they were wrapped, according to the plaintiff's testimony, in a piece of common brown paper and tied with a piece of common string. This wrapper, he states, he threw into a waste basket, in another room, without looking closely at it; and there it remained until after his daughter's death, which occurred four days later. Some time after her death he noticed this piece of brown wrapping paper in the waste basket, and observed that it had some writing upon it, in the hand of his deceased daughter, and which was in the following words:

> "In case of my death, to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein. [Signed] Mary Jane Bragg. Dated San Francisco, Feb. 4, 1910."

The piece of this paper containing this writing he preserved. Shortly thereafter the will of Mary Jane Bragg was produced and presented for probate by the plaintiff and the defendant, as the co-executors thereof. From the petition for probate and the inventory of the estate all reference to the stock and bonds embraced in the envelopes above referred to was omitted; and it was several months after the admission of said will to probate before the plaintiff took any steps in the way of an assertion that the purported gifts of stock and bonds by the deceased to her sisters were invalid or ineffectual, or that their acts in converting the same to their own names and uses, upon his initiative and advice, were wrongful. In the course of his testimony upon the trial of this cause the plaintiff stated that there was an understanding with his deceased daughter that the dividends and income from the stock and bonds which he had put into the possession of her sisters, as above set forth, was to be applied to the cost of administering her estate; but there is nothing either in her direction or in his action indicating that this was to be treated as a condition in any way affecting the validity of the gifts themselves. At the most it was only an obligation cast upon the respective donees to apply these revenues to the indicated purpose, and which would have been enforceable against them in an appropriate action at law.

The foregoing are substantially the undisputed facts in the case, and the sole question which was presented to the trial judge, at the time he granted the defendant's motion for an instruction to the jury to find a verdict in her favor, was the question as to what construction should be placed upon the writing of the deceased upon the brown paper wrapper about the envelopes which contained the decedent's proposed disposition of that portion of her estate; and the sole question presented here is as to whether it was the province of the trial court or of the jury to construe that writing, and to determine therefrom whether the decedent intended thereby to change the earlier arrangement entered into with her father, and to revoke his agency to make a delivery of the respective envelopes by which her wishes as to the disposition of those portions of her property embraced therein were to be given effect.

[2] It is to be observed that the writing of the deceased upon the brown paper wrapper, which inclosed the other and directed and indorsed envelopes, and their respective inclosures, is ambiguous and uncertain on its face, and that it becomes more so when considered in connection with said inclosures. It reads:

> "In case of my death to be opened only by Robert Bragg, Sr., or Rebecca Bragg Martenstein. * * *"

It is first to be noted that the word "only" is clearly a limitation upon the persons who might open the package, and not upon the time when it was to be opened. It is also to be noted that nothing is therein said or intimated as to what is to be done with the envelopes or their contents within the wrapper, when opened, and that no direction is given as to their delivery to any person or persons by those who were to open it. Neither did the inclosures contain any such direction. This absence of any instruction as to the delivery of the inclosed documents is highly important and significant, as bearing upon the interpretation of the writing on the wrapper and the real purpose and intent of its writer, for it indicates that she did not have the idea of the delivery of the papers in mind in making this writing, and hence that she did not intend thereby to change whatever previous direction she may have given respecting the delivery of the inclosed envelopes.

[3, 4] To adopt any other view is to place an interpretation upon this writing which would render ineffectual and abortive her every other intent and act as expressed in the writings within the wrapper, and in this connection it is important to note that the writing upon the outside of the wrapper and the writings upon and within its inclosures were made contemporaneously and as parts of the same transaction by the decedent, and are to be construed together. Civ. Code, § 1642. When so construed it becomes all the more apparent that the writing upon the wrapper cannot have any reference to the delivery of the papers within it with a view to the time of their taking effect, for otherwise it would defeat and render void every purpose for which these papers were prepared and indorsed and inclosed within their respective envelopes, and it is a cardinal rule of construction that no part of a writing or of several contemporaneous writings is to receive an interpretation which would render it or them unlawful, inoperative, indefinite, unreasonable and incapable of being carried into effect. Civ. Code, § 1643. Such would be the inevitable effect of interpreting the writing upon the outside of this wrapper to mean either that the opening of the package or the delivery of the inclosed papers was to be postponed until after the death of the person who prepared them. It is the much more consistent and reasonable interpretation that it was merely the writer's intention that if for any reason the inclosed documents were not delivered before her death, in accordance with her other arrangements in that regard—as, for instance, they might not be, by reason of the suddenness of her decease—that then and in that event they should pass into the hands only of those whom she had designated in her contemporaneous will to be the executors of her estate.

[5] It was a legal duty cast upon the trial court to place such an interpretation upon the obscure direction of the writing upon the outside of this wrapper as would not only give a reasonable effect to what the writer intended by it, but in so doing would also render effectual and valid the intent and purpose of the writer as expressed in its inclosures. In order to do this, it was the province of the court to have recourse to the circumstances under which these several contemporaneous writings were made, as disclosed by the undisputed evidence in the case. Civ. Code, § 1647.

[6] It is also a rule of construction and of practice that, when a writing requires explanation and when the circumstances surrounding its creation, as disclosed by the evidence, are undisputed, it becomes a question of law for the court, and not a question of fact for the jury, to determine what the proper construction of the writing should be. In this case the undisputed facts, as disclosed by the plaintiff himself, show that it was the lifelong purpose and intent of his daughter that her four sisters should be invested with the ownership of the respective shares of stock and bonds which were inclosed in the envelopes respectively indorsed and directed to them, and that this should be done by the delivery of such envelopes to the persons to whom they were directed when it became apparent to her father that she was about to die, and that he was to be and act as her agent in the execution of this purpose; that no intent on the part of his daughter to change this plan or revoke this agency was ever manifested by her to him during her life, although they were living at all times together in the utmost of mutual harmony and confidence, which relations also at all times embraced the beneficiaries of her intended gifts. These undisputed facts surrounding these ambiguous writings of the deceased were before the court when the motion of the defendant for an instruction to the jury to return a verdict in her favor was made, and we think it was the province of the court, as a matter of law, to determine the intent of the deceased as disclosed by her writings and explained by this evidence, and to instruct the jury accordingly, and that the court committed no error in its instruction.

There are certain other alleged errors of the court during the trial of the cause, but they are not of sufficient importance to merit consideration here.

The judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

25 Cal. App. 804

BRAGG v. CUMMING. (Civ. 1372.)

(District Court of Appeal, First District, California. July 28, 1914. Rehearing Denied by Supreme Court Sept. 26, 1914.)

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Robert Bragg, as executor of the will of Mary Jane Bragg, deceased, against Elizabeth Bragg Cumming. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

T. A. Perkins, of San Francisco (R. V. Whiting, of San Francisco, of counsel), for appellant. Gerald C. Halsey, of San Francisco, for respondent.

KERRIGAN, J. The facts in this case as presented at the trial were identical with those produced and considered by the trial court and reviewed by this court in the case of Bragg v. Martenstein, 143 Pac. 79. The reasoning and conclusions of this court in that case are in all respects applicable to the case at bar.

It follows that the judgment and order herein must be reversed, and the cause remanded for a new trial; and it is so ordered.

We concur: LENNON, P. J; RICHARDS, J.

25 Cal. App. 193

OAKLAND BARGE & LIGHTER CO. v. FOSTER. (Civ. 1196.)

(District Court of Appeal, First District, California. July 27, 1914. Rehearing Denied by Supreme Court Sept. 25, 1914.)

1. Shipping (§ 58*)—Loss of Barge—Liability of Charterer—Negligence—Evidence.

In an action for loss of a barge leased to defendant, evidence *held* to support a finding that, at the time of the loss, the barge was being operated in a careful and proper manner by defendant; that everything that human skill and agency could do to prevent such loss was done by defendant; and that the loss was without defendant's fault and occasioned by vis major.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

2. Shipping (§ 54*)—Loss of Barge—Liability of Charterer.

In an action for loss of a barge while being used by a charterer, defendant's liability must be determined by the rules governing loss of property while in use under a compensated bailment, in which case defendant would be liable for the loss only in the event that he failed to employ ordinary care and prudence in the use of the barge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

3. Shipping (§ 58*)—Loss of Barge—Liability of Charterer—Burden of Proof.

Where, in an action against a charterer for loss of a barge, defendant claimed that the barge was lost as the result of a sudden, unusual, and extraordinary storm, the burden was on defendant to establish such fact, and, when this was done, the burden shifted to plaintiff to affirmatively show that, notwithstanding the storm, the barge would not have been lost but for defendant's negligence or want of skill in operating it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

4. Appeal and Error (§ 1011*)—Findings—Conflicting Evidence—Conclusiveness.

A finding of fact, based on evidence in substantial conflict, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

5. Shipping (§ 58*) — Loss of Barge — Vis Major—Evidence.

On an issue as to whether a barge was lost as the result of vis major or of negligent operation, evidence that, on the day and about the time the barge in question broke her anchor and towlines, witness, who was captain of a tug, was towing a steamer in the same waters, and that his towline was carried away three times as the result of the strong wind and heavy tide, was admissible to show the prevalence and severity of the storm in the waters where the barge was lost.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

6. Evidence (§ 553*)—Experts—Hypothetical Questions.

Hypothetical questions put to an expert are improper, unless founded on admitted facts or other evidence already in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369–2374; Dec. Dig. § 553.*]

7. Evidence (§ 553*)—Experts—Hypothetical Questions—Objections.

On an issue as to the cause of the loss of a barge, an objection that the facts stated in hypothetical questions asked alleged experts were not sufficient in themselves to enable the witnesses to form and express an opinion as to the causes which produced the loss related to the weight rather than the admissibility of the evidence and was properly overruled.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369–2374; Dec. Dig. § 553.*]

8. Trial (§ 91*)—Reception of Evidence—Motion to Strike—Previous Objection.

A motion to strike out evidence, not preceded by a proper objection, should be overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242–244, 252; Dec. Dig. § 91.*]

9. Evidence (§ 539*)—Experts—Competency.

Where a witness, as a marine engineer and pilot, had made sufficient observation of tugs operated by gasoline engines to enable him to express an opinion as to the reliability of such engines, he should have been permitted to testify as to whether such tugs were generally reliable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349–2352; Dec. Dig. § 539.*]

10. Appeal and Error (§ 1056*)—Review—Exclusion of Evidence—Prejudice.

Where, in an action for loss of a barge being towed by a gasoline tug, there was no claim that the failure of the tug's engine to work had contributed in any manner to the loss of the barge, plaintiff was not prejudiced by the exclusion of the opinion of a qualified witness as to whether tugs operated by gasoline engines were generally reliable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by the Oakland Barge & Lighter Company against Charles T. Foster. From a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial, it appeals. Affirmed.

Milton S. Hamilton, of Oakland, for appellant. H. W. Hutton and A. P. Black, both of San Francisco, for respondent.

LENNON, P. J. Briefly stated, the complaint in this action of claim and delivery alleged that the plaintiff had leased to the defendant a barge of the value of $1,600 at a rental of $75 per month; that the defendant refused to pay the second month's rent, and refused and failed upon demand to return the barge to plaintiff. The defendant in his answer admitted that he had failed to return the barge to plaintiff, but pleaded as a defense to the action that he was prevented from doing so because the barge, while in use upon San Francisco bay, was driven ashore and wrecked as the result of a sudden, unusual, and extraordinary storm. In his behalf the answer of the defendant further alleged in effect that, at the time of the hiring, it was understood and agreed that the barge would be used for the purpose of transporting gravel from Napa creek to the city and county of San Francisco, and would be subject to all of the risks incident to such voyage, and that, at the time of its loss, the barge was loaded with gravel, and being towed by agents of the defendant in a proper and careful manner, and that everything that human skill and agency could do to prevent such loss was done by the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The trial court, among other things, found the facts surrounding the loss of the barge to be as alleged in the answer of the defendant, and as a conclusion of law therefrom declared that the plaintiff was not entitled to judgment. Judgment was accordingly rendered for the defendant, from which, and from an order denying a new trial, the plaintiff has appealed.

[1] The principal point presented for a reversal involves the sufficiency of the evidence to support the trial court's finding of fact that, at the time of the loss of the barge, "she was being operated in a careful and proper manner by defendant, and everything that human skill and agency could do to prevent such loss was done by the defendant, and the said loss was entirely without his fault, but was occasioned by causes beyond human control." This finding, we think, is sufficiently supported by the evidence adduced in support of the defendant's case, which in substance is as follows: The plaintiff knew that the barge was hired and would be used for the purpose of transporting gravel from Napa creek to the city of San Francisco. The barge was being used solely for that purpose at the time of its loss. The barge left Napa creek loaded with gravel in tow of the towboat Anacapa. The crew of the Anacapa consisted of the master, one man, the engineer, a licensed pilot, and two boys about 18 or 20 years old. Her engines were in perfect working order, and she was properly and fully equipped and found for the work in which she was engaged. At the start the weather was good, and the Anacapa, with the barge in tow, proceeded as far as Point Pinole, where the anchor was dropped. When the tide turned, the weather still being fair, the journey to San Francisco was resumed. Approaching The Brothers, it began to breeze up; and it was agreed between the master and pilot of the towboat that it would be best to go into Pirate Cove off Angel Island in San Francisco bay. This was done, and there the barge was anchored with two anchors attached to a 4½-inch Manila rope. Shortly thereafter the anchor line parted. The wind was northwest, an extraordinary and unusual wind for that time of the year. After the breaking of the anchor, the crew endeavored to tow the barge with a 4½-inch Manila rope in good condition, but the line broke twice, and after that it became impossible, without great danger, to put a man aboard the barge to make fast another towline. The towboat whistled for assistance and kept with the barge. Another towboat responded, but its crew failed in an effort to get a line aboard the barge. The barge, with the Anacapa hovering near, drifted out to the Heads. When the tide turned, she drifted in and went ashore at Baker's Beach. The wind on the bay, at or about the time the barge broke her anchor and towlines, was blowing about 25 miles an hour, and the sea was very rough. The wind was blowing a steady blow; it was blowing squally. The 4½-inch Manila rope and two lines in use upon the Anacapa were considered very strong lines, and ordinarily would have been sufficiently strong to hold and tow the barge in question. The combined force of wind and tide caused the anchor and towlines to break. The Anacapa had sufficient power to tow and handle a barge loaded with 125 tons of gravel. The barge in question was loaded with but 93 tons of gravel.

[2] It is conceded that the case as a whole shows the loss of property while in use under a compensated bailment, and that therefore the defendant could be held liable for the loss only in the event that he had failed to employ ordinary care and prudence in the use of the property.

[3] It is also conceded that the burden of proof was upon the defendant to show that the barge in question was lost as a result of a sudden, unusual, and extraordinary storm; and that, when this was done, the burden of proof shifted to the plaintiff to the extent of affirmatively showing that, notwithstanding the storm, the barge would not have been lost but for the defendant's negligence or his want of skill or care in operating the barge. It is insisted, however, upon behalf of the plaintiff that the evidence shows that the loss of the barge was not caused, either proximately or remotely, by a storm of sufficient severity to have probably caused the loss without fault on the part of the defendant, but that such loss was directly due to defendant's negligence, and carelessness in operating the barge with an inefficient towboat and defective equipment. The evidence upon this phase of the case is discussed in detail by counsel for the plaintiff in a very earnest endeavor to show that it is in favor of the plaintiff, and therefore should have compelled a finding against the defendant. But, upon a careful review of the record, we are satisfied that the effort of counsel is but an argument directed merely to the weight of conflicting evidence.

[4] The evidence relating to the sufficiency of the towboat to ordinarily perform the work for which it was engaged, and the sufficiency of the equipment, is, we think, in substantial conflict. The weight of the evidence was a question to be determined exclusively by the trial court; and its decision of a

question of fact, based upon conflicting evidence, will not be disturbed here.

[5] A witness for the defendant testified that he was the captain of the towboat Millie, and that on the day, and about the time the barge in question broke her anchor and towlines, the Millie, with the witness in command, was towing a steamer on San Francisco bay; and that when abreast of Angel Island the towline carried away three times as the result of a strong wind and heavy tide. The objection to this testimony was properly overruled. The purpose of the testimony was undoubtedly to show the prevalence and severity of the storm in that portion of the bay in which the barge in question broke her anchor and towlines. For such purpose the effect of the storm upon other vessels similarly situated was relevant and material. Jones on Evidence, § 141.

[6] Several hypothetical questions, purporting to be based upon the facts and circumstances preceding and attending the loss of the barge, were put to a witness for the defendant. In each instance the question was objected to upon the ground that it assumed facts not in evidence. The objection was well taken, and should have been sustained. When the questions were put to the witness, the supposed facts which formed their basis had not been established in evidence. Hypothetical questions must always be founded upon admitted facts or other evidence in the case; and, if the questions complained of had not been followed by evidence of facts upon which they were based, the overruling of the plaintiff's objections would have been prejudicial error. While the procedure adopted by the trial court in the reception of the evidence complained of was careless and confusing, nevertheless, upon the whole, we are satisfied that it did not result in substantial injury to the plaintiff.

[7] The objection that the facts stated in the hypothetical questions were not sufficient in themselves to enable the witness to form and express an expert opinion as to the causes which produced the loss of the barge went to the weight of the evidence sought to be elicited by the questions rather than to the admissibility of such evidence.

Complaint is made of the ruling of the trial court striking out that portion of the testimony of the witness Leffingwell which was to the effect that, in his opinion, towboats operated by gasoline engines were not generally reliable. The motion to strike out was made upon the ground that the proper foundation for the question which called for the opinion of the witness had not been laid, in that it had not been shown that the witness was familiar with towboats operated by gasoline engines. Upon the ground stated, the motion to strike out should have been denied.

[8, 9] In the first place the motion was not preceded by a proper or any objection; and in the second place, the examination of the witness developed the fact that he, as a marine engineer and pilot, had made sufficient observation of towboats operated by gasoline engines to enable him to express an opinion as to the reliability of such engines.

[10] The ruling, however, was harmless. While the towboat in question was operated by a gasoline engine, yet it was not claimed that the failure of the engine to work during the storm contributed to the loss of the barge. No such issue was presented by the evidence; and therefore testimony as to the general unreliability of towboats operated by gasoline engines was wholly immaterial. This being so, the presence of the testimony stricken out would not have tended in the slightest degree to warrant and support a finding in favor of the plaintiff.

We have examined the remaining assignments of error in the rulings of the trial court, and we are satisfied that they are without merit and not of sufficient importance to require discussion.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 183

AYERS et al. v. KINGSBURY. (Civ. 1368.)

(District Court of Appeal, First District, California. July 25, 1914. Rehearing Denied by Supreme Court Sept. 23, 1914.)

1. Public Lands (§ 144*)—School Lands—Purchase—Deposit—Effect.

Pol. Code, § 3494, relating to sales of school land, provides that the applicant shall pay 20 per cent. of the price within 50 days after the issuance of a certificate of location, and section 3513 declares that, if such payment is not made within the time, the certificate shall be void. Section 3498 requires that all such applications must be retained by the surveyor general for 90 days before approval, and must be approved, except in certain contingencies, at the expiration of six months. St. 1889, p. 434, provides that every such application shall be accompanied by a deposit of $20 in addition to the filing fee, for which the surveyor general shall give the applicant a receipt, which shall be accepted in part payment of the purchase price of the land, and shall be forfeited in case of the applicant's abandonment of his application or for certain other reasons. *Held*, that such deposit is intended merely as an evidence of good faith, and not as a preliminary part of the price, and that the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such before the application to purchase has been approved.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

2. Public Lands (§ 144*)—School Lands—Purchase—Requisites to Initiation of Contract.

Pending preliminary proceedings prescribed for the purchase of school lands, the state recognizes no absolute right in the applicant, and a contract between the applicant and the state does not come into existence until the first installment of the purchase price has been paid and the applicant has received a certificate of approval, as provided by Pol. Code, § 3498, and has taken the same to the county treasurer and made the first payment of 20 per cent. of the price; the contract being evidenced by a certificate of purchase showing the class of land purchased, etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

3. Public Lands (§ 144*)—Lands of State — School Lands — Application to Purchase—Withdrawal from Sale.

Petitioners having regularly applied to purchase school lands within the exterior boundaries of national forest reserves, the surveyor general, on tender of the applications and the necessary fees, refused to file the applications, and two days thereafter the lands were withdrawn from sale by Act March 24, 1909 (St. 1909, p. 680), supplemented thereafter by Acts March 8 and May 1, 1911 (St. 1911, pp. 311, 1408). *Held* that, since the tender of the applications for filing or the filing thereof prior to their approval and the payment of the whole or part of the price would be ineffective to create any right to the land in the applicants, withdrawal of the lands prior to such approval, etc., terminated all preliminary proceedings instituted by the applicants to purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

4. Public Lands (§ 144*)—Lands of State—School Lands—Application to Purchase—Rights of Applicant.

Compliance by applicants to purchase school lands with the preliminary procedure provided for the sale of such lands secures to them nothing more than the privilege of becoming the exclusive purchasers of the lands applied for, in the event that the state does not withdraw them from sale before a contract to purchase has been completed by an approval of the application and payment of the first installment of the price.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

5. Public Lands (§ 144*)—Application for Purchase — Refusal — Mandamus — Statute.

Where petitioners offered to file with the surveyor general certain applications to purchase school lands within national forest reserves prior to the withdrawal of the lands from sale, and the surveyor general improperly refused to file the applications, and two days thereafter the lands were withdrawn from sale by the passage of Act March 24, 1909 (St. 1909, p. 680), supplemented by Acts March 8 and May 1, 1911 (St. 1911, pp. 311, 1408), before the applications could be or were approved and part of the price paid, petitioners could not thereafter maintain mandamus to compel the surveyor general to file the applications and enter them of record nunc pro tunc as of the dates of their presentation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus by Frank H. Ayers and others against W. S. Kingsbury, as Surveyor General and ex officio Register of the State Land Office. From a judgment dismissing the writ, plaintiffs appeal. Affirmed.

Devlin, Devlin & Maddux, of San Francisco, for appellants. U. S. Webb, Atty. Gen., and Robert W. Harrison and Malcolm C. Glenn, Deputy Attys. Gen., for respondent.

LENNON, P. J. This is a proceeding in mandamus, instituted in the superior court of the city and county of San Francisco against the respondent, in his official capacity as surveyor general and ex officio register of the state land office. The petition for the writ was demurred to by the respondent upon the grounds that the facts stated did not constitute a cause of action, and that the proceeding was barred by the provisions of section 338, subd. 1, of the Code of Civil Procedure. The demurrer was sustained, and, the petitioners declining to amend, judgment was entered for the respondent, from which an appeal has been taken to this court upon the judgment roll.

The only question discussed in the briefs of counsel for the respective parties is the sufficiency of the pleaded facts to constitute a cause of action. We shall assume, therefore, that the question of the statute of limitations was not presented in the lower court, and that it has been abandoned here.

Generally stated, the facts of the case, as revealed by the petition for the writ, are as follows: On or about March 22, 1909, the petitioners presented to the respondent, for filing and approval, their respective applications to purchase from the state as school lands certain sixteenth and thirty-sixth sections lying within the exterior boundaries of national forest reserves. The lands applied for became the property of the state by grant from the United States, and were at the time the several applications were presented for filing, open for sale by the state. Each application, when presented to the respondent, was accompanied by a tender of the filing fee and a deposit of $20, and in all other respects conformed to the requirements of the then existing law relating to the making and filing of applications to purchase public lands. Pol. Code, tit. 8, c. 1, Stats. 1889, p. 434. In each instance, however, the respondent declined to accept the filing fee and deposit, and ultimately refused to formally file the several applications.

With the foregoing facts as a basis, the petitioners prayed for the mandate of the lower court, commanding and compelling the respondent to formally file and enter of record nunc pro tunc the several applications as of the dates of their presentation to the respondent.

The respondent concedes that the facts stated in the petition for mandate would be sufficient to warrant the issuance of the writ if it were not for the fact that subsequent to the presentation of the applications, and long prior to the institution of the present proceeding, the state by various legislative enactments withdrew the lands in question from sale, and expressly prohibited the respondent from receiving or filing any applications to purchase such lands, and commanding him to take no action upon any such applications previously filed or presented for filing, other than to cancel the same. Stats. 1909, p. 680; Stats. 1911, p. 311; Stats. 1911, p. 1408.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It will be noted in passing that the several statutes just referred to respectively became the law of the state on March 24, 1909, March 8, 1911, and May 1, 1911.

The applications to purchase, as previously noted, were presented to the respondent on or about March 22, 1909; and the petition for the writ in the present case was filed March 19, 1912. It is the contention of the petitioners that the mere presentation of their several applications to purchase, accompanied by a tender of the filing fee, and an offer to deposit the $20 required by the statute of 1889, gave them a vested right in the lands in question, which could not be destroyed by the subsequent withdrawal of such lands from sale. More accurately stated, it is the contention of the petitioners that, inasmuch as their applications to purchase the lands in question complied in every respect with the requirements of the law existing at the time the applications were presented for filing, a contract of purchase and sale was thereby consummated with the state, the obligation of which could neither be abrogated nor impaired by subsequently enacted legislation withholding from sale the lands which were the subject of the contract. It is not disputed by the respondent that, if the interests of the petitioners in the lands in question had ripened into consummated contracts of purchase and sale, no subsequent act of the Legislature could be invoked upon behalf of the state to avoid the obligation of the contracts; but it is contended that even if the applications to purchase had been duly filed and entered of record in the office of respondent, and the filing fee and $20 deposit accompanying the applications had been received and accepted by him, still no contract of purchase and sale could have been consummated until the applications were first approved by the respondent and then followed by the payment of the first installment of the purchase price, and the issuance by the state of a certificate of purchase, as required and provided for in sections 3498 and 3514 of the Political Code.

In view of the position taken by respondent, we do not deem it necessary to discuss the question as to when, as a matter of law, a paper is to be deemed filed with a public officer, further than to say that conceding, as is contended, that the rights of the several petitioners could not be defeated by the mere arbitrary refusal of the respondent to receive and file their several applications, we are of the opinion, nevertheless, that the actual filing of the applications to purchase the lands in question, accompanied by the filing fee and the $20 deposit required by the statute, would not alone have constituted a complete contract of purchase and sale. This conclusion is founded upon a consideration of the various provisions of the codified and statute law of the state relating to and controlling the sale of public lands. In so far as the question involved in the present case is concerned, the procedure provided by the state for the purchase of its public lands, and the conditions precedent to a completed contract of purchase and sale, are to be found exclusively in the Political Code and the act of 1889 (Stats. 1889, p. 434), and may be briefly outlined as follows: The class or character of public lands subject to sale, and the terms and conditions of sale, are prescribed by section 3494; and section 3495 prescribes what the applications to purchase must contain. Section 3498 requires that all applications must be retained by the respondent for 90 days before approval, and must be approved, except in certain contingencies, at the expiration of 6 months. Section 3494 directs and requires the applicant to pay 20 per cent. of the purchase price within 50 days from the date of the issuance of the certificate of location, a copy of which, by the provisions of section 3512, must be presented to the county treasurer of the county in which the land is situated, who must receive the amount to be paid, and indorse his receipt therefor upon the certificate of location and return the same to the purchaser. Section 3513 declares that, if the first payment of 20 per cent. is not made within the 50 days provided by section 3494, the certificate of location becomes void; but under the provisions of section 3514, "whenever the register receives from the county treasurer a statement showing that an applicant for state lands has made the first payment, he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest is to be computed, the amount paid, and the amount remaining unpaid, which certificate is prima facie evidence of title." Such certificate and all the rights acquired thereunder are, by the provisions of section 3515, expressly made the subject of sale by deed or assignment. The remaining Code sections, which have application to the question in mind here, provide in substance that the county treasurer shall report monthly to the register all moneys received for lands during the preceding month, and also the number of the location and the name of the purchaser. Such report must be forwarded to the register at once; and upon receipt thereof he must enter the reported payment to the credit of the purchaser. Pol. Code, §§ 3422, 3423.

The act of 1889 (Stats. 1889, p. 434) provides in part (section 1) that every application shall be accompanied by a deposit of $20 in addition to the filing fee required by law, for which the surveyor general shall give the applicant a receipt, which receipt shall be accepted by the county treasurer in part payment of the purchase price of the land.

The act further provides that the deposit so made and receipted for shall be forfeited in the event that the applicant shall abandon his application, or fail to make proper proof as to the character of the land, etc., or if his application be rejected by reason of any false statement in his affidavit.

The 90-day period provided by section 3498, within which applications may not be approved, is for the benefit of occupants and actual settlers on land (section 3497), to enable the surveyor general to ascertain the character of the land applied for (section 3493), and to see that timber lands are not sold except upon payment of the full purchase price in cash. (Section 3500.) During such period, and in fact at any time before patent is issued, contests may be made. Sections 3498, 3414 et seq.

[1] The act of 1889 is undoubtedly supplemental to and in aid of the various provisions of the Political Code previously enacted, and therefore must be considered and construed in conjunction with the procedure and conditions prescribed by those sections for initiating the purchase of public lands. This being so, and having in mind the fact that applications to purchase public lands must, after being filed, wait not less than 90 days before being approved, and that, after the certificate of approval is issued, the applicant must within 50 days make his first payment of 20 per cent. of the purchase price to the county treasurer, we are of the opinion that the deposit called for by the act of 1889 was intended and required merely as an evidence of good faith rather than as a preliminary part payment of the purchase price of the lands applied for. In other words, we are convinced, by a consideration of the provisions of the statute and the several Code sections under discussion, that the deposit required by the statute was intended to be nothing more than a mere conditional deposit, and that the receipt to be given therefor does not become a part of the purchase price, and cannot be accepted as such, before the application to purchase has been approved.

[2] It would appear, therefore, that, pending the preliminary proceedings prescribed for the purchase of public lands, the state recognizes no absolute right in the applicant, and does not enter into a contract of purchase and sale with him until the payment of the first installment of the purchase price; that is to say, not until the applicant receives a certificate of approval under section 3498 of the Political Code, and has taken such approval to the county treasurer and made the first payment of 20 per cent. of the purchase price, does the state recognize any irrevocable right in the applicant. When this has been done, then the state closes a contract of purchase and sale, and evidences such contract by the issuance of a certificate of purchase, showing the class of lands purchased, etc.

[3] This conclusion might be fully fortified by a more minute analysis of the various provisions of the codified and statutory state land laws hereinbefore summarized; but such analysis is rendered unnecessary, inasmuch as the conclusion here reached is confirmed by a consideration of the many cases in this and in other jurisdictions, where, in defining the purpose and effect of the same or similar land laws, it has been held in effect that the withdrawal of public lands from sale prior to approval of the applications to purchase, and the payment in whole or in part of the purchase price, finally and effectually ended all preliminary proceedings instituted for the purchase of such lands. Hutton v. Frisbie, 37 Cal. 475; People v. Shearer, 30 Cal. 645; Johnson v. Squires, 55 Cal. 103; Eckart v. Campbell, 39 Cal. 256; Yosemite Valley Case, 15 Wall. 77, 21 L. Ed. 82; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Shiver v. United States, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; Gonzales v. French, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 548; Graham v. Great Falls Water, etc., Co., 30 Mont. 393, 76 Pac. 808; State v. Work, 63 Tex. 148; People v. Banning, 166 Cal. 635, 138 Pac. 101.

In the early case of Eckart v. Campbell, supra, our Supreme Court had under consideration former provisions of the state land law similar, if not identical, in language and purpose to the Code sections under consideration here, and there the court said:

> "It does not seem to have been the intention of the statute that the state should be considered as having parted with any interest in the land, until she had received the payment of at least the first installment of the purchase money."

And in the comparatively recent case of Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. 65, it was said that:

> "The decisions of this court are clear to the effect that an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price, under statutes essentially similar to the scheme provided by the Political Code for the disposition of public lands, has no such vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for sale."

The reasoning and conclusion reached in the cases cited and quoted proceeded upon the theory that the statutory procedure and conditions provided for initiating the purchase of public lands are purely preliminary to the completed contract of purchase, and that compliance with such procedure and conditions merely conferred upon the applicant the exclusive privilege of becoming the purchaser of the lands applied for upon approval of the application and the payment of the 20 per cent. of the purchase price within 50 days after the issuance of the certificate of location. The scope and effect of the act of 1889 (Stats. 1889, p. 434) do not appear to have been under consideration in the case of Messenger v. Kingsbury, supra, nor has that act, so far as we have been able to ascertain, been elsewhere construed. We are satisfied, however, that the act in question is not fairly susceptible of a construction different from that placed upon it here; therefore we apprehend that the reasoning and the result reached in the case of Messenger v. Kingsbury, supra, and the kindred cases therein cited, would not have been otherwise even if the statute in question had been invoked and considered.

[4] Upon like reasoning the conclusion must follow in the present case that the mere compliance by the petitioners with the preliminary procedure provided for the sale of state lands secured to them nothing more than the privilege of becoming the exclusive purchasers of the lands applied for in the event that the state did not withdraw the said lands from sale before a contract of purchase and sale was completed by the approval of the application and the payment of the first installment of the purchase price.

[5] This brings us more minutely to a consideration of the remedy sought by the petitioners. It will be remembered that the petitioners are seeking to compel the respondent to enter, as filed upon the records of his office, the applications to purchase public lands, which it is alleged should have been so entered at the time they were presented to the respondent for filing some several years ago. It may be conceded that the law in force at the time the applications were presented made it the duty of the respondent to formally enter them of record as filed in his office. The fact remains, however, that he has never performed this duty; and it affirmatively appears, from the allegations of the petition, that, a few days after the applications to purchase had been offered for filing, the lands applied for were withdrawn from sale by the state, and at the same time the surveyor general was expressly prohibited by law from thereafter receiving or filing any applications for the purchase of such lands; and that no action or procedure was instituted to enforce the filing of the petitioners' applications, while it still remained the duty of the surveyor general to do so. Under these circumstances, a writ of mandate will not now issue to compel the respondent to file the petitioners' applications, either as of the present date or as of the date when the applications were originally tendered for filing. This is so because a writ of mandate will not issue to compel the performance of an act which, when performed, would be of no avail to the petitioner for the writ. Kerr v. Superior Court, 130 Cal. 183, 62 Pac. 479; Ellis v. Workman, 144 Cal. 113, 77 Pac. 822; Messenger v. Kingsbury, supra; San Diego v. State, etc., 164 Cal. 41, 127 Pac. 153.

If we are correct in the conclusion hereinbefore expressed, that the state may rightfully withdraw public lands from sale at any time before approval of the application to purchase and the payment of the first installment of the purchase price, and that such withdrawal effectually terminates the preliminary proceedings instituted by the applicant for the purchase of such lands, then it must follow in the presence of the existing law, prohibiting the sale of the lands in question, that it would be a vain and idle act to compel the respondent to perform a one time duty which, when performed would not operate to revive and revest in the petitioners whatever inchoate rights they may have had in the first instance. Messenger v. Kingsbury, supra.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 803

PARKER v. KINGSBURY. (Civ. 1369.)

(District Court of Appeal, First District, California. July 25, 1914. Rehearing Denied by Supreme Court Sept. 23, 1914.)

Appeal from Superior Court of City and County of San Francisco; J. M. Seawell, Judge.

Mandamus on petition of L. G. Parker against W. S. Kingsbury, as Surveyor General and ex officio Register of the State Land Office, etc. From a judgment dismissing the writ, plaintiff appeals. Affirmed.

Devlin, Devlin & Maddux and Charles C. Boynton, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Robert W. Harrison and Malcolm C. Glenn, Deputy Attys. Gen., for respondent.

LENNON, P. J. This case in its essential features is identical with the case of Ayers v. Kingsbury (No. 1368) 143 Pac. 85, this day decided. For the reasons stated in the opinion of this court filed in that case, the judgment appealed from herein is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 192

HOOPER et al. v. KINGSBURY. (Civ. 1367.)

(District Court of Appeal, First District, California. July 25, 1914. Rehearing Denied by Supreme Court Sept. 23, 1914.)

PUBLIC LANDS (§ 144*)—SCHOOL LANDS—APPLICATION TO PURCHASE — WITHDRAWAL FROM SALE.

Where, after applications to purchase school lands within the exterior boundaries of national forest reserves had been filed, nothing further was done to perfect the applicants' right to purchase until after the lands were withdrawn from sale by Acts March 24, 1909 (St. 1909, p. 680), and March 8 and May 1, 1911 (St. 1911, pp. 311, 1408), there was no contract between the state and the applicants, at the time of withdrawal, which would prevent the withdrawal from taking effect.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Mandamus on petition of F. A. Hooper and others against W. S. Kingsbury, as Surveyor General and ex officio Register of the State Land Office. From a judgment dismissing the writ, plaintiffs appeal. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Devlin, Devlin & Maddux and Charles C. Boynton, all of San Francisco, for appellants. U. S. Webb, Atty. Gen., and Robert W. Harrison and Malcolm C. Glenn, Deputy Attys. Gen., for respondent.

LENNON, P. J. This case in its essential features is practically the same, in so far as the points of law involved are concerned, as the case of Ayers v. Kingsbury (No. 1368) 143 Pac. 85, this day decided. In its facts, the present case differs from that case only in the particular that the applications to purchase public lands were actually filed with the respondent. Those applications, however, were not approved before the withdrawal of the lands from sale. No approval of such applications could have issued prior to the enactment of the statute withdrawing all the lands in question from sale; and therefore, under the theory discussed and developed in the opinion of this court filed in the case of Ayers v. Kingsbury, above mentioned, which is to the effect that the state has power to withdraw lands from sale prior to the approval of the applications to purchase and the payment of the first installment of the purchase price, it follows that the petitioners herein are in no better situation than the petitioners in that case, and that they acquired no irrevocable right to purchase from the state the lands applied for, notwithstanding the payment by them of the filing fee and the deposit of the amount specified in the act of 1889 (St. 1889, p. 434).

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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25 Cal. App. 247

WATTERSON et al. v. OWENS RIVER CANAL CO. (Civ. 1471.)

(District Court of Appeal, Second District, California. July 29, 1914. Rehearing Denied Aug. 28, 1914. Denied by Supreme Court Sept. 26, 1914.)

1. Principal and Surety (§ 7*)—Obligation of Surety.
That a construction contract was void between the parties because not recorded in accordance with Code Civ. Proc. § 1183, does not exonerate the contractor's surety from liability upon his bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 8–12, 14, 16, 18; Dec. Dig. § 7.*]

2. Principal and Surety (§ 100*)—Liability of Surety—Release.
A change in the terms of a construction contract upon which plaintiff was surety, will release plaintiff.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*]

3. Principal and Surety (§ 100*)—Discharge of Surety—Changes in Contract—Authority to Make.
Unless shown to be authorized, the agreement by officers of a corporation to changes in a construction contract will not change the contract, so as to discharge the contractor's surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*]

4. Principal and Surety (§ 100*)—Liability of Surety—Release.
A surety upon a written construction contract is not discharged by verbal changes in the contract, unless such changes are executed; Civ. Code, § 1698, declaring that a contract in writing may be altered only by a written instrument or an executed oral agreement.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*]

5. Principal and Surety (§ 129*)—Release of Surety—Equitable Estoppel.
Where a surety upon a contractor's bond took over the work which was abandoned by the contractor after some changes in the contract had been made, and without objection completed the contract as changed, demanding and receiving payment as for the original contractor, he is estopped to claim that the changes were outside the original contract or made without his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 366–372; Dec. Dig. § 129.*]

6. Mechanics' Liens (§ 114*) — Rights of Surety.
When a surety, in pursuance of the terms of his undertaking, assumes the performance of the principal's contract, he becomes necessarily subject to all of his liabilities, and hence a surety, who completed a construction contract, is entitled to no lien for his work, where the contractor was not entitled to one because the contract was not recorded.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 149; Dec. Dig. § 114.*]

7. Mechanics' Liens (§ 95*)—Right to Lien.
Though the principal contractor was not entitled to a lien because the contract was not recorded as required by Code Civ. Proc. § 1183, subcontractors, who performed labor and furnished materials, are entitled to a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 127; Dec. Dig. § 95.*]

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by T. G. Watterson, consolidated with an action by Charles Powers and another, against the Owens River Canal Company. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Reversed as to the first-named plaintiff, and affirmed as to the others.

See, also, 139 Pac. 804.

L. C. Hall, of Bishop, and Potter & Potter and Wm. J. Clark, all of Los Angeles, for appellant. P. W. Forbes, of Bishop, S. E. Vermilyea, of Los Angeles, and Ben H. Yandell, of Independence, for respondents.

CONREY, P. J. In the superior court the action of the plaintiff Watterson and a separate action of the other plaintiffs, against the same defendant, were consolidated. From a judgment in favor of the plaintiff Watterson and in favor of certain other plaintiffs, and from an order denying defendant's motion for a new trial, the defendant appeals.

On December 30, 1908, P. N. Snyder and C. A. Collins entered into a written contract with the Hillside Water Company and the Owens River Canal Company, whereby the contractors agreed to perform the excavation work required by certain specifications, for the purpose of making improvements in a canal belonging to defendant Owens River Canal Company. The contract was dated November 30, 1908, and was delivered on December 30th following. Work was commenced early in December, and the contract was not recorded until February 9, 1909. At the time of the execution of this written contract, the plaintiff T. G. Watterson executed to defendant Owens River Canal Company an undertaking in the penal sum of $5,000, conditioned upon due performance of the contract by the contractors. As Collins does not appear any further in the transactions, we will discuss the case as if Snyder were sole contractor.

The consideration to be paid for this work, as stated in the contract, was $19,000, installments payable monthly on estimates to be made by the engineer. As the contract was not recorded before commencement of the work, the transaction became subject to the provision of section 1183, Code of Civil Procedure, that such contracts "shall be wholly void, and no recovery shall be had thereon by either party thereto; and, in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The specifications, which are referred to in the contract and attached thereto, contain the following provisions:

> "The work to be done consists of excavating one or both banks of the canal to double its present cross section with a view of doubling the present carrying capacity of the canal. The company's engineers will give levels and grade stakes designating the excavations that are to be made, and the contractor is to pay particular attention to these stakes and make the excavation true to the stakes given. At the discretion of the engineer in charge the excavations may be made on either the upper or lower bank, or both banks of the canal, as the character of ground and material indicates for the most economical and safest excavation. It is also understood and agreed that the said engineer in charge may require changes to be made in the route and line of the canal, particularly where the distance can be shortened, and the engineer in charge may direct such changes; and in settling for the same, allowance shall be made to either party, whether the quantity or quality of the materials removed shall be greater or less or of a different character from the estimates and classifications above referred to and made a part of this contract."

The contractor Snyder took charge of the work and conducted the same personally and by subcontractors for various sections, until February 16, 1909. Disputes arose between him and the engineer, on account of changes in levels as furnished by the engineer, and on account of a change made by directing a certain cut-off which shortened the canal. On January 8th a conference took place between the contractor and the engineer and some officers of the two corporations named in the contract, as to the manner in which the work should be done, and it was understood that Snyder would follow the directions given as to these changes ordered by the engineer. But dissatisfaction continued on both sides, so that Snyder gave up the work on February 16th, and at the same time the plaintiff Watterson took charge of the work in place of Snyder. Watterson continued the work until April 16th, when it was completed.

Watterson claims that the verbal understanding at which the contractor and the said representatives of the owner arrived on January 8th constituted a change in the contract, such as to relieve Watterson from the obligations of his bond, and that, as the contract itself was void, his work from February 16th to April 16th was on an original request of the owner, entitling him to claim his lien under the provisions of section 1183, Code of Civil Procedure, quoted above. The appellant contends that the changes made in the work were only such as were provided for in the specifications; and that the work done by Watterson was done by him by virtue of his relation to the transaction as bondsman for the contractor, and for the purpose of protecting himself from liability on the bond.

There was no formal contract, either written or unwritten, between plaintiff Watterson and the owner, by virtue of which Watterson undertook to complete the work. Mr. L. C. Hall was treasurer, and was a director and also attorney for the Owens River Canal Company. Mr. Watterson's testimony is that on February 9th or 10th Mr. Hall complained to him that Mr. Snyder was not complying with the instructions of the engineer and was not doing the work satisfactorily, and that they had lost confidence in him, and asked Watterson to go ahead and finish the work. On February 15th Watterson told Snyder about this. Snyder said, "All right, go ahead and finish it." Watterson replied, "All right." It was under these circumstances that Watterson took charge of this work and did all that was done by him in completion thereof.

The payments by the defendant amount to $16,000, of which the sum of $10,000 was paid prior to February 16th. All of the payments were delivered to Watterson, who was a creditor of Snyder for supplies furnished, and Watterson's receipts recite that the moneys so received were on account of the Snyder and Collins contract, and were to be used for payment of such accounts as would constitute liens against the canal.

The demand of Watterson in this action is for the sum of $20,189.54, and the decree appealed from is in his favor for the sum of $10,285.71, with interest, and in favor of the other plaintiffs for sums which in the aggregate are a little over $1,000.

The findings of the court state that on the 16th day of February, 1909, the plaintiff Watterson, "at the personal instance and request of said defendant, and by and with the consent and authority of said contractor, P. N. Snyder," took charge of the described work, and completed the same on April 16, 1909.

The court's findings declare that on January 8, 1909, "officers and agents" of the defendant, and P. N. Snyder, "made an oral agreement" whereby the work in question was materially and substantially altered from the manner and conditions specified in the contract of November 30, 1908, and the specifications thereof; that by virtue of said oral agreement the work was made more difficult and expensive than that provided for in said written agreement; that the work performed, from January 8, 1909, until the completion thereof on April 16, 1909, was essentially different from and constituted a material departure from said original terms and conditions; that plaintiff Watterson was not consulted with reference to said oral agreement and said changes and did not assent at any time to said changes in said work, or to any change or departure from the terms and conditions of the original contract.

Finding 4 is as follows:

> "That on the 16th day of February, 1909, a large portion of the said construction, alteration, enlargement, addition to, and repair of said Owens River Canal had been done, performed, and made by said P. N. Snyder, one of said contractors, under said contract of November 30, 1909."

There is no finding that shows how much of the changes in the contemplated work was executed by Snyder, and how much by Watterson, but the finding generally is that these changes were involved in the work done from January 9th to April 16th. Watterson at all times had knowledge of the original contract and specifications. He did not, when he took charge of the work, or at any time, make any protest against doing the work as directed, including these changes. He did not inform the defendant that he was taking up this work independently of the contract, or that he was not assuming the work as a bondsman for a contractor unable or unwilling to perform the obligations of his contract.

[1, 2] Although the contract is void under the Code provisions to which we have referred, yet the matter of changes in the work is material to the questions before us, because the invalidity of the contract did not destroy the liability of Watterson as surety on the bond. Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. 662; Summerton v. Hanson, 117 Cal. 252, 49 Pac. 135. And if the work provided for by the original contract was changed by the parties thereto without consent of Watterson, he would thereby be released from his liability on the bond. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co., 3 Cal. App. 338, 85 Pac. 156; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 497, 99 Pac. 856.

[3-5] The conclusion of the court below that the written contract was thus changed by an oral agreement cannot be sustained.

> "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Civ. Code, § 1698.

Though it be conceded for the moment that the changes in the work, which have been mentioned, were not such changes as the engineer might order, as provided in the written contract, the objection remains in force that there was not any evidence that the "officers and agents," who are found to have made the oral agreement, were authorized by defendant to make for it a new or amended contract. And, even if they had been so authorized, the conversation of January 8th would not be effective to create changes in the contract until the proposed changes in the work were actually executed. Until thus executed, and in force as contract changes made without the consent of the surety, they could not be sufficient to release him from liability on his bond.

But it further appears that, when the changes in the work were actually made in course of the performance thereof, very large portions of those changes were executed by Watterson himself. This being so, he was necessarily consenting thereto, unless his relations to the transaction, as surety on the bond, had been previously abrogated by reason of the small proportion of changes in the work, which had been executed by Snyder. The evidence all shows that after Watterson had taken charge of the work, and with full knowledge of the facts as they then were, he continued to receive payments as we have before stated, accepting them as payments on the Snyder and Collins contract, and assuring defendant that the money might safely be paid, as defendant had his bond for completion of the contract. He obtained these payments, not merely as compensation earned by Snyder for work done prior to February 16th, but as payments on the contract generally, and represented that he must have them in order that he (Watterson) might be able to complete the work. In view of these facts, it seems clear to us that the plaintiff Watterson cannot successfully maintain that the changes now under consideration were outside the terms of the written contract, or that they were made without his consent.

[6] It is therefore clear also that when

Snyder told Watterson to go ahead and finish the work of this contract, and Watterson consented and proceeded in accordance with that request, he was in the situation of a surety on a contractor's bond, who undertakes to finish the contract work for his principal.

"When a surety, either corporate or individual, in pursuance of the terms of an undertaking, assumes the performance of the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all of his liabilities." Ausplund v. Ætna Indem. Co., 47 Or. 10, 81 Pac. 577; Hughes v. Gibson, 15 Colo. App. 318, 62 Pac. 1037.

Since Watterson, in completing the work, stood in the place of the contractor, he was not, any more than Snyder could be, a person deemed to be acting "at the personal instance of the owner," as described in the Code of Civil Procedure, § 1183, or entitled to any lien for the value of anything furnished or done by him. His right of recovery, if any, for the value of the labor and materials furnished by him, was merely the right to recover a personal judgment therefor, under like limitations as were binding upon Snyder. As Mr. Watterson succeeded and in that way represented the contractor, it follows that Watterson would be limited in his recovery (as in like circumstances the contractor would have been) by the contract price named in the written contract, after adjustment of all additions and deductions due to changes in the work as it progressed, and also after allowance of the proper credits for payments made by the owner. Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. 391; Condon v. Donohue, 160 Cal. 749, 754, 118 Pac. 113. In the trial of this action, however, this plaintiff not only attempted to assert a lien, but has obtained a decree affirming his claim without regard to the limitations above noted.

With respect to the cause of action stated in plaintiff's complaint, his right to recover herein, and to enforce the lien claimed by him, depends primarily upon the allegation and finding that on or about the 16th day of February, 1909, plaintiff and defendant entered into an agreement, under which plaintiff was to furnish certain labor and materials, for the purposes named. There is no evidence of any such agreement, unless the fact could be derived from the circumstances to which we have referred. As these circumstances do not support the claim as to the alleged contract, the appeals must be sustained as to him.

[7] Concerning the judgment in favor of plaintiffs Charles Powers and Arthur Powers, appellant urges nothing in favor of its appeal, except the bare proposition that there is a material variance between the claim of lien and the evidence as to the person by whom they were employed. A comparison of the references in appellant's brief, with the record in the transcript, fails to support the claim of appellant as to this matter. The plaintiffs Powers were subcontractors under the contractor Snyder. Being persons who furnished labor and materials to a so-called contractor, whose contract was void as herein shown, these plaintiffs were entitled to their lien for the value of the labor furnished by them.

The judgment and decree in favor of the plaintiff T. G. Watterson, and the order denying defendant's motion for new trial as to plaintiff Watterson, are reversed. The judgment and decree and the motion for new trial, as between the defendant and the plaintiffs Charles Powers and Arthur Powers, are affirmed. The appeals against the decree in favor of the other respondents have been abandoned, and are dismissed.

I concur: JAMES, J.

I concur in the judgment: SHAW, J.

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25 Cal. App. 255

ALTPETER et al. v. POSTAL TELEGRAPH-CABLE CO. (Civ. 1258.)

(District Court of Appeal, Third District, California. July 29, 1914. Rehearing Denied by Supreme Court Sept. 26, 1914.)

1. APPEAL AND ERROR (§ 876*)—ORDERS APPEALABLE.

A party aggrieved by a judgment or an order must take his appeal from the judgment or order itself if an appeal therefrom is authorized, and not from a subsequent order refusing to set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3549-3559; Dec. Dig. § 876.*]

2. JUDGMENT (§ 403*)—SETTING ASIDE—SUIT IN EQUITY.

A party aggrieved by a judgment must ordinarily maintain a suit in equity to set it aside for reasons collateral to the questions examined or determined therein, where the time for appeal has passed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. § 403.*]

3. JUDGMENT (§ 135*)—VACATION—MOTION—STATUTE.

Where defendant was not served with process, service being had upon a foreign corporation by the same name, and for that reason did not defend, and was not represented by counsel, defendant is, under Code Civ. Proc. § 473, providing that when for any cause the summons in an action has not been personally served on defendant, the court may allow the defendant on such terms as may be just, at any time within one year after rendition of judgment, to answer to the merits of the original action, entitled to move to set aside the judgment at any time within the year, notwithstanding an appeal might have been taken.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 246, 247; Dec. Dig. § 135.*]

4. JUDGMENT (§ 135) — VACATION — MOTION — STATUTE.

The remedy prescribed by this section is cumulative and distinct from the remedy of bill in equity to vacate a judgment for extrinsic matters.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 246, 247; Dec. Dig. § 135.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. JUDGMENT (§ 140*)—VACATION—MOTIONS—REMEDIES.

The remedy prescribed by such section may be resorted to in cases of other than constructive service, as where the defendant was not served at all.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 252; Dec. Dig. § 140.*]

Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Catherine Altpeter and another against the Postal Telegraph-Cable Company. There was a judgment for plaintiffs, and from an order refusing to vacate it defendant appeals. On motion to dismiss. Motion denied.

See, also, 22 Cal. App. 63, 133 Pac. 329.

J S. Spilman, of San Francisco, and L. T. Hatfield, of Sacramento, for appellant. E. E. Gaddis, of Woodland, for respondents.

PER CURIAM. This is a motion to dismiss the appeal taken by the defendant from an order refusing to grant a motion to vacate the judgment. The action was by the plaintiffs for damages for the alleged destruction by the defendant of four walnut trees standing and growing immediately in front of the former's premises on Court street, in the city of Woodland. The jury, by whom the cause was tried, returned a verdict in favor of the plaintiffs in the sum of $500, and the court, acting upon the authority of section 3346 of the Civil Code and section 733 of the Code of Civil Procedure, entered judgment for the plaintiffs on said verdict for treble the amount assessed by the jury.

It is important in this proceeding, as will presently be perceived, to know that said judgment was entered on the 11th day of November, 1912, and that it contains, among others, the following recitals:

> "This action came on regularly for trial on the 24th day of September, A. D. 1912. The parties appeared by their attorneys, E. E. Gaddis, Esq., counsel for plaintiffs, and L. T. Hatfield, Esq., for defendant. A jury of 12 persons was regularly impaneled, and sworn to try said action. Witnesses on the part of plaintiffs and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court with the verdict signed by the foreman, and, being called, answered to their names and say"

—following which is the verdict.

But a clearer understanding of the legal propositions advanced in support of and against the allowance of the present motion may be obtained by a summary statement of the history of this action and its several ramifications.

Two different and distinct proceedings growing out of this case—one an application for a writ of review and the other an appeal from the judgment by a New York corporation of the same name as that of the defendant here—have heretofore been before and decided by this court. See Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538, and Altpeter et al. v. Postal Telegraph-Cable Co., 22 Cal. App. 63, 133 Pac. 329. The opinions in those cases contain a recital of the circumstances under which the case came to this court on the occasions referred to. As the facts constituting a history of the case as they are disclosed by the present record are substantially given in the case of Altpeter v. Postal Telegraph-Cable Co., supra, we will, as a matter of convenience, follow said opinion in some measure in stating said facts here.

> "It appears that there are two separate and distinct corporations named and known as 'Postal Telegraph-Cable Company,' one of which was organized and is existing under and by virtue of the laws of the state of New York and the other organized and existing under and by virtue of the laws of the state of California. The record discloses that the corporation originally sued by the plaintiffs was the New York corporation, the complaint alleging that the defendant, Postal Telegraph-Cable Company, was a corporation organized, existing, and doing business under and by authority of the laws of the state of New York. When the trial of the case was proceeded with, it was, in the outset thereof, discovered that, if the plaintiffs suffered the damage as set out in the complaint, such damage was caused by the California corporation named and known as Postal Telegraph-Cable Company and not by the New York corporation of that name, whereupon counsel for the plaintiffs applied to the court for leave to amend the complaint so as to substitute the California corporation for the New York corporation as party defendant. After an extended discussion between counsel, in the course of which the attorney for the appellant declared that the two corporations were distinct entities, and that he was in court for the sole purpose of representing the New York corporation and that the California corporation was without a legal adviser or representative in the action, the court allowed the amendment. Although interposing an objection to the allowance of the amendment on the ground that the court was without jurisdiction to do so, and, although reserving an exception to the order of the court permitting the amendment, counsel for the appellant, after the order granting the plaintiffs leave to amend was made and entered, retired from further participation in the trial of the action, declaring that, 'if the California corporation is the defendant in this case, we have no appearance for it and no authority to appear.' The trial of the cause was thereupon proceeded with in the absence of a legal representative of the defendant, with the result as hitherto stated."

The defendant (that is, the California corporation), shortly after the trial of the action, petitioned this court for a writ of certiorari for the purpose of annulling and setting aside all the proceedings had in the action, because, as was the claim, they were coram non judice and void. The specific ground upon which the application for said writ was based was that the substituted defendant had never been served with summons, that it, consequently, had no notice of the institution and pendency of the action, and that, therefore, the court had not acquired jurisdiction of the person of said defendant. On March 13, 1913, this court handed down its decision on said application, denying the writ on the ground that the petitioner was afforded a remedy in the ordinary course of law—that is, by appeal. A rehearing was granted by this court in said proceeding and, on the 24th day of September, a decision was rendered and an opinion filed therein, affirming the views and the conclusion declared in the former opinion. Postal Telegraph-Cable Co. v. Superior Court, 22 Cal. App. 770, 136 Pac. 538, supra.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On January 2, 1913, and while the proceeding on the writ above mentioned was still pending before this court, the New York corporation (the original defendant in the action) filed in this court its record on appeal from the judgment in said action. A motion was made by the plaintiffs to dismiss said appeal on the ground that the said corporation, having been, by the order granting the plaintiffs leave to amend their complaint, supplanted as party defendant to the action by the California corporation and was thereby altogether eliminated from the case, was not a "party aggrieved," within the contemplation of section 938 of the Code of Civil Procedure. This point was sustained and the motion to dismiss the appeal granted in an opinion handed down by and filed in this court on the 9th day of May, 1913. Catherine Altpeter et al. v. Postal Telegraph-Cable Co., 22 Cal. App. 63, 133 Pac. 329.

On the 24th day of October, 1912—almost six months after the time within which it might have appealed from the judgment had passed (section 939, Code Civ. Proc.)—the defendant served and filed a notice of motion to vacate the judgment on the ground that summons in said action had never been served on it, and that therefore the court had never acquired jurisdiction of the person of said defendant. The notice further states as one of the grounds upon which the defendant claims to be entitled to be relieved from the effect of the judgment through said motion that "said judgment was rendered against this defendant by reason of its mistake, surprise, and excusable neglect." Said motion was supported by affidavits, accompanied by a proposed answer to the complaint. The court denied the motion and it is the appeal from the order denying said motion that the plaintiffs now move to dismiss.

The affidavits filed and used to support the motion are not controverted—that is, the record does not disclose a counter showing upon the facts set out in said affidavits, and therefore the verity of the facts so set forth stands admitted. These affidavits are by the president and general superintendent, the vice president and superintendent, the secretary and treasurer, and L. T. Hatfield, appearing on this appeal as one of the attorneys of the defendant. Each of the above-named officers of the defendant deposes that he was not served with summons or otherwise notified of the institution and pendency of this action. Mr. Blake, the president and general superintendent of the defendant, further deposes that, during all the times mentioned in his affidavit, he was the only person or officer of the defendant authorized to employ attorneys for said corporation; that he never at any time employed, retained, or instructed Mr. Hatfield to represent this defendant in this action until after the return of the verdict by the jury at the trial of said action; "that, after the trial of said action, and after receiving notice of the result of said trial, affiant employed J. S. Spilman, Esq., as attorney for said defendant, and L. T. Hatfield, Esq., as counsel; that said Spilman and said Hatfield were employed by affiant for the said defendant for the purpose of procuring relief from such judgment by having the same annulled or vacated or set aside by such proceedings as they might be advised to be proper in the premises." Blake further declares that Hearn and Elberg, respectively the vice president and superintendent and the secretary and treasurer of the defendant, "are the only persons holding statutory offices of said corporation in the state of California," and that Jeremiah K. Beede, chief operator of the defendant at and in charge of its telegraph station at the city of Sacramento, and upon whom service of summons was made in this action as originally commenced against the Postal Telegraph-Cable Company, of New York, has never at any time had any power or authority to transact any other business for or on behalf of the defendant than that involving the duties of chief operator as above explained; that said Beede has at no time been authorized or empowered to enter into any contracts or agreements for said defendant, or to bind it in any manner in any transactions except such as necessarily came within the scope of his duties as chief operator, "or to accept service of process against it, or to appear for it in any court, or elsewhere, or otherwise, or at all."

In his affidavit, Mr. Hatfield corroborates Blake as to his (Hatfield's) connection with the defendant and this action, declaring that he was never at any time employed or retained by the defendant or any of its officers to appear as attorney for said defendant in this action until after the trial thereof and the rendition of the verdict and judgment therein; that, after the trial of said action, he was employed by the defendant to take such legal steps as he might conceive to be necessary and appropriate to obtain for the defendant relief from the judgment entered against it in this action. He further deposes:

> "That the recitals in the judgment eventually entered in said cause, wherein it is set forth that affiant appeared as counsel for any defendant or in any manner whatever took part in said trial on behalf of defendant, are wholly false, as this affiant did not at any time take any part in the trial of said cause on any account whatever on behalf of said California corporation, or otherwise or at all, except in the matter of filing an answer by and on behalf of the New York corporation, and in aiding in impaneling a jury for the trial of the cause

against said New York corporation, but did not offer any evidence on the merits of said cause at any time, but left the courtroom when the amendment to the complaint was allowed, as fully shown in the stenographic report of said trial, to which stenographic report reference is hereby made as part hereof."

The answer proposed and tendered by the defendant is verified and, in appropriate language, denies that the defendant caused the injury complained of in the complaint. The reporter's transcript of the proceedings on the motion of the plaintiffs for leave to amend the complaint by substituting the California corporation for the New York corporation as defendant in the action was offered and admitted in evidence. The said affidavits, together with the stenographer's transcript of the proceedings on the plaintiffs' motion for leave to amend their complaint as above indicated, are contained in and authenticated by a bill of exceptions, and constituted all the proceedings had on the motion by the defendant to vacate the judgment.

[1-4] The contention of the plaintiffs is that the determination of the question submitted here must be governed entirely by an inspection of the judgment roll and not by a consideration of the affidavits and other evidence disclosing matters extrinsic to the judgment; that the only remedy which the defendant now has left to it for securing relief from the effect of the judgment is by a suit in equity, the time limited for an appeal from said judgment having expired at the time of the institution of the proceeding on the motion to vacate it. This position is sustained, it is claimed, by the proposition that, except in certain exceptional instances, within which, it is asserted, this case does not fall, a motion to vacate a judgment will not lie where, as was true here, the right of appeal from such judgment is available to the party against whom the judgment has passed. Section 939, Code Civ. Proc., supra. It is, of course, plainly manifest that, if such a motion cannot be entertained—that is, if an appeal from the judgment is the exclusive remedy—under the circumstances of this case, then an order denying such motion is not appealable, and in that view of the case before us the motion to dismiss the appeal would have to be granted, since, obviously, an order disallowing a motion which the court has no legal authority to entertain cannot be held to be among the orders from which the Code provides that appeals may be taken.

The position of the defendant is, however, that, inasmuch as it was not served with summons, either personally or constructively, and therefore was not afforded an opportunity to file an answer or otherwise appear in the action, it was authorized by section 473 of the Code of Civil Procedure to interpose an answer to the merits of the action, and that necessarily, in order to answer, it was entitled to have the judgment first vacated on motion, on a showing that, because of not having been legally notified of the commencement of the action, it had not answered to the merits thereof or otherwise appeared therein, said motion being made within one year after the rendition of the judgment.

We are of the opinion that the circumstances of this case show that the motion to set aside the judgment constituted one of the methods open to the defendant to obtain relief, if any it is entitled to, from the effect of said judgment, and are therefore further of the opinion that the motion was one which was proper to be made under the circumstances, and which the court was consequently legally authorized to entertain, and that the order denying it is appealable. In reaching this conclusion, we have been governed solely, so far as the evidence is concerned, by the facts set forth in the affidavits filed and used by the defendant in support of the motion to vacate the judgment and the proceedings on the application for leave to amend the complaint so far only as they corroborate the said affidavits upon the proposition of fact in impeachment of the recitals of the judgment to the effect that, at the trial, the defendant was represented by counsel. Thus we have limited the consideration of the proceedings leading to the amendment of the complaint, as disclosed by the bill of exceptions, because we desire and intend to refrain from passing upon the main proposition in this case, to wit, whether the act of substituting the defendant for the New York corporation, the original defendant in the action, as the party defendant thereto, although allowed under the guise of an amendment to the complaint, in effect amounted to the institution of a new action, or, at all events, one in which service of summons was necessary to give the court jurisdiction of the person of the substituted defendant. We prefer that this question be left open, to be considered and determined upon a consideration of the appeal upon its merits.

The general rule is, of course, that the party aggrieved by a judgment or an order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. This rule is clearly explained and aptly illustrated by Judge Hayne, in his work on New Trial and Appeal (2d Ed.) § 199, and the many cases therein referred to and examined.

It is also the general rule that the aggrieved party to a judgment must appeal to equity in the form of an independent suit for that purpose, where, the time within which he might have appealed therefrom having passed, he desires to set it aside for reasons extrinsic or collateral to the questions examined and determined in the action. Pico v. Cohn, 91 Cal. 132, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; French v. Phelps, 20 Cal. App. 101, 111, 128 Pac. 772, and cases therein cited. But there are exceptions to said rules. Title Ins. & Trust

Co. v. Calif., etc., Co., 159 Cal. 488, 114 Pac. 838; People v. Davis, 143 Cal. 675, 77 Pac. 651. The Legislature has seen fit to make provision for the application of some of these exceptions in section 473 of the Code of Civil Procedure, and, as stated, it is claimed by the defendant that the circumstances of this case bring it within the one-year clause of said section.

So much of said section as is important in the solution of the problem submitted by the motion now under consideration reads as follows:

> "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

This provision necessarily presupposes the right in the party to the action upon whom personal service of summons has not been had to have the judgment set aside preliminarily to the filing of the answer, for it would be absurd to say that a party defendant might, under the circumstances contemplated by that provision of the section, file his answer within the time specified, and so join the plaintiff on issues of fact and proceed with the trial of such issues while there still exists a judgment against such party.

The question here, then, is: Do the facts and circumstances of this case bring it within any of the exceptions of the general rules above stated? Or, in other words, are the facts such as legally to entitle the defendant to invoke the provision of section 473, above quoted, to obtain relief from the judgment? We can justly perceive none but an affirmative reply to that question.

The above quoted provision of section 473 was intended to mean something. It cannot be treated as a provision having no substantial or vital purpose in its enactment. The section plainly says that where, from any cause, a defendant has not been personally served with summons, he may, within a year after the rendition of judgment, answer to the merits of the action. That in such case the defendant is not only entitled, but compelled, to show that he has not been personally served with summons is an obvious proposition. The section does not, it is quite manifest, contemplate a new or an independent suit in equity to set aside the judgment in order to enable him to answer to the merits. It was unquestionably intended as a distinct remedy from and cumulative to that which may be had in a court of equity to annul a judgment, the time for appealing from which has passed. It does not, perhaps, always involve precisely a collateral attack upon a judgment, for under said provision the judgment may be set aside upon matters which are not strictly collateral thereto, or which presumptively are included in the adjudication. But it is nevertheless an indirect attack. The provision undoubtedly means, as obviously does the preceding language of the section providing for the securing of relief in certain instances within six months after the act from the effect of which relief is desired has been done, that the relief so sought may be granted in a summary proceeding, as by motion on affidavits. This proposition is sustained by all the authorities, notably People v. Davis, 143 Cal. 675, 77 Pac. 651, where it is said:

> "It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, *unless the motion is made within a reasonable time*, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, *which in no case exceeds one year*. * * * The effect of these well-settled rules is, that unless the invalidity of the judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, *in the absence of application made within the time specified in section 473 of the Code of Civil Procedure*, to make any order vacating or setting aside such judgment, and the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action, on the equity side of the court. See Eichhoff v. Eichhoff, 107 Cal. 42 [40 Pac. 24, 48 Am. St. Rep. 110]; People v. Temple, 103 Cal. 447 [37 Pac. 414]."

While the judgment here appears upon its face to be valid, the undisputed facts developed upon the motion to vacate it show: That the defendant was not served with summons, either personally or constructively; that it had no opportunity to answer to the merits of the action; that a trial was had in its absence and without its having been represented thereat by counsel or otherwise and that the judgment here complained of was, under those circumstances, entered against it; that the motion to vacate said judgment was filed and made within one year after the rendition of the same; that, with said motion, the defendant proposed and tendered an answer to the complaint, or "to the merits of the action."

We can conceive of no circumstances more strongly calling for the application of the one-year clause of section 473 of the Code of Civil Procedure than those shown by the affidavits filed on the motion to set aside the judgment here. Indeed, we may go further and say that if this is not a case in which a motion to vacate a judgment valid on its face will lie, under the terms of section 473 of the Code of Civil Procedure, then it would be difficult to form a conception of circumstances which will justify the application of the one-year clause of said section. That the defendant was, by reason of the circumstances under which the judgment was rendered against him in this action, deprived of an opportunity to make a bill of exceptions or other record which would present whatever meritorious grounds of objection which it might have to said judgment is plainly manifest. Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 488, 114 Pac. 838. At the trial of the action upon its merits, the defendant, not being present or represented, had no opportunity to register objections to any of the proceedings.

[5] But, says counsel for the plaintiffs, the code provision resorted to by the defendant for relief from the judgment applies to cases only where the service is constructive and judgment is, upon such service, taken by default, and in support of that proposition he cites section 199 of Hayne on New Trial & Appeal, and the cases referred to therein. We do not so understand the author of that learned treatise on the appellate practice, nor the decisions cited therein. It is true that Judge Hayne says (page 1033) that:

> "It seems that there are cases not strictly ex parte which constitute exceptions to the rule. Of these are to be noted cases where the service was constructive, and the judgment rendered was a judgment in default. Of such class of cases was De La Montanya v. De La Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165."

But we do not understand that thus it was intended to say, or that the learned author does say, that the application of the exception is confined to cases where constructive service has been had and a default judgment thereupon entered. The reason for applying the exception to such cases is undoubtedly because the defendant, in point of fact, has possibly not received notice of the action, and therefore had no opportunity to appear, defend, and so prepare a record. The same reason is no less forceful and applicable in a case where, as here, the defendant has not been served at all, and, so far as such defendant is concerned, a trial had without issue joined and without his presence thereat either in person or by a representative. A judgment entered under such circumstances cannot be said to be impressed with qualities superior to those of a default judgment entered on a constructive service of summons. Indeed, the judgment here, according to the evidence adduced at the hearing of the motion to vacate it, is no less a default judgment than one in a divorce action, in which testimony must be taken to support the allegations of the complaint even though, having been served with summons, the defendant makes no appearance. In truth the case here is much stronger in support of the right of the defendant to seek relief under section 473 than it would be in support of the application of a defendant upon whom service by publication has been regularly had for similar relief from a default judgment, for, in this case, as seen, there was no service of summons at all.

We are unable to discern any just reason for holding that the defendant is not entitled to invoke the remedy provided by section 473 of the Code of Civil Procedure for setting aside the judgment obtained against it under the peculiar circumstances of the case as disclosed by this record.

The motion to dismiss this appeal is accordingly denied.

25 Cal. App. 268

COLUMBIA CRUDE OIL CO. v. DEYO.

(Civ. 1601.)

(District Court of Appeal, Second District, California. July 30, 1914. Rehearing Denied by Supreme Court Aug. 28, 1914.)

1. Appeal and Error (§ 694*) — Record — Form.

On appeal from an order denying motions, a typewritten copy of affidavits and documents certified by the clerk to be true copies of the original documents on file in his office could not be considered, where it did not show that such documents were presented to, or considered by, the court upon the hearing of the motions, or that other evidence was not offered and considered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

2. Appeal and Error (§ 553*) — Record — Authentication.

On appeal from an order denying motions to recall and quash an execution, and for an injunction restraining proceedings under such execution, a typewritten copy of affidavits and documents certified by the clerk to be true copies of the original documents on file in his office was not properly authenticated to be considered in lieu of a bill of exceptions, since, when a bill of exceptions is not brought up, the record must be authenticated as required by Code Civ. Proc. § 953a, which provides that the party appealing may request that a transcript of the testimony, etc., be made up and prepared; that when so prepared and filed the clerk shall notify the attorneys that it will be presented to the judge for his approval; and that at the time specified in the notice the judge shall examine it and see that it is a full, true, and fair transcript, and shall thereupon certify to its truth and correctness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465–2471; Dec. Dig. § 553.*]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Columbia Crude Oil Company against W. S. Deyo. From orders denying motions to recall and quash an execution, and for an injunction restraining proceedings under the execution, defendant appeals. On motion to dismiss the appeal. Motion granted.

A. C. Routhe, of Alhambra, for appellant. Rupert B. Turnbull, of Pasadena, and Flint, Gray & Barker, of Los Angeles, for respondent.

SHAW, J. Motion to dismiss appeal from: First, an order of the trial court denying defendant's motion to recall and quash an execution; and, second, an order denying defendant's application for an injunction directed to the sheriff, restraining him from further proceedings under the execution so issued upon a judgment rendered in favor of the plaintiff in the action.

[1, 2] The motion is made upon the ground of the insufficiency of the record presented in support of the appeal. In lieu of a bill of exceptions settled by the court and exhibiting the alleged errors of the trial court in the proceedings, appellant has incorporated in a typewritten copy thereof certain affidavits, telegrams, and letters, certified by the clerk to be true copies of such original documents on file in his office. It does not appear that these documents were presented to the court, or considered upon the hearing of the motions so by the court denied. Nor, assuming they were so offered and received, is there anything in the record showing that other evidence was not offered and considered. When a bill of exceptions is not adopted as a means for presenting the record on an appeal from such orders as those here involved, the party appealing must, in having the record authenticated, comply with the provisions of section 953a, Code of Civil Procedure, under which he must request a transcript of the evidence offered or received, to be settled and signed by the judge, after notice as therein provided. No attempt, apparently, was made to follow the provisions of the statute in having the record so authenticated.

So far as shown by the record, no evidence was offered or received in support of the motions on which the orders of denial were made, and the purported record is not authenticated in the manner required by law, without which this court cannot consider the same.

The motion to dismiss the appeal is granted.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 231

BRITT v. EAST SIDE HARDWARE CO.

(KINARD, Intervener.) (Civ. 1236.)

(District Court of Appeal, Third District, California. July 28, 1914.)

1. Appeal and Error (§ 544*)—Presentation for Review—Disallowance of Intervention.

While an order disallowing intervention is a final judgment as to the proposed intervener, the record on appeal from such order must, under the express provisions of Supreme Court rule 29 (119 Pac. xiv), be authenticated by a bill of exceptions containing all the papers used in the particular proceeding and upon which the court acted in making the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2417–2420, 2422–2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

2. Appeal and Error (§ 612*)—Presentation for Review—Disallowance of Intervention—Judgment Roll—Certificate.

Since, within the contemplation of Code Civ. Proc. § 670, providing what the judgment roll shall contain, there was no judgment roll in a proceeding wherein leave to intervene was denied, a certificate of the trial clerk that "the foregoing is a true copy of the judgment roll in the above entitled cause" was not an authentication of the record on the motion to intervene.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. § 612.*]

3. Appeal and Error (§ 544*)—Authentication of Record—Sufficiency.

The only proper mode for authenticating a record on an appealable order, is by bill of exceptions, as required by Supreme Court rule 29 (119 Pac. xiv).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412–2415, 2417–2420, 2422–2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

4. Appeal and Error (§ 913*)—Presentation for Review—Disallowance of Intervention—Presumption of Regularity.

Where the record on appeal from an order disallowing a motion to intervene does not show the pleadings of the original parties, the appellate court will presume that, in the light of such pleadings, no legal ground was presented for the intervention sought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3690–3692; Dec. Dig. § 913.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§ 676*)—PRESENTATION FOR REVIEW—DISALLOWANCE OF INTERVENTION—BILL OF EXCEPTIONS—AFFIRMANCE.

Where, on appeal from an order disallowing an application for leave to intervene, the bill of exceptions fails to disclose the pleadings of the original parties, and therefore it cannot be determined whether the proposed intervention appertains to the pending cause of action, whether the applicant is interested in the subject-matter of the litigation within Code Civ. Proc. § 387, giving any person in interest a right to intervene, or whether he has presented any facts different from those set up in defendant's answer, the order will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2876; Dec. Dig. § 676.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by W. S. Britt against the East Side Hardware Company, a corporation. From an order and judgment disallowing the application of C. E. Kinard to intervene, he appeals. Affirmed.

C. E. Kinard, of Oakland, in pro. per. Chas. A. Beardsley and J. A. Kennedy, both of Oakland, for respondent Britt. Howard K. James, of Alameda, for respondent East Side Hardware Co.

HART, J. This is an appeal from an order and judgment dissallowing the application of the appellant for leave to intervene in this action.

[1] At the outset, the plaintiff makes the point that there is here no record upon which this court can determine whether the court below erred by making the order and entering the judgment appealed from, and we think this position must be sustained. The transcript contains the pleadings of the original parties, a temporary injunction granted by the court against the defendant upon the filing of the complaint and the notice of appeal. It also contains a bill of exceptions as proposed by the appellant and settled by the court on the proceeding involving the proposed intervention. The said bill embodies the following documents and none other: The proposed complaint in intervention, a proposed answer to the plaintiff's complaint, the written agreement upon which plaintiff's action is founded, and the order dissallowing the application for leave to intervene. The transcript purports to be authenticated by the certificate of the clerk of the court, which reads, in part:

> "That the foregoing is a true transcript of the judgment roll in the above entitled cause, now on file in my office, together with other proceedings, papers, and minutes of the said superior court herein contained."

While an order disallowing an intervention amounts in legal effect to a final judgment as to the proposed intervener (Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616), it seems to be settled that, where an appeal is taken from such order, the record thereon must be authenticated by a bill of exceptions containing all the papers and documents used in that particular proceeding, and upon which the trial court acted in making the order. This conclusion is in accord with rule 29 (119 Pac. xiv) of the Supreme Court, which provides:

> "In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law."

[2, 3] We know of no other mode provided by law for authenticating the record on a motion such as the one resulting in the order from which this appeal has been taken than by a bill of exceptions. It can hardly be said that there is, within the contemplation of section 670 of the Code of Civil Procedure, a judgment roll in a proceeding on a motion for leave to intervene in an action, where the motion has been denied; hence the certificate of the clerk of the trial court, certifying that "the foregoing is a true copy of the transcript of the judgment roll in the above-entitled cause" is not an authentication of the record on the motion. There is, in strictness, no judgment roll until the action has been tried and a decision therein reached on the merits. We cannot therefore conceive how it could be held that the certificate of the clerk to a record of the nature of the one before us can amount to anything, in so far as it purports to be evidence of the authenticity of such record. As stated, the only proper mode for authenticating a record on an appealable order is by a bill of exceptions, as required by rule 29 (119 Pac. xiv) of the Supreme Court, supra.

It follows that all that we are authorized to review on this appeal are the papers and documents embraced in and authenticated by the bill of exceptions which is printed in the transcript. In other words, we cannot, in the consideration of this appeal, examine the pleadings of the original parties or any other documents contained in the transcript that are not embodied in the bill of exceptions. Thus confined in our consideration of the record before us, we cannot say that the court below erred in refusing to permit the appellant to intervene in this action.

[4] The proposed complaint in intervention alleges that the defendant is a corporation, and that the appellant is a stockholder therein, and as such "has a material interest in the subject-matter in litigation in the above entitled cause"; that the transaction giving rise to this action was the direct result of a fraudulent scheme jointly conceived and concocted by the plaintiff and certain members of the board of directors of the defendant for the purpose of turning over to the plaintiff, without an adequate or any consideration, the property of the defendant, in fraud of the rights of the appellant and other stockholders in the latter; that, to accomplish that end, an alleged written agreement was entered into

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

between the plaintiff and the defendant, whereby all the property of the latter would be transferred to the plaintiff; that said agreement, not having been consented to by the stockholders of the corporation holding of record at least two-thirds of the issued capital stock of said corporation (section 361a, Civ. Code), is void and cannot therefore be enforced against said defendant. The proposed complaint in intervention further declares that the answer of the defendant to the plaintiff's complaint admits the validity of said agreement, and fails to set up the facts disclosing the fraudulent character of the transaction upon which this action is founded, and so fails to show that the plaintiff and the defendant and the latter's board of directors are parties to said fraudulent transaction; that the appellant has frequently requested the defendant and its attorneys of record in this action to amend the defendant's answer to the plaintiff's complaint by setting up therein the alleged fraud referred to, but that the defendant and its attorneys have failed and refused so to amend said answer.

The record does not reveal the reason or reasons which moved the court below in its course on the appellant's motion. But, whatever might have been the grounds upon which the said motion was denied, we must assume, in the absence of an affirmative showing to the contrary, that the action of the court in disposing of it was legally justified. In other words, every presumption in support of the order must be indulged, it not appearing from the face of the record that the court erred in making it, and we must presume, therefore, that the appellant, on his motion, submitted to the court no legal ground or reason for the intervention sought for by him.

[5] In the absence from the bill of exceptions of the pleadings of the original parties, it is manifestly impossible for this court to determine whether the proposed intervention, as indicated by the pleadings therein tendered by the appellant, appertains to the same transaction or the alleged cause of action upon which this action is founded. Nor can it be told whether the appellant is interested in the subject-matter of the litigation and entitled to intervene. Section 387, Code Civ. Proc. And even if, by any stretch of the imagination, we were enabled to infer from the averments of the appellant's pleadings that his proposed intervention related and was pertinent to the cause of action declared upon in the plaintiff's complaint, and that he is an interested party within the purview of section 387, supra, we are not informed by the record whether he, in his said complaint, has presented any different or further facts than those set up in the defendant's answer. In other words, for all that we can know from the record as it appears before us, the answer of the defendant may contain all the facts which are pleaded in the proposed pleadings of the appellant, including the charge therein made that the transaction upon which this action is founded originated in a fraudulent scheme hatched by the plaintiff and certain members of the board of directors of the defendant for the purpose of effecting a transfer of the property of the defendant to the plaintiff, in fraud of the rights of the other stockholders of the latter.

At all events, under the record as it is presented here, it is plain that there is no other course open to us but to uphold the order appealed from, and the same is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 236

PEOPLE v. PETROS. (Cr. 271.)

(District Court of Appeal, Third District, California. July 28, 1914.)

1. Criminal Law (§ 1134*) — Appeal — Review—New Trial.

Where the trial court on granting a new trial rendered an opinion setting forth its reasons for making the order, which was general in terms and named no specific ground, the opinion which is not part of the record cannot be considered for any purpose in determining the propriety of the order.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986–2998, 3056, 3067–3071; Dec. Dig. § 1134.*]

2. Criminal Law (§ 1156*)—Appeal — Review—New Trial.

In a prosecution for pandering, where there was a conflict in the evidence as to whether accused was guilty of any overt act constituting an attempt, an order of the trial court setting aside a conviction of an attempt will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. § 1156.*]

3. Criminal Law (§ 44*) — "Attempt" — What Constitutes.

An attempt to commit a crime consists of the intent to commit it and a direct ineffectual act done towards its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. § 44.*

For other definitions, see Words and Phrases, First and Second Series, Attempt.]

4. Prostitution (§ 1*)—Pandering—What Constitutes—Attempt.

Where accused, by his false representations to the prosecuting witness that he would procure for her a better position if she would consent to accompany him, took her to a hotel, where they occupied the same room, living as husband and wife, and accused thereafter turned her over to a prostitute whom he told that he wished to place the prosecuting witness in her house, he was guilty of an attempt to pander, within St. 1911, p. 9.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

5. Prostitution (§ 1*) — Pandering — Offense—Attempt.

The fact that the professional prostitute took the prosecutrix with the intention of delivering her from accused does not change the offense and render accused not guilty.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Gus Petros was convicted of an attempt to pander, and from an order granting a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People. Stephen N. Blewett, of Stockton, for respondent.

HART, J. The defendant was accused by information of the crime of pandering, as defined by an act of the Legislature of 1911 (Stats. 1911, p. 9), and upon being tried on said information was convicted of the crime of an attempt to commit the crime therein charged. Section 1159, Pen. Code. In due time, the defendant moved for a new trial on the following grounds: "(1) * * * (2) * * * (3) That the verdict is contrary to law. (4) That the verdict is contrary to the evidence." The court made an order granting said motion "upon the ground of the insufficiency of the evidence to sustain the verdict." This appeal is prosecuted by the people from said order.

The statute upon which the information is founded reads as follows:

> "Section 1. Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats, violence, or by any device or scheme, shall cause, induce, persuade a female person to become an inmate of a house of prostitution, or shall procure for a female person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution or any other place in which prostitution is encouraged or allowed to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any female person to become an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution, or who shall receive or give, or agree to receive or give, any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill fame within this state, or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, to wit: pandering, and upon conviction for an offense under this act shall be punished by imprisonment in the state prison for a period of not less than one year nor more than ten years."

In its charge to the jury, the court declared that "a verdict of guilty of pandering would be unwarranted" under the evidence, but instructed that it was within the legal province of the jury, under the evidence, to find the accused guilty of the crime of an attempt to commit the crime of pandering, if they were convinced by the evidence beyond a reasonable doubt that such an attempt had been made.

Embodied in the brief of counsel for the respondent is the opinion of the trial court, rendered at the time of the granting of the motion, and which sets forth at considerable length the reasons impelling the conclusion of said court that the verdict was not justified or sustained by the evidence. From said opinion it appears that the court is of the view that, although not questioning its verity, the evidence was insufficient, as a matter of law, to uphold a verdict of guilty of the crime of an attempt to commit the crime of pandering, and it further appears therefrom that it was solely upon that view of the evidence that the new trial was granted. Doubtless influenced to a great extent by a consideration of said opinion and the views therein expressed, the Attorney General devotes his brief entirely to a discussion of the question whether, as a matter of law, an attempt to commit the crime of pandering is shown by the evidence, and, concluding that the trial court has thus betrayed a misapprehension of the scope and effect of the evidence adduced before the jury, insists upon a reversal of the order.

[1] But, obviously, the opinion of the trial court setting out the reasons leading it to make the order from which this appeal is taken is no part of the record, and cannot therefore be considered in reviewing this record. We must be governed entirely by the order itself and not by the reasons of the trial court for making it. It will be noted that the order is general in its terms, in so far as is concerned the specific ground upon which it is based, and does not specify any particular reason leading to the making of it.

[2] The rule is thoroughly settled that:

> "The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion." Domico v. Casassa, 101 Cal. 413, 35 Pac. 1024; Warner v. Thomas, etc., Works, 105 Cal. 411, 38 Pac. 960; Eidinger v. Sigwart, 13 Cal. App. 667, 676, 110 Pac. 521, 524, and cases therein cited.
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> "Indeed, it has repeatedly been said in the cases that the action of a trial court in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision 'is so far a matter within its discretion that, if there is *any appreciable conflict* in the evidence it is not open to review.'" Newman v. Overland Pac. Ry. Co., 132 Cal. 74, 64 Pac. 110; Otten v. Spreckels, 141 Pac. 224.

In this case there appears to be a conflict in the evidence upon the vital question here whether the defendant committed any overt act in furtherance of what seems to have been a well-established intention in him to commit the crime charged.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless true that it is invested with a supervisory control over a trial before a jury, and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may, of course, pass upon the probative value of the testimony submitted in proof of the charge against the accused. In other words, such court may consider, examine, and scrutinize the testimony by the aid of those tests by which the jury are required to measure the worth and weight of the proofs adduced in substantiation of the charge, and if it thus reaches the conclusion that the jury, to reach its conclusion, must have accorded to such testimony undue weight and credit—that is to say, if it be persuaded by a just and fair consideration of the testimony that it is insufficient to establish guilt beyond a reasonable doubt, and that the jury formed an erroneous judgment on the probative power of the evidence—and, accordingly, in the exercise of the discretion committed to it as to such matters, grants a new trial, the order granting the motion must then be held to stand free from disturbance by a court of review.

For aught that may be ascertained from an examination of the record now under review, the trial court might have concluded that, although the testimony presented by the people on its face appeared to disclose the guilt of the accused and, if believable, was sufficient to support the verdict returned the witnesses giving such testimony had so given it as to convince it that they were not telling the truth, and that the jury, in according to the witnesses and their testimony the credit and the weight essential to the support of the conclusion that the defendant was guilty of the crime of which he was convicted, were influenced either by a misconception of the true worth or real evidentiary value of such testimony or by passion or prejudice, superinduced, perhaps, by the sentiment generally prevailing throughout the country against such acts as constitute the foundation of the charge preferred against the defendant. But, whatever might have been the specific reasons persuading the trial court to grant the motion on the ground that the evidence does not justify the verdict, this court is in no position to declare that the action of the court in that regard involved an abuse of the discretion confided to trial courts in disposing of motions for new trials.

[3-5] As before stated, however, the opinion of the learned trial judge appears in the brief of counsel for the defendant as a part of the argument advanced by the latter in support of the order appealed from, and, since it thus appears that it is his opinion that the facts brought to light by the evidence, assuming said evidence is credible and believable, do not bring the acts of the defendant as thereby disclosed within the condemnation of the statute under which he was prosecuted, and, in view of a probable retrial of the case, it is thought to be proper to give herein our conception of the legal effect of said evidence—that is, whether it can fairly and reasonably be said to show an attempt to commit the crime charged.

The facts are: The prosecuting witness, Bessie Edwards, first met the defendant early in the month of February, 1914, in the city of San Francisco. She was at that time just approaching her 19th birthday, and was employed as a domestic in the city of Oakland. The defendant proposed to her that she accompany him to the city of Stockton, where, he said, he would be able to secure a position for her as a waitress in a restaurant, at which nothing but "soft drinks and black coffee" were served with the meals. The prosecutrix assented to the proposition and, on the 2d day of February, 1914, went to the city of Stockton in company with the defendant. The defendant took her to a room in a rooming house situated near one of the railroad depots in said city, and there they remained together, occupying the same bed that night. The following day he secured a room in the Dale Hotel, where he registered himself and the young woman as husband and wife. They occupied the room together up to the time of the defendant's arrest, or for a period of five or six days. On two different occasions during this period of time the defendant brought men to the room, introduced them to the prosecutrix, and gave her to understand that the purpose of their visits was to have sexual relations with her, and for which each would pay her $1.50. Such relations she had with the men referred to, and the money so obtained by her she turned over to the defendant in obedience to his demand for it. Prior to having these relations with other men, the defendant, so the prosecutrix said, would arise from bed at a very early hour in the morning, would leave the room, and seldom return until late in the day, leaving her alone and without food or means to procure a substantial meal. He would, on his return in the evening, bring her a sandwich. During that time she went out on the streets on but two occasions—on one for the purpose of procuring a few doughnuts at a nearby bakery, and on the other to purchase a cheap waist at a store situated within a few blocks of the Dale. It further was made to appear that, while the couple were rooming at the Dale, he told her of the "Bull Pen," a place in the city of Stockton, to which those houses of prostitution which are each occupied by a single prostitute are confined, and said to her that he would have to "break her in," the inference from that statement being that he intended or desired to initiate her into the business of a prostitute.

On the Saturday evening of the week during which the couple occupied the room in said hotel, the defendant and prosecutrix went to the Union Restaurant for dinner. There they met a prostitute, known as Teddie Smith, and a male friend of the latter. The defendant introduced the prosecutrix to the Smith woman and her friend, and all four ate their meals at the same table. The defendant gave the prosecutrix some beer, but she drank very little of it, saying that she did not like it. When, however, she would drink a small amount of it, the defendant would immediately fill her glass with more beer. Finishing their meals, the Smith woman remarked that it was time for her to return to her "crib" (a term used to designate a place of prostitution of one or two rooms, and occupied by but one female), whereupon the defendant asked her to take the prosecutrix with her, saying, "I wish you would get her to work to-night, because I have the last dollar in my pocket." Miss Smith then inquired whether the girl had ever "worked" in a "crib," and the defendant immediately replied that she had "worked" in a "parlor house." "I thought she looked green," continued Miss Smith, "and I says, 'How old are you?' and he [defendant] said 'Twenty-three.'" The Smith woman then said that she would take the prosecutrix with her to the "crib," and thereupon the two women left the restaurant together and the two men departed in another direction. Miss Smith continued:

> "Well, I knew she couldn't get work Saturday night, and I knew that she wasn't in the hands she ought to be; I wanted to get her alone to find out whether she was a sporting girl. So we got outside, and I asked her, and she owned up to it—she owned up to me—she said she was afraid, though, she would have to go, or he would kill her; I told her no, he would not; she said she would have to go or he would kill her; I told her no; I says, 'No, girlie, it is an awful life to live'; she said, 'Well, I don't want to do that,' but she says, 'I will have to do it or he would kill me.' I says, 'No, he won't; I will take you and put you in hands you won't get hurt.'"

Miss Smith took the prosecutrix to her apartments or "crib," which was one of a number of "cribs" or houses of prostitution constituting the "Bull Pen" before referred to. She telephoned from there to police headquarters and reported the case to the officers, and a policeman was at once dispatched to the "crib" and took charge of the girl.

The above statement of the facts embraces, in substance, the stories as told before the jury by the prosecutrix and Miss Smith.

The theory of the learned trial judge, as indicated by the opinion rendered by him when granting the motion for a new trial in this case, is that the facts as given above disclose nothing more than mere preparation to commit the crime of pandering—that is to say, that, while the evidence shows that the defendant had the intent to commit said crime and was engaged in making preparation to carry out that intent or to consummate the offense, it does not show that he made an attempt to do so; that, to complete the offense of an attempt to commit the crime of pandering, the accused must have attempted to secure a room or a house to be used by the female for the purposes of prostitution. In support of its conclusion, as above stated, the court cites and relies upon the following cases: People v. Matsicura, 19 Cal. App. 75, 124 Pac. 882; People v. Murray, 14 Cal. 159; Ex parte Floyd, 7 Cal. App. 588, 95 Pac. 175; Ex parte Turner, 3 Okl. Cr. R. 168, 104 Pac. 1071. We are unable to persuade ourselves that those cases support the conclusion reached by the learned trial judge in the case at bar. In other words, we are of the opinion that the evidence in this case, assuming only for the purposes of this discussion that it was not for any reason unworthy of credence or belief, goes much further than any of the cases referred to and shows a clear attempt by the defendant to commit the crime with which he was charged.

> "An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct ineffectual act done towards its commission." 2 Bishop, Crim. Proc. par. 71.

Or, as Wharton, page 268 of the eleventh edition of his work on Criminal Law, defines it: "An attempt is an intended apparent unfinished crime." Of course, as that learned author proceeds to say, "there must be some appreciable fragment of the crime committed," and if it be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, then the attempt is complete. In other words, "to constitute the crime of an attempt to commit a crime, the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." People v. Grubb, 141 Pac. 1051; 1 Wharton, Crim. Law (10th Ed.) § 181; Clark & Marshall's Law of Crime (2d Ed.) § 123.

That the evidence in this case clearly shows that the defendant's intention was to place the prosecutrix in a house of prostitution for the purpose of carrying on that business is not denied. Manifestly, as the cases cited by the trial court in its opinion and above mentioned say, the mere intention to commit a crime does not of itself constitute an attempt to commit it; nor does the mere preparation to commit the crime, unaccompanied by any overt act, constitute an attempt to commit it. And if the evidence in this case disclosed nothing more than an intention and preparation to commit the crime of pandering, we would be compelled to hold with the trial court that the crime of an attempt to commit said offense was not established. But we think that the evidence clearly shows that the defendant went much further than merely to form the intent to commit the crime charged and to take certain preliminary steps, amounting only to preparation, looking to the execution of such intent.

In the first place, it is to be remarked that the statute, among other things, provides that any person who, by any device or scheme, shall cause, induce, persuade, or encourage a female person to become an inmate of a house of prostitution is guilty of a felony. It is further to be observed that an examination of the information will disclose that it is in the language of the statute, and that, among other things, it charges the defendant with having induced, persuaded, and encouraged the prosecutrix to become an inmate of a house of prostitution. It cannot be doubted that, under the language of the statute, where it is made to appear that such inducement, persuasion, or encouragement had reached the point that its effect would have been to cause the female to become an inmate of a house of prostitution but for the intervention of circumstances apart from and independent of the will of the persuader, the crime of an attempt to commit the crime denounced by the statute had been fully accomplished. It seems clear to us that the acts of the defendant had, according to the face value of the evidence, reached that very point. He, indeed, seems to have done all that he could do to induce her to become an inmate of such a house. While it is true that he did not personally procure for her a house or a room to be used by her for the purpose of plying the business of a prostitute (an act which we do not conceive to be indispensably essential to the consummation of the offense in all cases), he nevertheless, evidently having her under his domination and control, turned her over to the custody of a keeper of a house of prostitution, with instructions to put her to "work" at once, saying in effect that his supply of money was about exhausted, and the woman into whose charge she was thus placed, acting upon his persuasions, took her to a house of prostitution. If he had himself taken her to such a house for the purpose of making her an inmate thereof, no one would be found to say that such act would not constitute an attempt to commit the crime of pandering as defined by the statute upon which the information is based. And we are unable to perceive any difference in principle between such an act and the act of the accused in turning the prosecutrix over to the custody of a keeper of a house of prostitution with instructions that the latter place her in such a house to become an inmate thereof for the purpose of carrying on the business of prostitution. What the motive of the woman, Smith, might have been in taking the girl to her house of ill fame—whether to make her an inmate thereof in compliance with the expressed wish and request of the defendant, or only to secure an opportunity for placing her in the charge of the authorities and thus protecting her against the iniquitous designs of the accused—is immaterial, so far as the defendant himself is concerned. That circumstance did not and could not have the effect of rendering his conduct any the less an attempt to commit the crime of pandering. Indeed, but for the part that was finally played in the matter by Teddie Smith, the prosecutrix would undoubtedly there and then have entered upon the career of a common prostitute as the direct result of the acts of the defendant. That she did not was due entirely to the will and act of the Smith woman, and not to any act or wish of the accused. And it was this most commendable and humane intervention in the malodorous transaction by the fallen woman, Teddie Smith, that constituted the "extraneous circumstances"—circumstances arising independently of the will of the accused—which frustrated or prevented the execution of his purpose to place her in a house of prostitution as an inmate thereof.

As stated, the facts developed in the cases in which the learned trial judge perceives support for the conclusion declared in his opinion are very much different from those of the present case.

In the case of the People v. Matsicura, supra, the defendant was convicted of the crime of pandering under the statute in question. The undisputed evidence showed that the defendant was the owner or lessee of a house of prostitution, in Bakersfield, Kern county, and that the prosecutrix, some months prior to the date of the alleged commission of the crime of which the defendant was convicted, occupied a room in said house and there carried on the business of prostitution; that she had left said house and gone to Stockton, where she engaged in said business for a short period, when she sent word by wire to the defendant to either go to Stockton and take her back to Bakersfield or send her a railroad ticket to the latter place. The defendant forwarded a ticket to her, and she arrived at Bakersfield early on the following morning. She immediately repaired to the house of the defendant, who was then still in bed, and awakened him and accompanied him to a restaurant, where they had their breakfast. During the course of the meal she asked the defendant whether her "crib" was ready for her, and he replied, "No, not yet, but after breakfast I will fix it up for you." The defendant was arrested while at breakfast and charged with the crime of pandering, of which he was convicted upon evidence disclosing no other facts than those above detailed. It will at once be noted that the court in that case was dealing with a verdict of conviction of the crime of pandering itself, and not of an attempt to commit that crime. Obviously, the uncontradicted facts utterly failed to establish said crime, but it is not declared in the opinion that a conviction of an attempt to commit it might not have been thereby sustained.

In respect of the facts, we perceive no parallel between the other cases cited by the learned trial judge in his opinion and the case at bar. The evidence in those cases revealed no overt acts by the accused directed toward the commission of the specific crimes charged, but merely disclosed preparation of the means whereby said crimes might have been committed.

We are satisfied that the evidence, as disclosed by the record, if not for any reason unbelievable, is sufficient to establish an attempt on the part of the defendant to commit the crime of pandering as the same is described by the statute upon which the information is founded.

However, for the reasons stated in the outset of this opinion, the order appealed from must be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 216

WELLER v. BROWN et al. (Civ. 1244.)

(District Court of Appeal, Third District, California. July 28, 1914.)

1. Appeal and Error (§ 1099*)—Law of the Case—Decision on Former Appeal.

The decision on a former appeal, in a suit to quiet title, that an oral agreement that a deed from plaintiff to defendant to a strip of land, "to be used as a public street, and not as a lot for building purposes," should constitute a reservation in favor of the owners of adjoining land of rights in a public street and of a negative easement prohibiting the erection of any building showed no more than that an immediate dedication to the public was not contemplated was the law of the case on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

2. Quieting Title (§ 47*)—Trial—Findings—Constructon.

A finding, in a suit to quiet title, that it was "never agreed," between the parties to a deed to a strip of land "to be used as a public street," that the grantors should reserve any rights in the land which they would have were it a public street was not in irreconcilable conflict with a finding that such an agreement existed, where it appeared from the concluding clause of the first finding that it meant that there was no "express" agreement.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95–97; Dec. Dig. § 47.*]

3. Quieting Title (§ 54*)—Costs—Allowance.

Where the only issue, in a suit to quiet title, was the existence of an easement in favor of defendant for a right of way, as to which issue the judgment was for defendant, plaintiff was not entitled to costs, under Code Civ. Proc. § 1022, providing when costs shall be allowed to the plaintiff, though he was found to be the owner of the fee.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 105; Dec. Dig. § 54.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by H. A. Weller against R. M. Brown and another. From judgment and order for defendants, plaintiff appeals. Affirmed.

See, also, 160 Cal. 515, 117 Pac. 517.

Mannon & Mannon, of Ukiah, for appellant.
Preston & Preston, of Ukiah, for respondents.

BURNETT, J. On June 15, 1906, respondent Louisa M. Brown (wife of her codefendant), being the owner of a tract of land in Ft. Bragg, Mendocino county, conveyed to appellant by a grant deed a strip 60 feet wide extending across the entire width of her tract and leaving her with a parcel adjoining it on each side; all three parcels fronting on Main street. The deed was in the usual form, purporting to convey the absolute title, except that it contained the following clause:

> "It is hereby mutually agreed between the parties of the first part and the party of the second part that the above-described land is to be used as a public street and not as a lot for building purposes."

An action was brought by plaintiff to quiet his title to this strip, and a judgment was rendered in his favor in the superior court of said Mendocino county, but this was reversed by the Supreme Court, and the cause remanded for a new trial. 160 Cal. 515, 117 Pac. 517. Before the action was tried again, plaintiff amended his complaint, alleging that, by reason of a mistake as to the legal effect of the language of said deed, it did not correctly express the intention of the parties to the contract, in that it was no part of the agreement that the respondents should have any interest in the land conveyed by them.

By stipulation, the original answer of the respondents was considered as their answer to the amended complaint, and it was further agreed that any additional allegations in the amended complaint should be deemed denied. Afterwards the court found:

> "(3) That the said plaintiff agreed to pay to the said defendants, and the said defendants agreed to accept, the sum of $450 in gold coin of the United States for said lot, and plaintiff agreed not to use said lot for building purposes, but that he would buy it and pay for it and hold it until the city needed it for a street, and, when said city repaid him the consideration he was to pay defendants for the land, he would convey it to said city for a public street, and that no other or further agreement was made between plaintiff and the defendants herein in relation to said land.
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> "(4) * * * That plaintiff did not then or there or at any other time or place claim to be acting for, by, or on behalf of the public, nor did he take said deed from the defendant Louisa M. Brown for the land in controversy with the understanding or agreement, whether duly or regularly made or otherwise, that the said land in controversy should be or become a public street or highway for public use or travel, unless and until the city repaid plaintiff the considera-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion he paid defendants therefor, or that the same should be or become an easement appurtenant to the remaining lands so owned by said defendant Louisa M. Brown, whether for the purpose of ingress or egress thereto or therefrom, unless the facts found in paragraph 3 hereof, taken in connection with the situation of the land in controversy as herein found, reserved to defendant Louisa M. Brown such rights as a matter of law; that the right to travel or use said land in controversy is not necessary but is convenient for the use or occupation by said defendant Louisa M. Brown of the lands she owns that adjoin the land in controversy.

"(5) That at the time of the execution of said deed, and thence up to the 7th day of August, 1911, the plaintiff supposed and believed that said deed expressed the true agreement of the parties thereto as set out in paragraph 3 of these findings, but that on said last-mentioned day the Supreme Court of the state of California decided that the language of said deed, as a matter of law, reserved to the said defendants all of the rights in the lot thereby conveyed which they would have were it a public street; that it was never agreed between the parties to said deed that the defendants or either of them should reserve all or any of the rights in said lot which they would have were it a public street, and that the reservation of such rights was inserted in said deed by mistake as to the true legal meaning of the cause thereof in this paragraph above quoted; and that therefore the said deed did not and does not express the true agreement of the parties thereto, unless the facts found in paragraph 3 hereof, taken in connection with the situation of the land in controversy, as herein found, reserved to defendant Louisa M. Brown such rights as a matter of law.

"(6) That the failure of said deed to express the true agreement of the parties arose from a mistake as to the legal effect of the language contained in said deed and quoted in paragraph 5 of these findings; that plaintiff at the time of accepting said deed, and at all times up to August 7, 1911, supposed that he knew and understood the legal effect of the language used in said deed, and that such legal effect was to express the true agreement of the parties, as set forth in paragraph 3 of these findings; that the defendants did not make the same mistake as to the legal effect of said deed as did said plaintiff, but that they and each of them knew of plaintiff's said misapprehension of the law as to such legal effect at the time of executing said deed, but that said defendants did not, nor did either of them, at that time or at any other time, rectify plaintiff's said misapprehension of the law.

"(7) That plaintiff was at the time of the commencement of this action, ever since has been, and now is the owner, seised in fee, in the possession and entitled to the possession, of all of the lot of land described in paragraph 3 of these findings, subject to the right of the defendant Louisa M. Brown by virtue of the said deed; that the public at large has no right to travel over or to use the said land in controversy or any part thereof as or for a public street or highway."

As conclusions of law the court found:

"That plaintiff is entitled to a decree of this court reforming the said deed so as to express the true intention of the parties thereto by striking therefrom the words 'is to be used as a public street and not as a lot for building purposes,' and by inserting in lieu thereof the words 'is not to be used as a lot for building purposes, but is to be held by the party of the second part until the city of Ft. Bragg needs it for a street, and, when said city repays said party of the second part the sum of $450, said party of the second part will and shall convey the land hereby conveyed to said city for a public street,' and that said reformation should take effect as of the date of said deed. That the defendant Louisa M. Brown is entitled to judgment that she is the owner of an easement for a right of way over the land described in paragraph 3 of these findings, with the right to ingress and egress thereon, being the same rights that she would have in said land in controversy if the same were a public street, and that said easement is appurtenant to the remaining lands of the said defendant. That the plaintiff is entitled to a judgment declaring that he is the owner and seised in fee, in the possession and entitled to the possession, of all the land in paragraph 3 of the findings of fact described, subject to the said right and easement of the said defendant Louisa M. Brown therein, as hereinabove set forth."

While the deed was reformed, as we have seen, there seems to be no appreciable difference in legal effect between the decisive findings here and those at the former trial. Then it was found by the court:

"That at the time of the execution and delivery of said deed, and concurrently therewith, the plaintiff verbally agreed with the defendants that he would pay to them the full value of said land and hold possession of the same. That, if the city of Ft. Bragg could be induced to buy said land and dedicate it to street purposes, the plaintiff would deed said land to said city upon receipt by him of the amount he paid defendants therefor, and that then, and not till then, the same might become a public street. That no further or other agreement was ever had or entered into between the plaintiff and defendants or between plaintiff and either of the defendants respecting the lands in controversy or the use thereof."

[1] The deed itself provided that:

"The above-described land is to be used as a public street and not as a lot for building purposes."

In reforming the deed, however, the court added to the above-mentioned covenant virtually said oral agreement, so that the deed now contains substantially and almost identically the language of the former written and also the oral covenant as to the use of the land. In other words, the whole agreement was formerly set forth, partly in the deed and partly in parol, but now it appears in the deed itself. The meaning and effect, however, of the completed covenant have not been changed, and no different construction of the contract of the parties is permissible.

But in the opinion of the Supreme Court in the former appeal, written by Mr. Justice Sloss, it was said:

"The question to be decided is whether the deed, read in connection with these circumstances existing at the date of its execution, reserved to the grantors any interest in the land conveyed."

And, after considering the nature of said restrictive covenant in the deed, the opinion proceeds:

"Apart, however, from the various considerations above suggested, there still remains a way by which the restrictive words of the deed may be given effect; that is, by construing them as intended to reserve an easement in the land granted for the benefit of the remaining and adjoining land of the grantors."

And the court holds that this is the natural and reasonable conclusion to be drawn from the facts found, and that, while the agreement would not of itself effect a dedication of the strip as a public street, it was sufficient, as between the parties, "to constitute a reservation in favor of the owners of the adjoining land of such rights as they would have in a public street, and further to reserve to them a negative easement prohibiting the erection of any building upon the strip." As to the effect of said oral agreement, which is now a part of the deed, it was declared that "it shows no more than that an immediate dedication to the public was not contemplated," and that it "may be given full effect without setting aside the covenant restricting the grantee's use of the land pending a purchase by the city." We look upon this decision of the Supreme Court as embodying the law of the case and controlling on this appeal.

[2] The findings, as set forth, may be lacking somewhat in precision, but, when properly understood, we think there is no irreconcilable conflict. The declaration "that it was never agreed between the parties to said deed that the defendants or either of them should reserve all or any of the rights in said lot which they would have were it a public street," etc., is modified by the concluding clause of the finding, and manifestly means that there was no express agreement to that effect.

It is to be observed in this connection that there is no finding that it was not the intention of the parties or either of them that the grantors should reserve any rights in the premises. If there were, some embarrassment might be met in the effort to affirm the judgment.

The finding as to the mistake of the grantee means, as we understand, that he believed the covenant, as incorporated originally in the deed, had the same significance as that now embodied therein by order of the court. The legal effect, however, of the agreement of the parties not having been changed, we can see no vital importance in this consideration.

[3] The point is made by appellant that, even if the court below properly construed the deed, costs should have been awarded plaintiff, under the authority of Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690, wherein it was held that, under section 1022 of the Code of Civil Procedure, plaintiff was entitled to his costs; it appearing that he was the owner of the land in fee, the defendant having taken issue as to such title. Sierra Union, etc., Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038, and Gibson v. Hammang, 145 Cal. 454, 78 Pac. 953, were therein cited in support of the ruling.

In the former of these it was held that:

> "Where the plaintiff has any judgment in his favor in an action to quiet title, though it be for only a part of the property, and though the defendant has judgment in his favor for the residue, the plaintiff is entitled, under the terms of the statute, to recover his costs as of course."

In the Gibson Case the action was to annul a deed made by a testatrix in her lifetime to defendant, and was brought by the heirs at law, who were devisees under the will, and it was held that it was an action involving the title to the land in question, and that plaintiffs were entitled to their costs, since they recovered part of the property sued for.

We do not think, however, that these cases are controlling here.

Construing the answer as a whole, we find that the only material issue was as to the existence of the easement in favor of defendant Louisa M. Brown for a right of way, and, as to this, the judgment was in favor of said defendant. There would be, therefore, as much reason for invoking section 1024 of the Code of Civil Procedure in favor of said defendant as said section 1022 in favor of plaintiff. At any rate, we think the court was justified in striking out plaintiff's cost bill.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 206

ALLEN v. LOS MOLINOS LAND CO.

(Civ. 1249.)

(District Court of Appeal, Third District, California. July 28, 1914.)

1. Appeal and Error (§ 1011*)—Review—Findings.

A finding of the trial court, based on conflicting evidence, will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Waters and Water Courses (§ 263*)—Breach of Contract for Water for Irrigation—Measure of Damages.

In an action for damages for breach of a contract to furnish water for irrigation, the measure of damages, under Civ. Code, § 3300, declaring that a party aggrieved by a breach of contract is entitled to compensation for all the detriment proximately caused, is the difference between the market value of the crop planted and the expenses of maturing it.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. § 263.*]

3. Waters and Water Courses (§ 263*)—Breach of Contract for Water for Irrigation—Actions—Findings — Construction.

A finding, in an action for damages for breach of a contract to furnish water for irrigation, that the cost of producing and marketing the crop would have been the sum of $129, and that the net damages accruing to plaintiff, to wit, the value of the crop that would have been produced, less the sum of $129, was as great as $700, is not a finding that the market value of the crop produced would only be $700, and will support a judgment in favor of plaintiff to that amount.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. § 263.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. EVIDENCE (§ 419*)—PAROL EVIDENCE—VARYING OF WRITTEN INSTRUMENTS.

Where a contract for the sale of land provided for transfer to the purchaser of irrigation rights, and that he should receive so much water per acre, it was not improper, in an action by the purchaser for damages for breach of the contract, to permit him to testify that the agreement that water was to be furnished was an inducement to his purchase; such testimony not varying the written contract of sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

5. WATERS AND WATER COURSES (§ 261*)—IRRIGATION—ACTIONS FOR DAMAGES.

Where the canals leading to plaintiff's land were not completed in time to furnish him water for irrigation in accordance with contract, the fact that plaintiff made no demand on defendant for water in accordance with the rules will not preclude plaintiff's recovery; a demand under such circumstances being an idle thing.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 261.*]

6. APPEAL AND ERROR (§ 959*)—PLEADING (§ 236*)—AMENDMENTS—ALLOWANCE—DISCRETION OF COURT—REVIEW.

While, under Code Civ. Proc. § 473, the court may allow trial amendments when a party is surprised, and even continue the case, the allowance or disallowance of trial amendments is a matter within the discretion of the lower court, and its ruling will not be reviewed, unless an abuse appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. § 959;* Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

7. CORPORATIONS (§ 428*)—NOTICE TO OFFICERS—EFFECT.

Where defendant's answer was verified by its superintendent, defendant, though a corporation, is charged with notice of the averments of the complaint, and cannot at trial claim surprise because of the case made in accordance with the complaint.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748–1761; Dec. Dig. § 428.*]

8. PLEADING (§ 236*)—AMENDMENTS—ABUSE OF DISCRETION.

In an action against a land company for damages for failure to furnish plaintiff, a purchaser, with water for irrigation according to the contract of sale, the complaint alleged that plaintiff was entitled to receive certain water from an irrigation company organized to supply the lands of defendant; that the irrigating season began April 1st; that plaintiff's crop failed because no water was furnished until May 18th, the canals and ditches leading to plaintiff's land not being completed until that date. The rules of the irrigation company entitled it to three days' notice before it was required to furnish water. *Held* that, where defendant filed a verified answer, the court did not abuse its discretion in refusing permission to file a trial amendment setting up plaintiff's failure to demand water in accordance with the rule, and that, if such demand had been made, the ditches and canals to plaintiff's land would have been constructed within three days.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

9. NEW TRIAL (§ 87*)—RIGHT TO.

In such case, though defendant's counsel, who died shortly thereafter, was found upon post mortem examination to have been suffering from brain trouble, the denial of a new trial, asked on the ground that he was incompetent to protect defendant's interest, was not an abuse of discretion; it appearing that he prosecuted other business at that time with his customary mental vigor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 174, 175; Dec. Dig. § 87.*]

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Alexander Allen against the Los Molinos Land Company. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

McCoy & Gans, of Red Bluff, for appellant.
W. P. Johnson, of Red Bluff, for respondent.

CHIPMAN, P. J. This is an action for damages under a written contract, made part of the complaint, whereby defendant was to sell and plaintiff was to buy certain 12.54 acres of land, and, among other agreements, plaintiff was entitled to receive from the Coneland Water Company, organized for the purpose of irrigating the lands of defendant and others, "one-fifth miner's inches per acre, at such times and places and subject to such rules and regulations" as may be prescribed by said Coneland Water Company, and for which water plaintiff was to pay $2 per acre annually. Both said companies were under the management of one and the same person. It is alleged in the complaint that the irrigating season was, by a rule of said Coneland Water Company, declared to be from April 1st to October 31st of each year, and said rule was in force from and after April 1, 1912; "that one of the chief inducements of plaintiff to enter into said contract was the provision in said contract in respect to furnishing water for said land" (paragraph 5); that about March 18, 1912, plaintiff had all of his said land planted to potatoes; that said land was prepared for said planting in a farmerlike manner, and agreeably to the custom of good husbandry, and that the soil of said land was suitable for raising large crops of potatoes with proper irrigation, and said contract provided for a supply of all the water necessary for the land for such purposes (paragraph 6); that about April 15, 1912, "said potatoes so planted were growing nicely, and gave promise of making a good crop, but from said date were in need of water for irrigation thereof; that between said date and the 18th day of May, 1912, the growth of said potatoes was arrested because of lack of water, and between said dates said potato crop was continuously in need of water for irrigation thereof" (paragraph 7); "that the defendant and said Coneland Water Company had not had their canals and irrigating ditches in proper condition for the furnishing of water for the said land in accordance with said contract, and that said canals and irrigating ditches were not constructed and prepared so the water could be delivered upon the said land until the 18th day of May, 1912, when water was furnished by said companies to plaintiff for his said land; that no provision had been made by the said companies by which water could have been furnished and delivered to plaintiff for the irrigation of his said land at an earlier date than the said 18th day of May, 1912" (paragraph 8); "that, by reason of the failure of said companies to furnish water between said dates, the growth of said potatoes was arrested, and when water was delivered to the plaintiff for the said crop, as set forth herein, it was too late to save said crop from being a total loss;" that plaintiff depended upon defendant to furnish water for said purpose, and, by reason of its failure so to do, said crop was a total loss (paragraph 9); that, by reason of the foregoing, plaintiff has been damaged in the sum of $700 (paragraph 10). Damages are also claimed for the cancellation by defendant of said contract because of plaintiff's failure to pay installments due thereunder, which failure it is alleged resulted from the failure to raise said potato crop. As the court found against plaintiff on this issue, and as plaintiff does not appeal, this branch of the case need be no further noticed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The complaint and answer are verified. Defendant denied, on information and belief, the averments in paragraph 5 of the complaint, denied the averments of paragraph 6 as to alleged proper planting and preparation of the land, but admits its suitability for growing potatoes, and alleges that said land was not ready to receive water nor properly prepared prior to May 18, 1912. The averments of paragraphs 7 and 8 are admitted by not denying them. Defendant denies the averments in paragraphs 9 and 10. The answer was verified by Thomas H. Means, the general manager of the companies.

The court found paragraphs 1 to 9, inclusive, of the complaint to be true, and "that plaintiff was ready and his land was prepared to receive water earlier than May 18, 1912, and plaintiff was so ready and his land was so prepared in time to have prevented the loss of his crop, if water had been furnished by defendant." The court also found that plaintiff was damaged "in a sum equal to what the value of the said potato crop would have been if water had been furnished, less the additional costs and expenses that would have been incurred in taking care of, harvesting, and selling said crop," which the court found was $129, "and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced, less the said item of $129, was as great as the sum of $700."

Judgment accordingly passed for plaintiff for $700, from which, and from the order denying its motion for a new trial, defendant appeals.

[1] 1. The findings as to the preparation of the land for planting, that the land was ready to receive water earlier than May 18, 1912, that the growth of the potatoes was arrested by reason of the lack of water, and that, when water finally was furnished, it was too late to save the crop are challenged as unsupported by sufficient evidence.

Plaintiff testified that the soil is rich loam, well adapted to the growing of potatoes, which defendant admitted; that he prepared the land by deep plowing and sufficient harrowing agreeably to the requirements of good husbandry; that he bought his seed from Oregon of approved varieties, in good condition, and planted it in accordance with approved methods of planting; that the seed came up and showed healthy and promising growth; that in due time he hoed and "hilled up" the earth against the vines in proper manner and kept the ground cultivated to retain moisture and promote further growth. He testified:

> "That spring was a very dry year, and there was a great lack of rain. There was a very long dry spell, at the end of which there was a very hot north wind, and after that there was a very heavy rainstorm, after this dry spell, and which soaked the ground very thoroughly. This was May 19th. This was the day after the water was delivered."

He testified that he examined the vines at this time, and "a second growth" appeared, which he learned later had rendered the crop of no value. He testified that up to May 1st the potatoes seemed to be doing well, but the continued dry weather and lack of moisture, which irrigation would have supplied, was the apparent cause of the "set back" which the potatoes received. He testified that, after water was furnished, there was no lack of moisture, but nothing could then have saved the crop. There was corroborating testimony of some of the essential facts testified to by plaintiff. Defendant introduced witnesses whose testimony tended in some degree to dispute the correctness of plaintiff's testimony, but all that we are at liberty to say of it is that it created a conflict which it was for the trial court to deal with. Its findings have sufficient support and must stand as presenting the ultimate facts in the case.

[2] 2. The evidence was that under favorable conditions "it was a poor year for potatoes." There was testimony that such land as plaintiff's "ought to raise nothing less than 50 sacks per acre, and ought to bring as high up as 150 sacks." Plaintiff in his testimony said that he "was figuring on 50 sacks to the acre of 120 pounds to a sack." He gave the market price of the two varieties he planted at the time they should have matured and have been ready for market. also the cost of producing and marketing the crop, or, as the court expressed it, the market value of the potatoes, less "costs and expenses that would have been incurred in taking care of, harvesting, and selling said

crop." With these facts before it, and the acreage planted, the court arrived at what we think was the correct measure of damages, to wit, the market value of the potatoes at the selling place, which the testimony showed was Red Bluff, less the expenses incurred in growing and marketing the crop. The action is for the breach of an obligation arising from the contract, and the measure of damages "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ. Code, § 3300.

[3] It is claimed that the finding as to the damages does not support the judgment, and, properly construed, means $700, less $129, to wit, $571, and not $700, as entered in the judgment. The court found the cost of producing and marketing the crop "would have been the sum of $129, and that the net damage accruing to the plaintiff, to wit, the value of the crop that would have been produced, less the said sum of $129, was as great as $700." This is not a finding, as defendant contends, that the value of the crop was $700, but that its value was a sum equal to at least $700, after deducting $129, and supported the judgment for $700. A simple calculation of 50 sacks of 120 pounds each at 1¼ cents per pound, the lowest market price named, would give a net value greater than the sum allowed.

[4] 3. Error is claimed because plaintiff was permitted to testify that the agreement that water was to be furnished for irrigation was an inducement to purchase the land. One of the conditions of the contract of sale was that plaintiff should receive one-fifth miner's inches of water per acre on said land. It was not varying the terms of the contract for plaintiff to say that this was an inducement. The contract itself said as much.

[5] 4. Plaintiff testified that he was familiar with the rules of the water company, and knew there was a regulation that a water user, desiring to irrigate, should notify the company or its officers, in writing, three days in advance of the time water was needed.

> "Q. Did you make any demand in writing for the delivery to you of water? A. Not at that time. I was told it was not necessary. Q. When did you make any demand at all, either in writing or otherwise? Mr. Johnson (plaintiff's attorney): I object on the ground it is incompetent, irrelevant, and immaterial. The pleadings admit that the company didn't have the canals completed and couldn't deliver it (the water) before this particular time (May 18th). What is the use of making demand before they have their canals ready to deliver it? The Court: I will sustain the objection. You allege you were ready to deliver on the 18th of May, and the inference is that you couldn't deliver it before that."

The complaint distinctly alleged that the water company had not completed its canals and was not in condition to deliver water before that date, which was admitted by not denying it. Objection to a similar question was later on sustained. After some further testimony was taken, Mr. Wells, defendant's attorney, asked leave to file the following amendment to the answer:

> "Furthermore, answering the complaint of plaintiff, the defendant admits that the canals and ditches were not in perfect condition to deliver water, but defendant alleges that it could, and that it would have put the ditches into condition to furnish any and all of the water needed, had demand been made for the same, and defendant alleges that plaintiff or any other person did not make demand. Defendant further says that it could within a very few days have furnished water after a demand is made. * * * The Court: I will deny the application to amend the answer at this late stage of the case."

The complaint alleges that by the rules of the water company the irrigating season began on April 1st, and that the defendant was not prepared to deliver water to plaintiff until May 18th, and the evidence was that the damage became irreparable prior to the latter date. There was no denial that the company was unable to furnish water sooner than May 18th; it was therefore immaterial whether or not a demand for water was made. Plaintiff was not called upon to perform the idle act of making a demand concededly impossible of being complied with.

[6-8] In support of its offer to amend the answer and of its claim that the court erred in refusing to allow the amendment offered, many cases are cited in illustration of the meaning of section 473 of the Code of Civil Procedure, to the effect that amendments to pleadings are favored to enable a party to prove all the facts necessary to his cause of action or defense. Crosby v. Clark, 132 Cal. 8, 63 Pac. 1022, and San Francisco, etc., Society v. Leonard, 17 Cal. App. 254, 119 Pac. 405, are cited as distinctly so holding. The court is empowered to impose terms where a party is taken by surprise and may even continue the case. While this is true, it is also ruled that the allowance or disallowance of an amendment in the midst of a trial is within the discretion of the trial court, and its ruling will not be disturbed, unless such discretion has been abused. Manha v. Union Fertilizer Co., 151 Cal. 581, 582, 91 Pac. 393; Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733. The answer was verified by the superintendent of both companies, and defendant is charged with knowledge of the averments of the complaint. The allegation that defendant had not so far completed its canals and ditches as to make it possible to furnish plaintiff's land with water earlier than May 18th could not have escaped the notice of defendant or its attorney and hence defendant cannot complain that it was surprised. Presumably the averment was not denied because it could not be truthfully controverted, and plaintiff had a right so to assume the fact to be when he went to trial. The proposed amendment gives evidence of hasty preparation, and fails fairly to present the issue that defendant was prepared on demand

to furnish plaintiff the needed water. The amendment seems to rely on the rule of the water company requiring three days' notice by a water user. The rules of the water company are not in the record, and all we know of this rule is derived from a question on cross-examination of plaintiff by Mr. Wells as follows:

> "Q. Regulation No. 3, which says water users desiring to irrigate shall notify the company or its duly appointed officer three days in advance of the time water is needed, and blanks will be furnished by the company for this purpose, and these blanks are to be filled out, giving time water is desired, the length of run desired, and number of inches needed, and the water user will then be notified when the water can be delivered to him, and he must be prepared for the delivery; you were familiar with that regulation? A. I was. Q. Did you make any demand for the delivery in writing for the delivery to you of water? A. Not at that time. I was told it was not necessary."

It seems to us that this regulation had reference to the delivery of water after the canals and ditches were completed, and was designed to aid the company in its distribution of water to many users. The regulation certainly did not mean that the company would construct its canals and ditches upon three days' notice. By its own regulation the irrigating season commenced on April 1st, at which time the company should have been ready to deliver water. The proposed amendment does not state clearly or at all that its canals and ditches were in a condition to have furnished water within three days. We cannot say that, under the circumstances, the court abused its discretion.

[9] 5. Upon the motion for a new trial appellant submitted certain affidavits tending to show that, at the time the answer was prepared, Mr. Wells, appellant's attorney, was afflicted with brain trouble, of which he, some time after the trial, died. There were counter affidavits from which the inference was fairly deducible that Mr. Wells had not at the time suffered any perceptible diminution of his mental powers. The record bears evidence that Mr. Wells had his case well in hand, and the trial judge was in a position to observe his capacity intelligently to conduct the defense. We cannot see that the court erred in denying the motion on this ground.

Superintendent Means made affidavit in support of the motion that, had plaintiff given notice under rule 3 of the water company, "said canals and ditches would have been constructed and prepared so that water could have been delivered upon the land of said plaintiff for the irrigation thereof according to said contract, within three days after the giving of such notice," and that the reason said canals and ditches had not been so constructed as to deliver water to plaintiff's land earlier than May 18th was that plaintiff had not given any notice as provided in said regulation 3. It will be observed that this statement of the situation is much more specific than is found in the proposed amendment. But it cannot be said, nor is it shown, that it was through surprise or excusable neglect that the facts were not set forth in the answer. It was still within the discretion of the court to grant or deny the motion, and we find no just ground for interfering with its ruling.

It is strongly urged that the mental condition of Mr. Wells was unknown to defendant, and came to its knowledge only through the autopsy after his death, whence, by a posteriori reasoning, his condition at the time of the trial is arrived at. It may be conceded that an incipient stage of brain lesion had developed, but there was evidence that Mr. Wells had returned from treatment at San Francisco and had resumed work in his office, had, shortly before the trial assisted in the trial of a case in court, attended to the business of a bank for which he was attorney, and otherwise exhibited his usual mental vigor. Had it clearly appeared without conflict that Mr. Wells was in fact incapable of framing the answer in this case or of conducting the defense, and that these facts were unknown to defendant, and could not with reasonable diligence have been known to it, a different situation would be presented. We are unable to discover that the trial court abused its discretion.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

25 Cal. App. 269

PARKIN v. GRAYSON-OWEN CO.

(Civ. 1246.)

(District Court of Appeal, Third District, California. Aug. 1, 1914. On Petition for Rehearing, Aug. 31, 1914. Denied by Supreme Court Sept. 30, 1914.)

1. Appeal and Error (§ 882*)—Review—Estoppel to Allege Error—Misleading Instructions—Requests by Defendant.

Where defendant, in his instructions, suggested a certain issue as to which there was no evidence, he cannot complain of an instruction asked by plaintiff, based on the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

2. Municipal Corporations (§ 706*) — Streets — Leaving Teams Unattended — Hitching—Instructions.

Where an ordinance provides that a horse properly secured "must be hitched," in a prosecution for violation of the ordinance, that defendant set the brake on his team and wrapped the reins around it is immaterial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. Municipal Corporations (§ 706*)—Use of Streets — Negligence — Actions — Instructions—Applicability to Evidence.

On an issue of defendant's negligence in leaving a team in the street insufficiently secured, an instruction that if defendant's driver, on dismounting set the brake hard, wound the reins around it, and then fastened one end of the hitching strap, reasonably fit, to the bit of one of the horses, and the other end to a post, the jury must consider all those circumstances in determining whether the driver was negligent sufficiently gave defendant the benefit of evidence that the driver, before alighting, set the brake and wrapped the reins around it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

4. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS — NEGLIGENCE — ACTIONS — INCONSISTENT INSTRUCTION.

In an action for alleged negligence in not properly hitching defendant's team, as required by a city ordinance, the court charged that if, to properly secure the team, a strap or rope should have been passed through the bit and around the neck of one or both horses, then defendant was negligent. There was no evidence that such method was reasonably necessary to properly secure the team. *Held*, that such instruction was not inconsistent with other instructions given at defendant's request that the ordinance did not prescribe the particular manner of hitching; and, if defendant's servant hitched the team as a reasonably prudent person, using ordinary care, would have done, that was sufficient, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

5. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INCONSISTENT INSTRUCTIONS.

Inconsistent instructions must be plainly confusing or misleading in order to be prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

6. MUNICIPAL CORPORATIONS (§ 706*) — STREETS—HITCHING ANIMALS—CITY ORDINANCE—TIE STRAP—QUESTION FOR JURY.

On an issue as to whether defendant's team was properly secured when left unattended in a street, as required by a city ordinance, evidence *held* insufficient to require a finding that the strap with which the team was hitched was such as would properly secure the horses under ordinary circumstances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

7. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS — NEGLIGENCE — ACTIONS — MISLEADING INSTRUCTIONS.

Where suit was brought for injuries resulting from alleged negligence in failing to comply with a city ordinance requiring horses to be properly secured when left unattended in the street, and the court charged that defendant was bound to exercise ordinary care to prevent its teams from running away and injuring persons using such streets in common with it, such instruction was but a statement of a common-law principle consistent with the ordinance, and not objectionable as an abstract statement of duty, disassociated from the facts of the case.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

8. APPEAL AND ERROR (§ 1099*)—DECISION ON APPEAL—MATTERS DECIDED.

No point in a case can be said to be decided on appeal, except the one specifically dealt with, and such others as are necessarily determined by the decision of the point under discussion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

9. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—NEGLIGENCE—INDEPENDENT "CONCURRING CAUSE"—PROXIMATE CAUSE.

Where defendant's horses were left standing in a street tied, but not "properly secured," as required by a city ordinance, and, being frightened by the discharge of a pistol by a boy, broke the strap by which one of them was tied, ran away and injured plaintiff, the act of the boy in frightening the horses was not such an intervening independent cause of the accident as would relieve defendant from liability, but was a concurring cause, within the rule that an independent wrongful act, to constitute the proximate cause, displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*

For other definitions, see Words and Phrases, Concurrent or Concurring Causes.]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by Hirst Parkin against the Grayson-Owen Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Myrick & Deering, of San Francisco, for appellant. Stanley Moore, of San Francisco, and B. H. Griffins, of Oakland, for respondent.

CHIPMAN, P. J. The cause of action is for damages arising out of the alleged violation of the following ordinance of the city of Oakland:

> "No person shall leave or allow any horse or mule to be or remain standing upon any of the public streets of the city of Oakland unless such animal is in some way properly secured either by hitching or being under the personal control of some person of suitable age."

This is the second appeal taken by the defendant in the case, and is from the judgment and order denying motion for a new trial in an action for personal injuries. The decision on the first appeal is reported in 157 Cal. 41, 106 Pac. 210.

In its opening brief appellant makes a statement of facts which is sufficient to give an understanding of the case, although respondent says it is inaccurate in some not very important matters, inasmuch as the errors claimed relate to instructions given or refused. We shall use the statement as made by appellant:

> "The plaintiff complains that the defendant's delivery wagon, to which there were attached two horses, a black and a bay, were improperly hitched, and that by reason thereof the said horses broke from their fastening, ran north on San Pablo avenue, turned easterly into Sixteenth street, and collided with the buggy in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> which the plaintiff, as driver, was riding with a doctor, overturning the buggy, throwing plaintiff to the pavement, and injuring his knee.
>
> "The driver of the delivery wagon, George Vincent, drove up in front of a restaurant on San Pablo avenue, between 10:30 and 11 o'clock in the forenoon. Vincent had left the barn about 5 o'clock in the morning, and had completed his delivery. He was an experienced driver; was 29 years of age; and for eight years had been a stage driver in Siskiyou county. He carried with him a hitching strap. He testified that he drove up to the restaurant, set his foot brake down hard and sufficiently tight to block the wheels, wrapped the reins three or four times around the brake, got down, snapped the snap of the hitching strap in the bit of the black horse, and tied it around the telegraph post. He further said that after he had ordered his luncheon he heard the report of a pistol. Before the driver could get to the door of the restaurant, the pistol was fired again, and the team broke loose. Vincent had previously testified that before he had gone into the restaurant he spoke to a small boy, who had a toy pistol in his hand, and cautioned him not to fire.
>
> "The strap that Vincent used for the purpose of hitching the horses was an ordinary hitching strap that had been patched, and there was considerable testimony at the trial as to this patching or repairing of the strap; plaintiff claimed that the strap was old and rotten, and insufficient for the purposes of a hitching strap.
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> "I. D. Tobin, a police officer, called by the plaintiff, testified that he was on duty that day, and before the runaway he noticed that the team was very nervous, and that the bay horse was crowding the black one up against the sidewalk. The black horse was pulling to and fro on the strap that he was tied to. 'I noticed that the black horse was tied.' On cross-examination this officer stated: 'There was nothing in the action of the horses, or in the way in which they were hitched, to arouse my suspicion that there was any danger at all. So far as I saw, everything was all right.' He also testified on cross-examination that: 'If the horse had not been properly hitched at that time it would have been my duty to have taken action in the matter. I did nothing. I saw how the horse had been hitched, how it was hitched at that time. I patted the horse; he calmed down.' Immediately afterward the runaway occurred.
>
> "Defendant complains that the lower court committed error in the instructions it gave to the jury, asserts that the case was not properly left for decision by the jury, and takes this appeal in order that the issues involved may be submitted to a jury under proper instructions."

[1] 1. It is contended that the court erred in giving the following instruction (No. 22):

> "If you believe from the evidence that, in order to have properly secured the defendant's team upon the occasion in question, a strap or rope should have been passed through the bit and around the neck of one or both of the horses in said team, then in such case I charge you that the defendant was guilty of negligence in merely snapping the hitching strap to the bit of one of said horses, even though you further believe that said strap was entirely sound."

The evidence was that the strap was fastened in the bit of the black horse next to the telegraph post.

Appellant makes several objections to this instruction: (A) That the court had no right to suggest to the jury how the horses might have been fastened, viz., by passing a strap or rope through the bit and around the neck of one or both; (B) it was prejudicial to suggest that to secure the team the strap should have been passed around the necks of both horses; (C) that the court, in so charging, disregarded the law of the case as laid down on the former appeal (157 Cal. 41, 48, 106 Pac. 210, 214), where the court said, "We consider it unreasonable to hold that, when a team is left standing, and unattended, the ordinance requires in any event that every horse constituting the team should be hitched;" (D) the instruction leaves out the important things done by the driver, Vincent, to secure the team (i. e., in setting the brake down and wrapping the reins around it); (E) the instruction in effect assumes that there is but one way properly to secure a horse, by passing the rope or strap around his neck and through his bit, and, where there are two horses, the same should be done with both.

Appellant recalls the fact that at the former trial expert testimony was received upon the subject of hitching horses. At the present trial appellant says, in its brief:

> "Plaintiff carefully refrained from calling experts at the time, and there was absolutely nothing said at the trial about passing a rope or strap around the horse's neck and through the bit."

The brief states:

> "The court knew, and so did the jury, that the strap was snapped into the bit of the black horse; that it was not passed around the neck of either animal."

It is contended that "the instruction contained an element nowhere found in the evidence, and was not fair to the defendant;" also that it was prejudicial "in that it suggested that, to secure the team properly, the strap should have been passed around the neck of both horses," and that the instruction "assumes there is but one way properly to secure a horse," or two horses, where there are two (that is, by the way pointed out in the instruction); and finally that the instruction disregarded the law of the case as held in the former appeal above quoted. We have thus grouped the claims made in paragraphs of the brief marked A, B, C, and E. Assuming it to be true that there was no evidence at all as to hitching a horse by passing the strap through the bit and around the neck, the most that can be said of the instruction is that it suggests something entirely outside the evidence. The jury were told that *if they believed from the evidence* that, in order properly to secure defendant's team, a strap or rope should have been passed through the bit and around the neck of one or both horses, merely snapping the hitching strap into the bit of one of the horses would constitute negligence under the ordinance. The ordinance required that the horses should "in some way be properly secured either by hitching or being under the personal control of some person of suitable age." If, therefore, the evidence had convinced the jury that the horses could have been "properly secured" *only* in the particular way pointed out in the instruction, less than that—"merely snapping the hitching strap to the bit of one horse"—would have been a violation of the ordinance. But there was no evidence upon which to base the instruction, and hence it seems to us that the only question is: Did it necessarily have a tendency to mislead the jury?

At defendant's request the court gave the following instructions:

> "(34) You are further instructed that the ordinance does not prescribe any particular manner of hitching; it does not prescribe that a rope should be used in preference to a leather strap, nor does it prohibit the use of a hitching strap with a snaffle, nor does it prescribe the strap should be fastened about the animal's neck rather than to the bit. The ordinance merely requires the horse to be properly secured by hitching, or that it be under the control of a person of suitable age. If you find that Vincent secured the horses in the present case by hitching them as a reasonable and prudent person using ordinary care, skilled in the handling of horses and experienced in driving would have done, then you would be justified in finding that the horses were properly secured by hitching, and, for their subsequent breaking away and injuring the plaintiff, the defendant would not be liable, and, if you so find, your verdict should be for the defendant.
>
> "(35) You are also instructed that the said ordinance does not in terms prescribe that where two horses attached to a wagon, as in the case at bar, are left standing in the street, both horses should be hitched; if you find that one of the two horses attached to defendant's delivery wagon was properly secured by hitching when Vincent, the driver, left the wagon and went into the restaurant, and that, to properly secure both horses by hitching, a reasonable and prudent man, skilled in the handling of horses and experienced as a driver, would have hitched but one horse, as was done by Vincent in this case, then your verdict should be for the defendant."

It will be observed that notwithstanding there was, as defendant claims, no evidence referring to passing the strap around the neck of one or both horses to "properly secure" them, the suggestion was found in these instructions, and was as much out of place here as in the instruction complained of, and appellant was equally responsible for the suggestion. Waiving that fact as immaterial in view of the want of evidence on the subject, it seems to us, conceding the instruction 22 should not have been given, that it was not necessarily misleading, for the instructions (34 and 35) given at defendant's request placed the matter very clearly before the jury and left them to decide upon the evidence before them whether the ordinance had been violated; the question of what would constitute the proper hitching of a horse was left with the jury as matter of common knowledge. 157 Cal., supra.

The law of the case, enunciated in the former appeal, was that it was error to instruct the jury that it was negligence not to have properly secured both horses. Said the court:

> "We consider it unreasonable to hold that, when a team is left standing and unattended, the ordinance requires in any event that every horse constituting the team should be hitched."

The instruction in question, as we read it, left the matter with the jury upon the evidence before them, and, as there was no evidence with regard to passing the strap around the neck of one or both horses, that feature was eliminated from the case.

[2] That the instruction omitted the fact that Vincent secured the team by setting the brake and wrapping the reins around it was not error. Since the ordinance expressly provides that a horse "properly secured" must be hitched or left in personal control of some person of suitable age, the fact could properly be omitted.

[3] If, however, this fact should have been considered by the jury, they had the benefit of it in the following instruction given at defendant's request:

> "If you find that, upon driving up to the sidewalk upon dismounting to go into the restaurant, Vincent, the driver, set the brake hard, wound the reins around the brake, and then fastened one end of the hitching strap, reasonably fit for that purpose, to the bit of one of the horses, and the other end to a post at or near the edge of the sidewalk, you must consider all these circumstances in determining whether the driver used reasonable care and caution to secure the horses in thus hitching them."

[4] It is further contended that instruction numbered 22 is inconsistent with instructions 34 and 35, above quoted. If we are correct in our view of instruction 22, the jury were not called upon to consider the passing of the strap through the bit and around the neck of one of the horses, because there was no evidence upon which to base a belief that such method of hitching was involved.

[5] Inconsistent instructions must be plainly misleading or confusing to make them prejudicial. Instructions 34 and 35 were given at defendant's request, and were in themselves a correct and easily comprehended guide to the jury. We can discover no inconsistency between them and No. 22, and certainly none such as would justify a reversal of the case. Nor do we think, apart from any alleged inconsistency between these instructions, that instruction 22 was prejudicial conceding error in giving it. If the jury believed from the evidence that the *only* way to have properly secured the team was to pass the strap through the bit and around the neck of one of the horses, the court was justified in telling the jury that merely to snap the hitching strap to the bit of one of the horses would have constituted negligence. The latter part of the instruction must necessarily be correct, following the assumptions of the first part of the instruction.

[6] Respondent contends that the verdict can be sustained upon other acts of negligence, independent of the method of hitching the horses or of the fact that but one horse of the team was hitched. Hence, if objectionable, the instruction complained of is without prejudice. It was alleged in the complaint, and the evidence concerning it was made the subject of instructions, that

defendant failed to furnish the driver of the team with a proper hitching strap. Vincent testified:

> "The hitching strap I had with me was a strap I had on the horses, the strap that broke when I had my runaway. It was the same strap that I found in the warehouse or mending room. The strap was sewn, and there was a rivet in it also—one rivet. The strap was pared down. I should say that the strap had been used more in that portion than it had up next to the horse's bit; that it was some thinner from use."

He testified that he "considered it to be a safe hitching strap," and saw nothing about it "to indicate that it was weak." He testified:

> "I mean to say that the strap was not weaker in the center by reason of this sewing together and paring of ends and thin from use. It was worn apparently a little bit. I do not mean to say that the thinning of the strap from use, if it had become a little thinner from use, would not weaken it at all; I do not mean that exactly. Certainly it was weaker after tying over this here sewed piece. * * * I riveted the strap together about a month after the accident. I have not used it since, not at all. It is now the same as it was immediately after the accident, except that it is riveted together, and except that I have thinned down the edges there on riveting them together. Q. I understand you to say that the strap had been stitched as well as riveted once? A. Yes, it had. Q. What has become of the stitching? A. Well, I tore them off, smoothed them down when I riveted it together. The stitching went clear through both ends. It is now lapped over further. I think I cut off 2½ inches from one piece where the snaffle was before I riveted it. The Court: You don't mean to say it is exactly in the same condition with the exception of the rivet, because a piece of it has been cut off? A. Well, I don't know how to express that. I cut off the piece where the stitching marks were." He was asked why he "did not leave it in the condition it was. A. Well, that is something I could not explain myself, and why I put the strap back together. I fastened them together, not because I wanted to use the strap again, but simply because I wanted to fasten it together in order to hold both pieces together."

Respondent invokes the familiar rule that a general verdict found for a party litigant in a case imports a finding in his favor upon all the issues in the case, citing Hayne on New Trial and Appeal, § 236, and cases there cited. It is urged that, if the verdict can be supported on the theory that the defendant was guilty of negligence in furnishing an improper hitching strap, it must stand. The court instructed the jury that if they believed from the evidence that defendant—

> "failed to furnish its driver, George Vincent, with a hitching strap strong enough to properly secure its team when it should be left standing unattended on the public streets, * * * and that, while said team was left standing, * * * it * * * became frightened by the firing of a toy pistol, and broke loose by reason of being improperly secured, and therefore ran away, * * * then in such case your verdict must be against the defendant. * * *"

The correctness of this instruction is not challenged. We cannot say the jury were unwarranted in finding that the strap was not such as would properly secure the horses when hitched there with it. If it be conceded that the way Vincent secured the team was a reasonable and sufficient compliance with the ordinance, certainly the means used (the strap) should have been free from defects that would weaken or make it unsafe. The jury had the right to pass judgment upon this point, and were not bound to accept the opinion of the driver that the strap was in his belief safe and sound. It is not necessary, however, to rest the decision upon respondent's contention, and we do not pass upon it.

[7] Some instructions were given (9, 10, and 14) which appellant complains, related to the common-law duty of drivers of horses upon public streets, whereas the action is for violating an ordinance requiring certain particular things to be done. Instruction 9 is illustrative of the other two:

> "The Grayson-Owen Company, while operating its delivery wagons upon the public streets of this city, was in duty bound to exercise ordinary care, vigilance, and foresight to prevent its teams from running away and injuring others upon the streets and using such streets in common with it."

It was perhaps unnecessary to give these instructions, in view of others dealing more directly with the immediate cause of the accident, but we cannot see that they were abstract statements of duty wholly dissociated from the facts of the case. If there were no ordinance requiring horses being used for delivery purposes in a city to be properly secured when left unattended, we think it would be negligence at common law to neglect this precaution against the happening of just such an accident as we have here. In a sense the ordinance is but the statement of a common-law principle. At any rate, it is plain enough to our minds that there was nothing prejudicially misleading in these instructions or calculated to divert the minds of the jury from the issues in the case. The instructions we think quite consistent with the ordinance.

Respondent calls attention to the fact that all the instructions objected to by appellant, particularly instruction 22, were given at the former trial and excepted to, but were not commented upon in the opinion reversing the judgment. We have not felt at liberty to treat the points now made as "deemed to have been passed upon as without merit."

[8] The fact may have some significance, but no point in a case can be said to have been decided, except the one specifically dealt with, and such others as may be said to be necessarily determined by the decision of the point under discussion.

[9] Error is claimed in the instruction given and in the instruction refused as to the effect of an independent intervening cause. It was alleged in the answer that a small boy discharged a pistol twice near the horses, frightening them, and "causing them to spring forward and break said hitching strap, causing them to run away; that said hitching strap was sound and was a per-

fect hitching strap," and the horses broke away from their fastening and ran "on account of the carelessness and negligence and thoughtlessness of said small boy in discharging said pistol, and not otherwise." Defendant requested, but was refused, several instructions upon this subject, one of which will illustrate the point now made:

> "Damages cannot be recovered in an action for personal injuries, such as in the present one, when an independent act of another person, such as a boy's firing off a pistol near the horses, intervened between the driver, Vincent's, leaving the team and the injury to the plaintiff, if that injury would not have occurred but for such act."

Vincent testified that, when he went into the restaurant to get his lunch, he saw a small boy with a toy pistol standing on the sidewalk almost opposite his team; that he cautioned the boy not to snap the pistol; that, after entering the restaurant, he heard the report of the pistol and started immediately for his team, and as he reached the door he heard another report, and before he got through the door the horses broke loose. The court gave the following instruction:

> "I charge you that it is immaterial in this case, so far as plaintiff's right to recover damages is concerned, whether a small boy fired off a toy pistol, thereby frightening defendant's horse or not, provided you believe from the evidence that said horses were improperly and negligently hitched by a weak and defective strap, and that they were able to break loose by reason of such improper and negligent hitching."

Appellant relies upon a rule which, when applied to a proper case, may be said to be well settled:

> "That an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause."

Respondent aptly replies that:

> "Counsel has lost sight of the fact that, if the horses were negligently hitched by a weak and defective strap, this was a continuing act of negligence. Every moment the horses were so hitched, the defendant was negligent. His negligence was continuing. Under such circumstances, the act of the boy in firing the pistol is not an independent act, but a mere concurrent act, and the defendant is liable notwithstanding."

Among the cases, in our appellate courts, illustrating the principle are Pastene v. Adams, 49 Cal. 87, which was a case of piling timbers, so that some of the ends protruded, and when run into negligently were thrown down injuring plaintiff; Barrett v. S. P. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186, was a turntable case; Spear v. United Railroads, 16 Cal. App. 637, 117 Pac. 956, was the case of a collision between an express wagon and a street car.

The doctrine was quite exhaustively treated by Mr. Justice Henshaw in Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 504, 111 Pac. 534, 536 (31 L. R. A. [N. S.] 559, 139 Am. St. Rep. 134), where the plaintiff was injured by the explosion of gas which the defendant gas company had negligently allowed to escape, and which was ignited through the negligence of the proprietor of the restaurant where the gas was escaping. After giving some examples to show the application of the principle involved, the learned justice says:

> "The cases serve to illustrate the true rule, which is that the independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage occasioned was in no way a natural or probable consequence of the original wrongful act or omission."

The case here falls clearly within the class treated in Merrill v. Los Angeles Gas & Electric Co. If the horses were negligently hitched, and this negligence was the cause of the injury, defendant's liability cannot be escaped because of the contributory negligence of the small boy. As said in the case last cited, "Each is and both are the proximate cause of the injury." The instruction given was a correct statement of the law, and it was not error to refuse the instructions requested by defendant.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

On Petition for Rehearing.

CHIPMAN, P. J. No new points are made, and while it is not improbable that we have mistaken the force of defendant's principal objection to the judgment, namely, that instruction numbered 22 given by the court was prejudicial error, we see no reason for opening the case for further argument.

Appellant is in error in assuming that it was said in our opinion heretofore filed that this "is the fourth judgment and order denying a motion for new trial." The statement, as it appears in the opinion on file, is:

> "This is the second appeal taken by the defendant in the case, and is from the judgment and order denying motion for new trial."

It was not our intention to express any opinion on the merits, for we had none, and feel quite sure that nothing in the opinion can be so understood; but, if so, we freely withdraw the same.

The petition is denied.

We concur: BURNETT, J.; HART, J.

168 Cal. 316

PEOPLE v. RABER. (Cr. 1835.)

(Supreme Court of California. Sept. 18, 1914.)

1. Homicide (§ 29*)—Conspiracy—Intent.

Where defendant and two others conspired to rob decedent of her jewelry and money, and during the process one of the conspirators choked decedent to death while defendant searched her apartments for valuables, it was not material to defendant's guilt of murder that the actual killing was done by his co-conspirator, since each of the parties to a criminal enterprise is responsible for all acts done by the other in the prosecution thereof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 47; Dec. Dig. § 29.*]

2. Homicide (§ 18*)—First Degree Murder—Perpetration of Robbery—Intent.

Where certain conspirators killed decedent in the perpetration of a robbery, they were guilty of murder in the first degree, as provided by Pen. Code, § 189, though neither had contemplated decedent's death as a part of the transaction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24–31; Dec. Dig. § 18.*]

3. Criminal Law (§ 729*)—Trial—Opening Statement—Conduct of District Attorney.

Defendant and D., with another, conspired to rob decedent, and in carrying out the plan D. killed her. The district attorney, in his statement of facts to the jury, said that after the return of the prisoners to Sacramento D. had told the whole story, "told of a plan engineered by defendant and suggested by C. to rob," at which point defendant's counsel interposed, whereupon the district attorney withdrew the statement as to what D. had stated and told the jury that he had no right to state the confession of D., and asked the jury to pay no attention to it. *Held*, that the district attorney, under such circumstances, was not guilty of prejudicial misconduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 729.*]

4. Criminal Law (§§ 419, 420*)—Evidence—Hearsay.

Where defendant and D. were arrested for killing decedent, evidence that, while they were confined in jail, D. stated to his fellow prisoners that he and not defendant killed decedent was inadmissible as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973–983; Dec. Dig. §§ 419, 420.*]

5. Criminal Law (§ 814*)—Instructions—Circumstantial Evidence.

Where, in a prosecution for homicide, the unlawful killing and defendant's participation therein were affirmatively shown by defendant's own testimony, though no eyewitness was produced, it was not error to refuse instructions applicable to cases, where the proof is circumstantial only, that a conviction is not warranted unless the proof is inconsistent with any theory or hypothesis other than that of defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

6. Criminal Law (§ 829*)—Trial—Requests to Charge—Instructions Given.

A requested instruction dealing with the presumption of innocence was properly refused, where the subject was sufficiently covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

7. Criminal Law (§ 781*)—Trial—Instructions—Admissions of Accused—Weight.

It was not error to refuse to charge that evidence of oral admissions of defendant ought to be viewed with caution, notwithstanding Code Civ. Proc. § 2061, providing that the jury is to be so instructed "on all proper occasions," since such instruction is mere commonplace and may be given or refused without error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864–1871, 1898; Dec. Dig. § 781.*]

In Bank. Appeal from Superior Court, Sacramento County; W. M. Conley, Judge.

Samuel J. Raber was convicted of murder, and he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., for the People.

SLOSS, J. Samuel J. Raber was found guilty of the murder of Cherry de St. Maurice, and sentence of death was pronounced. He appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] The proof of appellant's guilt was complete and convincing, and no question of the sufficiency of the evidence is made. It was shown that Cherry de St. Maurice, the deceased, was the keeper of a house of ill fame, known as the Cherry Club, in Sacramento. One of the inmates was a woman named Cleo Sterling. The information on which Raber was tried charged him, jointly with Cleo Sterling and one Drumgoole, with the murder. It was shown that the three had united upon a plan to rob the deceased of her jewelry and money. Drumgoole and Raber entered the Cherry Club with the connivance of Cleo Sterling, were admitted to her room, and, after there disguising themselves by blackening their faces and otherwise, gained admission to the room occupied by Cherry de St. Maurice. The woman was seized and overpowered, and while one of her assailants held her, the other searched the room and found a quantity of jewelry. In the course of the struggle, Cherry de St. Maurice was choked to death. Raber and Drumgoole, after removing their disguises, left the house with their booty. They made their way to San Diego, where they were apprehended in the effort to dispose of some

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the stolen jewelry. After their return to Sacramento, Raber made a confession which embraced the foregoing facts relating to the robbery and killing. His testimony in his own behalf was to the same effect. He claimed, in his confession and at the trial, that he had had no intention of killing the woman, and that the violence which caused her death had been inflicted by Drumgoole while he, Raber, was searching for valuables. Whether the actual killing was done by one or the other is entirely immaterial. Each of the parties to the criminal enterprise was responsible for all acts done by the other in the prosecution of that enterprise. Nor is it of the slightest consequence that the conspirators may not have intended to bring about their victim's death. The killing, having occurred in the perpetration of robbery, was murder of the first degree. Pen. Code, § 189.

[3] The appellant claims that his rights were prejudicially affected by a declaration of the district attorney. That officer, while making a somewhat elaborate statement of the facts to be proven, said that, after the return of the prisoners to Sacramento, Drumgoole had "told the whole story. He [Drumgoole] commenced with his leaving Reno with Raber; told of coming to Sacramento; told of a plan engineered by Raber and suggested by Cleo to rob. * * *" At this point defendant's counsel interposed, whereupon the district attorney said: "Excuse me: I will take that back. I have no right to state the confession of Drumgoole." He went on to say to the jury that any confession of Drumgoole was not testimony against the defendant, and directed or requested the jury to "pay no attention to anything he had stated that Drumgoole had said." The mere statement of what had occurred should be sufficient to answer the claim of prejudicial misconduct. The prosecuting officer, immediately upon objection being made, withdrew his statement regarding Drumgoole's confession, and frankly admitted to the jury that such confession could not be used against Raber, and should not be considered against him. Such prompt retraction would, except under extreme and unusual circumstances, remove the possibility of prejudice. Here the conditions were not such as to make the impropriety of the statement irremediable. The reference to Drumgoole's confession had gone no further than to indicate the formation of a plan of robbery. That such plan had been made and carried out, and that Raber was an active participant in it was admitted by the appellant himself. If it be said that the suggestion that such plan was "engineered" by Raber might have had a harmful effect, the simple answer is that Raber's confession and testimony made it perfectly clear that this description of his part in the enterprise was in substantial accord with the facts as related by himself. Even in the absence of the provisions of section 4½ of article 6 of the Constitution, we should unhesitatingly hold that the language complained of did not constitute misconduct warranting a reversal.

[4] After their arrest, Raber and Drumgoole were confined in the county jail at Sacramento. The appellant offered to prove, by the testimony of two fellow prisoners, that Drumgoole had stated to them that he, and not Raber, had killed Cherry de St. Maurice. The objection to this testimony was properly sustained. The alleged statement of Drumgoole was clearly incompetent as hearsay.

[5] The remaining points raised have to do with the refusal to give certain instructions requested by the appellant. Two of these were designed to present the proposition that a conviction in a criminal case is not warranted unless the proof made is inconsistent with any theory or hypothesis other than that of guilt on the part of the accused. Instructions embodying this principle have frequently been held to be proper in cases where the proof was circumstantial merely, and in such a case an instruction declaring the rule stated should, if requested, be given. People v. Dick, 32 Cal. 213. But here, while the prosecution produced no eyewitness to the homicide, the unlawful killing of the deceased, and the appellant's participation in that killing, were admitted, or, rather, affirmatively shown, by the appellant's own testimony. In this state of the case, it is difficult to see how there could be any choice between two theories—one pointing to appellant's guilt and the other to his innocence. The appropriateness of the requested instructions to the particular case is, at least, questionable. At any rate, under the facts shown, every substantial right of the appellant was protected by the action of the court in giving, as it did, very full instructions defining reasonable doubt and emphasizing the obligation of the prosecution to establish, beyond such doubt, every material allegation of the information.

[6] A requested instruction, dealing with the presumption of innocence, was refused, but the subject was sufficiently covered by the instructions given.

[7] The appellant requested the court to charge that "evidence of the oral admissions of the defendant ought to be viewed with caution." The Code of Civil Procedure, § 2061, provides that the jury is to be so instructed "on all proper occasions." It is, however, settled by the decisions of this court that such instruction, if not in violation of the constitutional injunction against charging juries on matters of fact, is one that may properly be refused as a "mere commonplace." In short, a judgment will not be reversed either for the giving or the refusing of this instruction. People v. Newcomer, 118 Cal. 263, 50 Pac. 405; People v. Wardrip, 141 Cal. 229, 74 Pac. 744; People v. Tibbs, 143 Cal. 100, 76 Pac. 904; People v. Hower, 151 Cal. 638, 91 Pac. 507.

The appellant makes no other points, and none presents itself to us upon a careful reading of the record. The appellant was fairly tried and justly found guilty as charged.

The judgment and the order denying a new trial are affirmed.

We concur: SULLIVAN, C. J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

25 Cal. App. 222

TABER et ux. v. PIEDMONT HEIGHTS BLDG. CO. (Civ. 1233.)

(District Court of Appeal, Third District, California. July 28, 1914.)

1. Vendor and Purchaser (§ 31*)—Rescission for "Mistake"—Matter Known to be Doubtful.

While, in view of Civ. Code, § 1577, defining a "mistake" as an unconscious ignorance or forgetfulness of a fact, equity will not relieve against a mistake where the parties to a contract treat upon the basis that the matter is doubtful, or where the parties have knowingly entered into a speculative contract, where the purchasers of a city lot distinctly pointed out to the seller's agent the particular parcel that they were willing to purchase, and distinctly told him that they would not purchase the land to the west of that pointed out, but in reliance upon his mistaken representation that the lot designated as lot 35 on a map was that which they had selected, contracted for the purchase of lot 35, a large part of which lay west of that selected, they were entitled to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 35–37; Dec. Dig. § 31.*

For other definitions, see Words and Phrases, First and Second Series, Mistake.]

2. Vendor and Purchaser (§ 34*)—Rescission—Misrepresentation.

Purchasers of a city lot had a right to rely upon representations of the seller's agent that the lot selected by them was the lot designated as lot 35 on a map, and the vendor could not escape responsibility by showing that the purchasers might have ascertained that such representations were untrue, though the agent believed his representation to be true.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 39; Dec. Dig. § 34.*]

3. Vendor and Purchaser (§ 341*)—Recovery of Purchase Price—Right to Recover Interest.

Under Civ. Code, § 3288, providing that in every case of oppression, fraud, or malice, interest may be given in the discretion of the court, and section 1917, providing that interest is payable at the rate there specified on all moneys "after they become due," in a suit to rescind a contract for the sale of a city lot for mistake as to the location of the lot covered by the contract, where though it appeared that the vendor's agent misrepresented its location, it further appeared that he was honestly mistaken, and that there was no fraud, willful concealment, or misrepresentation of facts, interest was recoverable on amounts paid by the purchasers only from the date of their election to rescind.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008–1017; Dec. Dig. § 341.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

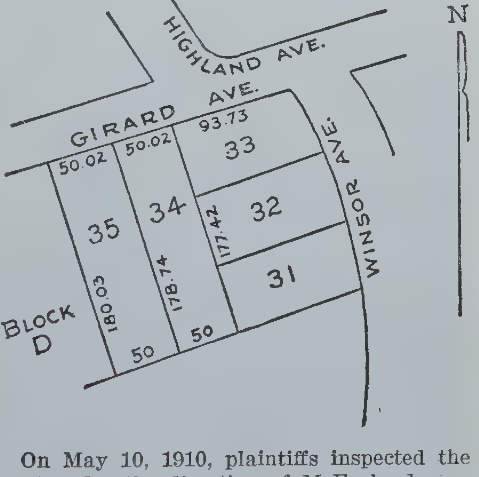
Action by Charles A. Taber and wife against the Piedmont Heights Building Company. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Fitzgerald & Abbott, of Oakland, for appellant. L. D. Manning, of Oakland, for respondents.

CHIPMAN, P. J. This is an action for the rescission of a contract for the purchase of a certain lot designated as lot 35 in block D upon defendant's map of Piedmont Knoll, Oakland, and to recover judgment for the money paid on account of said purchase. Plaintiff had judgment as prayed for from which, and from an order denying its motion for a new trial, defendant appeals.

The pleadings are verified; and most of the material averments of the complaint on which plaintiff relies were denied in the answer. As the findings follow quite closely the averments of the complaint, the issues will sufficiently appear from the findings of fact, which we proceed to state.

Plaintiffs are husband and wife. Defendant was, at all times mentioned in the complaint, the owner of lots 34 and 35 in said block D, and one Andrew McFarland was defendant's agent, with authority "to exhibit the lands and negotiate agreements of purchase of the lands of defendant." The following sketch of part of block D is necessary to an understanding of the findings and testimony in the case:



On May 10, 1910, plaintiffs inspected the land under the direction of McFarland—

> "as agent of defendant, for the purpose of selecting, and plaintiffs did then and there select a piece of land and did inform Andrew McFarland, as agent for defendant, that they selected and would purchase the piece of land on which they then stood; that plaintiffs were at that time unfamiliar with the designations and descriptions of the land, and Andrew McFarland, as agent of defendant with intent to induce plaintiffs to purchase a piece of land, paced the distance from a point which he stated to plaintiffs was the probable line of Winsor avenue, and stated the distance to be about 143 feet from Winsor avenue, and walked over the piece of land so selected by plaintiffs, and point-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed out to plaintiffs the approximate boundary lines thereof and exhibited to plaintiffs printed copy of the map of Piedmont Knoll, and stated to plaintiffs that such piece of land so selected by plaintiffs was designated on said map as lot No. 35 in block D. At that time a person unfamiliar with the land could not determine the true line of Winsor avenue or the true lines as designated on the map of the land selected by plaintiffs from an inspection or examination of the land. The plaintiffs relied solely upon such representation of Andrew McFarland, and from such recommendations believed that the land selected by them was designated and described as lot 35, block D, on the above-mentioned map, and were solely induced thereby to execute the contract admitted in evidence, made and entered into on May 10, 1910, and following the selection of such land, by the terms of which contract plaintiffs agreed to purchase and defendant agreed to sell" the lot above described as lot 35. "That on or about September 29, 1911, plaintiffs were informed by said Andrew McFarland as agent for defendant that a mistake had been made in the description of the piece of land selected by plaintiffs and that lot numbered 35 did not designate the land intended to be sold by defendant to plaintiffs, and did not include the land selected by plaintiffs. That plaintiffs thereupon demanded that defendant agree to convey to them the piece of land so selected by plaintiffs, but defendant refused on such demand to so agree to convey the land so selected. That the land selected by plaintiffs lies on the side of a knoll or raise at and above the level of the street and of the surrounding land, excepting a small part in the rear of the lot, and it is desirable for a residence site, while lot No. 35 lies adjoining and almost wholly in a hollow or depression below the level of the street and of the surrounding land, is partly filled ground, and is less desirable and is of less value for a residence site than the land selected by plaintiffs. The greater portion of the land selected by plaintiffs would be in lot No. 34 and a small portion in lot 35 of said block D. That at the time of executing such contract of purchase plaintiffs and Andrew McFarland believed the land described in such agreement as lot numbered 35 was identical with and was the proper description of the piece of land selected by and designated by plaintiffs to Andrew McFarland, as agent of defendant, as the land plaintiffs desired to purchase, and plaintiffs had no knowledge to the contrary until so informed by said Andrew McFarland on or about September 29, 1911. That plaintiffs would not have purchased said lot No. 35 nor have entered into such contract of purchase had they not relied upon and acted upon such representations of Andrew McFarland that plaintiffs were purchasing and entering into an agreement to purchase the land selected by plaintiffs. On October 2, 1911, plaintiffs notified defendant that they rescinded the agreement for the purchase of the land designated as lot No. 35, and plaintiffs offered to restore to defendant everything of value received under the contract by plaintiffs, and did tender a transfer in writing executed by plaintiffs conveying and releasing to defendant all interest held by plaintiffs in lot No. 35. That plaintiffs performed all the covenants of the agreement of purchase on their part to be performed, and paid $738.48 taxes and installments under the terms of the agreement. The interest accruing on the sum of $738.48 computed from the dates of the payment of the several installments up to October 2, 1911, the date of rescission, is found to be $55.93, and the additional sum of $25.44 interest computed from October 2, 1911, to this date. The allegations of the answer are untrue, except as above found."

As conclusions of law the court found:

"That the consent of plaintiffs to the above-mentioned contract was not mutual; that plaintiffs did not purchase the land now known to be designated and described as lot No. 35 in block D on said map, and that the designation in the contract of the land to be purchased as being lot No. 35 was agreed to by plaintiffs in the sense of being a description of the parcel of land indicated by plaintiffs to defendant at the time of selection as being the land they intended to purchase. That on October 2, 1911, plaintiffs rescinded such agreement as to lot No. 35. That plaintiffs are entitled to judgment as prayed for in the complaint upon conveying to defendant all interest received or held by them in lot No. 35 above mentioned."

Defendant presents but two questions in its brief: First. "Can a purchaser of a city lot rescind the purchase upon the ground of mistake in location, when he knew at the time of the purchase that he did not know the location, except approximately; in other words, is section 1577 of the Civil Code to be extended and enlarged so that mistake can be predicated on *conscious* ignorance of a material fact, as well as upon *unconscious* ignorance?" Second. Where there is no fraud, oppression, or malice, is it proper in a suit for rescission to charge interest from the date of payment on the land, and before the plaintiff has elected to rescind and while he is still making his payments and treating the contract as subsisting?

[1] Defendant does not in its brief attack the findings of fact as unsupported by the evidence; indeed, its points are based upon the findings. The argument proceeds upon the assumption that rescission is sought on the ground of mutual mistake which section 1577 of the Civil Code defines as "an unconscious ignorance or forgetfulness of a fact," while it is claimed that "all the evidence shows that the ignorance was conscious ignorance" of the location of the lot.

> "And there being no *unconscious* ignorance of that material fact, but rather a *conscious* ignorance, there was no mistake at all entering into the contract. The contract was based upon facts that were known to be doubtful. The plaintiffs knowingly made a speculative contract, and now cannot allege mistake simply because they speculated upon the location of the lot and do not now know and never knew its exact location."

Defendant brings to its aid the rule as stated in 9 Cyc. 398:

> "Where the parties treat upon the basis that the fact is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties."

The rule is elaborated in 2 Pomeroy on Eq. Juris. § 855, quoted in Colton v. Stanford, 82 Cal. 351, 388, 389, 23 Pac. 16, 16 Am. St. Rep. 137. The cases put by Mr. Pomeroy presuppose—

> "an arrangement based upon uncertain or contingent events purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result—and there is in either case an absence of bad faith, violation of confidence, misrepresentation or concealment or other inequitable conduct." "In such classes of agreements and transactions," says the learned author, "the parties are sup-

posed to calculate the chances, and they certainly assume the risks, breach of confidence, misrepresentation, culpable concealment, or other like conduct amounting to actual or constructive fraud."

Defendant still further relies upon the rule as stated in Ashcom v. Smith, 2 Pen. & W. (Pa.) 211, 21 Am. Dec. 437, where acreage was estimated. The court said:

"Equity will indeed relieve against a plain mistake, as well as against misrepresentation and fraud. But can mistake be alleged in a matter which was considered as doubtful, and treated accordingly? Where each of the parties is content to take the risk of its turning out in a particular way, chancery will certainly not relieve against the event."

The difficulty we find is in applying these very sound equitable principles to the evidence and findings of fact in the present case. The testimony of both plaintiffs, corroborated by friends who were present when they all went together with Mr. McFarland to view the lot, is very clear that plaintiffs distinctly pointed out to McFarland the particular piece or parcel of land and no other that they were willing to purchase, which turned out to be lot 34 instead of lot 35. They as distinctly told McFarland that they would not purchase the land which all present saw lay west of the land selected and "down in a swale or draw," some 25 feet below the street grade. Plaintiff Charles A. Taber testified:

"He, McFarland, had his map with him and he said the corner lot which faced east and the key lot (34) immediately back of it, according to his map, were sold, but he said, 'This lot here'—of course, while he had his map, and the numbers on it, I didn't pay any particular attention to the numbers because I was looking at the ground and noticing the topography of it and he stepped it off in a way. He said, 'Now this lot is 50 by 178 feet,' and I said, 'Does any of it go down in that swale or draw?' He says, 'No, not a bit of it, the west line of the lot as you will see, is right along the edge of it.' Well, I went to stepping it off. He says, 'It is 140 feet from the corner lot, but I can't locate the corner very well as the road has not been laid out as it should be, and we haven't the lines yet.' Well he paced it off and seemed satisfied with it, and I saw him go down into the fill just below the western edge of this high ground. I said, 'Now, we don't want to go down there at all.' He said, 'No, you are not coming down here at all.' And we were very well satisfied with it; we agreed on the terms, and got into the machine and drove back home. He wrote out a receipt for the money that we were to pay at that time, and I thought no more about it, leaving it entirely to Mrs. Taber."

Mrs. Taber testified:

"About the 10th of May, 1910, we all went out with Mr. McFarland in the automobile, Mr. Taber and Mr. Neece and my daughter and myself, and Mr. McFarland showed us the lot, and we said immediately that we would like that lot there, but we did not want the one in the hollow; that we wouldn't have it under any considerations. Mr. McFarland said, 'We are standing right on the lot.' And we walked to the back of the lot and all around, and we said, 'Are you sure this is the right lot?' and he said, 'Yes.' I saw them pacing it off, but I didn't know anything about pacing."

Some months later, Mrs. Taber thought it was in February, she went to McFarland's office to pay her monthly installment and said:

"Mr. McFarland, I think there is some mistake about the lot. He says, 'Oh, Mrs. Taber, don't worry; it is all right.' I says, 'Mr. McFarland, is it on the top of the hill, on the very ridge?' and he said 'Yes'. I says, 'It is not the one in the hollow, is it?' and he says, 'No.' It was along in February, I guess, that we had this conversation. The first time I asked him to go out and see about it, and he said for me to go; he said for me not to worry."

At another point in his testimony Mr. Taber testified:

"From our standpoint the lot that we selected was the only one of the two that we would care to consider at all. We made that point very clear to Mr. McFarland. I was standing on the fill just to the west of the lot we were selecting and looking at, and I told him that we didn't want to go down there at all under any circumstances. He says, 'No, your line is just east of this.'"

It is very certain that plaintiffs did not believe that they had "knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result," a condition which Mr. Pomeroy says is essential to the application of the rule relied upon by defendant. Nor was this (the location of the lot) "a matter which was considered doubtful and treated accordingly, where each of the parties" was "content to take the risk of its turning out in a particular way," as was essential to the rule given in Ashcom v. Smith, supra.

[2] Much reliance is placed by appellant upon finding 10:

"That at the time of executing such contract of purchase plaintiffs and Andrew McFarland believed the land described in such agreement as lot No. 35 was identical with and was the proper description of the piece of land selected by and designated by plaintiffs to Andrew McFarland, as agent of defendant, as the land plaintiffs desired to purchase."

McFarland's belief may acquit him of intentional misrepresentation or fraud, and we think the finding should be so understood, but as the sales agent of defendant, his belief does not acquit him of having sufficient knowledge or means of knowledge as to the location of the subdivided tracts he was selling to warrant his giving the assurances on which plaintiffs founded their belief and on which they relied and paid their money. The finding that they believed that they were getting the land they selected and pointed out to McFarland is entirely consistent with the finding that they were acting upon his confident assurance rather than upon any belief they may have had, and the evidence in no wise tends to show that as to the location of the lot they were intentionally speculating, or that they were taking the risk of getting the piece of land they selected. Plaintiffs had a right to rely upon the representations of defendant's agent "and the seller cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue." Morris v. Courtney, 120 Cal. 63, 52 Pac. 129.

[3] The court made a finding of unpaid ac-

crued interest to the date of rescission, to wit, $55.93, and interest computed from date of rescission to date of the judgment, to wit, $25.44. There is no allegation in the complaint of fraud or willful concealment or misrepresentation of facts, and there is no such finding. The court found that McFarland believed that the land selected by plaintiffs was the land intended in the contract. In this he was mistaken but, so far as appears, honestly mistaken. There was no rescission until October 2, 1911, and it seems to us the rule warrants no interest prior to that date. It is true that section 3288, Civil Code, provides that:

> "In every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

We find nothing in the pleadings, evidence, or findings justifying the claim that any one of these elements entered into the transaction. Kiger v. McCarthy Co., 10 Cal. App. 308, 101 Pac. 928, bears no resemblance to the case here; nor does Morris v. Courtney, 120 Cal. 63, 52 Pac. 129. There was nothing due plaintiffs from defendant until they rescinded, and the action there was for money had and received and not on the contract. In the absence of an agreement to pay interest, the law only awards interest upon money from the time it becomes due. Civ. Code, § 1917; Hayt v. Bentel, 130 Pac. 432. The error may be corrected upon the appeal from the judgment inasmuch as it clearly appears from the findings and may be corrected by an amendment to the judgment.

Interest prior to October 2, 1911, will be stricken out of the judgment, and otherwise the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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25 Cal. App. 295

SALO v. SMITH et al. (Civ. 1226.)

(District Court of Appeal, Third District, California. Aug. 7, 1914.)

1. FALSE IMPRISONMENT (§ 8*)—UNLAWFUL DETENTION—LIABILITY OF OFFICER.

Where a sheriff believing that plaintiff had committed an assault with intent to murder, lawfully arrested him, but, in order to determine the character of the offense, depending on the recovery of the person injured or otherwise, kept plaintiff in jail without filing a formal charge against him and taking him immediately before a magistrate, as required by Pen. Code, § 849, the officer was guilty of a trespass, and liable to plaintiff for the damages sustained.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68–73; Dec. Dig. § 8.*]

2. FALSE IMPRISONMENT (§ 36*)—TRESPASS—DAMAGE.

In an action against a sheriff for false imprisonment in keeping plaintiff in jail an unreasonable time without filing a formal charge against him and taking him before a magistrate, as required by Pen. Code, § 849, defendant's answer was held insufficient, and plaintiff moved for judgment. The complaint merely alleged that such wrongful detention had damaged plaintiff in the sum of $25,000, and admitted that there was no element of malice. The case was submitted without any evidence as to plaintiff's character, standing, or earning capacity. *Held*, that the court was entitled to consider the sheriff's absence of malice in mitigation of damages, and that an order awarding plaintiff nominal damages only was correct.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113–115; Dec. Dig. § 36.*]

3. PLEADING (§ 350*) — MOTION FOR JUDGMENT ON PLEADINGS.

A motion for judgment on the pleadings is, in substance, both a motion and a demurrer, challenging the complaint to state a cause of action or the answer to state a legal defense, and also operates as a motion for the entry of judgment without further proceedings, in which case the court becomes the exclusive judge of both the law and the facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070–1077; Dec. Dig. § 350.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by E. Salo against John K. Smith and the Pacific Surety Company. Judgment for plaintiff for nominal damages, and he appeals. Affirmed.

W. D. L. Held and T. J. Weldon, both of Ukiah, for appellant. Clarence F. Lea and T. J. Butts, both of Santa Rosa, for respondents.

HART, J. This is an action for damages for the wrongful detention of the person of the plaintiff, and grows out of the arrest of the plaintiff by the defendant Smith, as sheriff, and the failure of that official to comply with the mandates of section 849 of the Penal Code, which provides:

> "When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and an information, stating the charge against the person, must be laid before such magistrate."

It appears that the defendant Smith was the sheriff of Sonoma county, and the defendant surety company surety on his official bond, at the times mentioned in the complaint.

The complaint alleges:

> "That on the 2d day of January, 1911, and within four months prior thereto, a felony had in fact been committed in the county of Sonoma, state of California, to wit, the crime of assault with a deadly weapon with intent to commit murder; * * * that the defendant John K. Smith, sheriff as aforesaid, had reasonable cause to believe the plaintiff to have committed the same."

It is further alleged that, on the 10th day of October, 1910, said sheriff, by virtue of his duties as such officer, and without a warrant of arrest, took the plaintiff into his custody, in the city of Point Arena, in Mendocino county, and thereupon removed him from said county to the county of Sonoma, where he incarcerated him in the county jail of the latter county; that said sheriff did detain said plaintiff in said county jail, and thus restrain him of his liberty until June 1, 1911, when, the plaintiff having been acquitted by a jury of the above-mentioned charge, said sheriff discharged him and restored him to liberty.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The gravamen of the plaintiff's complaint is then set forth as follows:

"(6) That on said 10th day of October, 1910, there was in said city of Point Arena, and during all of the time intervening between said 10th day of October, 1910, and the 30th day of January, 1911, there was in said Santa Rosa, a magistrate, competent, willing, able, and ready to have taken before him this plaintiff and to have laid before him an information stating the charge against this plaintiff, and during all of said time such magistrate was accessible and convenient, and this plaintiff was, during all of said time, physically and mentally in a condition to be brought before such magistrate.

"(7) That said defendant John K. Smith did not as such sheriff, or at all, take this plaintiff before any magistrate in the county in which he so arrested this plaintiff, or elsewhere, or at all, until January 30, 1911, nor did said defendant, as such sheriff, or at all, lay any information, stating the charge against this plaintiff, or any information against him at all, before said or any magistrate until January 30, 1911, nor was this plaintiff at all taken before any magistrate until said January 30, 1911; nor was any information at all laid against him until said January 30, 1911; and in this behalf plaintiff alleges that the delay in so taking him before a magistrate and in so laying an information against him was unnecessary."

It is alleged that that portion of the restraint imposed by said defendant sheriff between October 10, 1910, and January 30, 1911, "and so much of said detention as occurred between said dates, was in excess of, and an abuse of, the power vested in said defendant sheriff, as such," etc.; "that by so much of said detention as occurred between January 2, 1911, and January 30, 1911, this plaintiff has been damaged in the sum of $25,000."

The joint answer of the defendants admits the arrest of the plaintiff under the circumstances as described in the complaint; admits that the defendant sheriff did not lay any information or prefer any charge against said plaintiff before any magistrate until January 30, 1911, and admits that, during all of the time the said defendant had the plaintiff in his custody, a magistrate was accessible and convenient; alleges that the defendant sheriff did not and could not know what charge to place against the plaintiff, "for the reason that the person assaulted was dangerously injured, and it was thought that he would not live, but would succumb to the injuries so inflicted upon him by the assault made upon him, and in that case the charge would have been murder, and that the delay in filing the complaint against said plaintiff was caused by the inability of the defendant John K. Smith to determine what charge should be placed against him"; denies "that by so much of said detention of plaintiff as occurred between the 2d day of January, 1911, and January 30, 1911, said plaintiff has been damaged in the sum of $25,000, or any other sum or at all."

When the cause was called for trial, the plaintiff, claiming that no legal defense to the cause of action alleged in the complaint was set up by the answer, applied to the court for judgment upon the pleadings. The defendants, admitting that a tort had been committed by the defendant sheriff against the plaintiff, consented to the motion, and the court thereupon rendered judgment upon the pleadings in favor of the plaintiff and awarded him nominal damages—the sum of $1. This appeal is by the plaintiff from said judgment.

The complaint against the judgment is that the court abused its discretion in the matter of assessing damages; the contention being that, on the facts as disclosed by the pleadings, the plaintiff was entitled to an award of substantial or compensatory, as distinguished from mere nominal, damages.

[1] That the plaintiff was entitled, on the facts stated and admitted by the pleadings, to a judgment is not and cannot be questioned. The only question is whether, under the facts, the trial court abused its discretion by awarding merely nominal damages.

No evidence showing the extent of the injury suffered by the plaintiff by reason of the tort or trespass complained of was presented to the court, and the complaint merely alleges general damages. It does not set up special damages, or, as is said in the written opinion of the learned trial judge, filed on rendering the decision herein and which is incorporated in the record:

"The complaint does not in a general way, or at all, state the business of plaintiff or that he suffered or sustained loss by reason of humiliation or disgrace, occasioned by said detention, or suffered from loss of time or inability in any way to follow the ordinary avocations of life. In other words, his station in life, earning ability, or opportunities to earn money in any way whatsoever are not alleged or suggested by the pleadings."

[2] The complaint admits that the defendant sheriff, in arresting and detaining the plaintiff, acted upon probable cause—that is, that he had reasonable ground for believing that the plaintiff had committed a felony—and this admission removes from said act of the sheriff any element of malice which might be inferred from a general undisputed allegation of an arrest effected without a warrant of arrest. Thus it will be observed that the trial court was without the aid of facts more specific than those contained in the complaint upon which to form a judgment in the matter of the admeasurement of damages. In other words, the court was required to base its assessment of damages upon a general statement or charge that a trespass had been committed upon the person of the plaintiff and without being apprised of the extent of the injury suffered by the plaintiff. As the trial court said in its opinion:

> "The court had, and has, no means of knowing the moral character, standing, or earning capacity of the plaintiff. The court did not even have an opportunity to observe him, and knows nothing of his past or present history or of his prospects for the future. All that it can know of him, touching his character, even in a limited degree, is the fact that there was reasonable cause to believe that he had committed an assault with intent to commit murder."

With much force the trial court then inquires:

> "On such a statement as here presented should the court award to plaintiff nominal damages, or damages in the sum of $100, or $500, or $5,000? Which of the three amounts would best comport with justice, without any evidence or suggestion touching the extent of his injury?"

That the sheriff had the right to arrest and detain the plaintiff is not disputed, and the fact that that official did not, immediately, upon making the arrest, formally charge the plaintiff with a felony constituted nothing more than a technical trespass. The complaint does not say that the plaintiff would have been the better able to have released himself, at least temporarily, from his detention had the sheriff promptly complied with section 849 of the Penal Code; nor is it to be inferred from the mere general statement of the sheriff's failure to comply with said section that the plaintiff's condition, so far as his personal liberty was concerned, would have been any different from what it was. He was not precluded from applying for bail by reason of the fact that he had not been formally charged with the felony for which he was arrested and being detained. Indeed, it does not appear that he applied for or was refused bail. Moreover, it is an admitted fact—necessarily admitted by the motion for the judgment—that the sheriff's delay in preferring a formal complaint before a magistrate against the plaintiff was due to uncertainty as to the nature of the charge which the circumstances might require should be made, whether that of murder or of assault to commit that crime, such uncertainty arising by reason of a doubt existing at the time of the plaintiff's arrest and for a long period of time thereafter as to whether the assaulted party would recover from, or succumb to, the serious wounds inflicted upon him. While this fact constituted no defense to the action, it nevertheless showed an absence of malice, and therefore constituted an element which the court was authorized to consider as in mitigation of damages.

It is true, as counsel for the plaintiff assert, that "physical inconvenience, mental suffering and humiliation of mind are all elements of general compensatory damages," and it is also true that evidence of such damages is admissible under the general statement of damage, or, perhaps it is more accurate to say, under a general statement of the tort or trespass. But, as has been made to appear, no evidence was offered in this case to show the extent of the injury following from the trespass alleged. And we may in this connection remark that, if this was a case in which it had been made to appear that the plaintiff's arrest and detention were without probable cause, then his position that upon a general statement in his complaint of such trespass he would be entitled, as a matter of law, to substantial or actual damages would doubtless be sustainable. But, as we have shown, this is not such a case.

The cases of Lick v. Owen, 47 Cal. 252, Taylor v. Hearst, 107 Cal. 272, 40 Pac. 392, and Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515, and Page v. Mitchell, 13 Mich. 63, 86 Am. Dec. 75, are cited by the plaintiff in support of his position here. The three cases first mentioned were actions for libel, and the Michigan case was one for an unlawful arrest. They are not in point here for at least two reasons: (1) In actions for libel, where, as in those cases, the publication is not privileged, the law implies malice (Civ. Code, § 47, and the cases above named), and in cases of tort, where the defendant has been guilty of oppression, fraud, or malice, actual or implied, the jury may, in addition to the allowance of actual damages, impose upon the defendant exemplary damages, "for the sake of example and by way of punishing the defendants" (Civ. Code, § 3294). (2) All the cases referred to were tried before juries and verdicts returned, and two of the libel cases and the Michigan case were reversed because of instructions limiting the juries to the finding of nominal damages only. In the other libel case the order granting a new trial was affirmed.

1. In this case there is no pretense that the act of the sheriff involved malice, either express or implied, or that oppression or fraud characterized it in any degree. To the contrary, as shown, the plaintiff himself absolves the defendant sheriff from any malice or imputation thereof in the act of arresting and detaining the plaintiff by alleging that such arrest and detention were supported by probable reason for believing that he (the plaintiff) had committed the felony for which he was so arrested and detained.

2. The case here was not tried before a jury to which it was necessary to submit instructions upon the law pertinent to the facts.

[3] The trial court, in this case, in awarding judgment upon the pleadings, and assessing damages, acted in a dual judicial capacity. This proposition necessarily follows from the very nature of a motion for such a judgment; for a motion for judgment upon the pleadings is, in substance, both a motion and a demurrer. While it is, in effect, a demurrer, because it challenges the sufficiency of the complaint to state a legal wrong or that of the answer to state a legal defense, as the case may be, it, at the

same time, operates as a motion for the reason that it is an application for an order for judgment. 31 Cyc. 606, and cases cited in the footnotes. It follows, therefore, as before declared, that the court in this action was required to exercise two different kinds of judicial functions: Firstly, it was called upon to determine the question, purely one of law, whether the plaintiff was entitled to any judgment upon the pleadings; secondly, having decided that the plaintiff was entitled to such a judgment, it was required to determine the question, which perhaps may be said to be one of mixed law and fact, as to the extent of the damage suffered by the plaintiff; that is, what damages, when measured in money, would satisfy the ends of the justice of the case as the same was disclosed by the facts before it. In other words, the latter function involved the determination of a question of mixed law and fact because said question, having been submitted to the court, required a determination by it of what damages in law the defendant was entitled to under the facts as disclosed by the complaint. But, in exercising that function—that is, in the determination of the quantum of damages—the court, in practical effect, acted in the place of a jury, and certainly it cannot be said that in that regard it was vested with any less discretion than a jury would have been had the case upon the facts been so tried and decided.

In this instance the court became the exclusive judge of both the law and the facts, and so was authorized to conclude and decide, as we think a jury would have been justified in concluding and deciding upon similar facts, under appropriate instructions, that, under the law, the facts justly justified the award of nothing more than nominal damages. If, to be more explicit, the case as it stands as to the facts had been submitted to the determination of a jury and a verdict for nominal damages returned, it could not well be argued that this court could say, as a matter of law, that the plaintiff was entitled to substantial damages, and that the conclusion so reached by the jury was therefore erroneous or not warranted by the facts. As we view the case, the situation here, so far as is concerned the decision of the question of damages, which is a question of fact, is precisely the same as if said question were submitted to the arbitrament of a jury, and it is no more within the competence of a reviewing court to annul a judgment rendered and entered under such circumstances as are shown here than it would be to set aside a judgment entered upon the verdict of a jury founded upon facts similar to those to which the court was confined in the matter of the assessment of damages in this case.

Our conclusion is, as before stated, that the case as it was submitted to the trial court was one in which the conclusion was forced that the omission of the sheriff to make a formal complaint against the plaintiff, as required by the Code section mentioned, involved nothing more than a mere technical trespass, from which the plaintiff could have suffered no substantial injury or actual damage.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

168 Cal. 321

HART v. JORDAN, Secretary of State.

(S. F. 7137.)

(Supreme Court of California. Sept. 24, 1914.)

1. ELECTIONS (§ 126*)—PRIMARY ELECTION—CANDIDATES OF DIFFERENT PARTIES FOR SAME OFFICE.

Primary Election Law (St. 1913, p. 1389) § 5, subd. 4, providing that nothing contained in the act shall limit the right of any person to become the candidate of more than one political party for the same office on complying with the requirements of the act, but that no person shall be entitled to become a candidate for more than one office at the same election, authorizes a member of one political party, seeking a nomination for an office, to become the nominee of another party for the same office by his own initiative or through the action of five electors, etc.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 21*) — PRIMARIES — CANDIDATES—CONDITIONS—CONSTITUTIONAL PROVISIONS.

By Const. art. 2, § 2½ (Amendment 1908), directing the Legislature to enact laws providing for direct nominations at primary elections, and to determine the tests and conditions on which electors, parties, or organizations of electors shall participate, the Legislature may prescribe tests and conditions for candidates as well as for electors, but is not bound to make membership in a party a condition of the right to seek the nomination of that party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 21.*]

3. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—CANDIDATES—PARTY AFFILIATION.

Since, by Primary Eelection Law 1913 (St. 1913, p. 1379), the selection of candidates of a party for political offices is committed to those who have declared their affiliation with that party, such persons, to wit, the members of that party, may select as their candidate one affiliated with another party or with no party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

In Bank. Petition by William H. H. Hart, for writ of mandamus against Frank C. Jordan, as Secretary of State, to require respondent to cancel the certificate of nomination of U. S. Webb, as a candidate of the Republican party for the office of Attorney General, or, if no certificate has been issued, to omit the name of Webb as a candidate of the Republican party and to substitute petitioner's name therefor. Denied.

Louis Montgomery, of San Jose, and S. C. Denson and Chas. L. Thompson, both of San Francisco (Wm. H. H. Hart, of San Francisco, of counsel), for petitioner.

PER CURIAM. The petitioner, a qualified elector, who had registered as a member of the Republican party, was a candidate for the nomination of said party for the office of Attorney General at the primary election, held on August 25, 1914, under the provisions of the Primary Election Law of 1913. Stats. 1913, p. 1379. At the same election U. S. Webb, a qualified elector of the Progressive party, having appointed verification deputies under subdivision 2a of section 5 of the act, was a candidate of said Progressive party for its nomination for the same office. Said Webb was also a candidate for the Republican nomination for the same office, having been proposed as such candidate by five qualified electors "registered as intending to affiliate with" the Republican party, pursuant to subdivision 2b of section 5 of the act. At the primary election, Webb received a plurality of the votes cast for the Progressive nomination, and also a plurality of the votes cast for the Republican nomination. The petitioner, who received the second highest number of votes for the Republican nomination, avers that the Secretary of State is about to issue, or has issued, to Webb a certificate of nomination as the Republican candidate and to certify Webb's name to the various county clerks and registrars as that of the regular nominee of the Republican party for said office of Attorney General to be voted for at the general election to be held on November 3d. The present application is for a writ of mandate requiring the respondent to cancel such certificate of nomination, if he has issued one, and to omit Webb's name as candidate of the Republican party, substituting therefor the petitioner's name, in certifying names of nominees to county clerks and registrars.

[1] The petitioner's contention is that a

member of one party, seeking its nomination for an office, cannot at the same time, by his own initiative or through the action of five electors, be a candidate for the nomination of another party for the same office. That the act, by its direct terms, authorizes such candidacy for the nomination of two or more parties, is too plain for argument. Subdivision 4 of section 5 provides that:

> "Nothing in this act contained shall be construed to limit the rights of any person to become the candidate of more than one political party for the same office upon complying with the requirements of this act, but no person shall be entitled to become a candidate for more than one office at the same election."

[2] This being the clear intent of the framers of the act, we cannot see in the provision any violation of constitutional restrictions. By the amendment of 1908, adding section 2½ to article 2 of the Constitution, the Legislature is directed to enact laws providing for direct nominations at primary elections, and to determine the tests and conditions upon which electors, parties, or organizations of electors shall participate. Under this section, the Legislature may prescribe tests and conditions for candidates, as well as for electors. Soc. Party v. Uhl, 155 Cal. 776, 103 Pac. 181. But it is not bound to make membership in a party a condition of the right to seek the nomination of that party.

[3] The selection of candidates of the party is, under the law, committed to those who have declared their affiliation with it. If they (the members of that party) seek to select as their candidate one affiliated with another party, or with no party, that is their privilege. No violation of fundamental right, or of the traditional practice of parties, is committed. Before the day of direct primary laws, it was not uncommon for a convention of one party to nominate a member or a candidate of another party, and there is no constitutional reason for saying that the same thing may not be authorized to be done by the direct action of the electors of the party.

The writ is denied.

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168 Cal. 793

WILLIAMS v. JORDAN, Secretary of State.
(S. F. 7138.)

(Supreme Court of California. Sept. 24, 1914.)

In Bank. Petition for writ of mandamus by Helen K. Williams against Frank C. Jordan, as Secretary of State. Writ denied.

Louis Montgomery, of San Jose, and S. C. Denson, and Chas. L. Thompson, of San Francisco (Wm. H. H. Hart, of San Francisco, of counsel), for petitioner.

PER CURIAM. Application for writ of mandate. The facts presented by this application are in legal effect the same as those presented in Hart v. Jordan, 143 Pac. 537, this day decided. Upon the authority of that case, the petition for writ of mandate is denied.

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168 Cal. 323

REDONDO IMPROVEMENT CO. v. O'SHAUGHNESSY et al.
(L. A. 3318.)

(Supreme Court of California. Sept. 25, 1914.)

1. Limitation of Actions (§ 84*)—Suspension—Absence from State—Mortgages—Original Owner or Mortgagor.

The running of limitations in favor of a subsequent grantee of mortgaged premises is not suspended by absence from the state or by any other act of the original owner or mortgagor, but where the original mortgagor left the state after she had parted with her title, and in turn her grantee was and remained out of the state, so that from 1905 until 1911 the only two persons who were necessary and proper parties defendant, in an action to foreclose, were both out of the state, such absence suspended the running of limitations, as provided by Code Civ. Proc. § 351.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439–448; Dec. Dig. § 84.*]

2. Mortgages (§ 461*) — Foreclosure — Different Source of Title.

Since the presence or absence of a subsequent conveyance on the record in the proper office, when an action to foreclose a mortgage on the property is commenced, is the conclusive test as to whether the holder need or need not be made a party defendant, so as to bind him by a foreclosure decree, evidence, in a suit to foreclose, that defendant held title under an alleged owner of the mortgaged premises, whose title was subsequent to the mortgage and did not appear on the record, was inadmissible, though the mortgagee had actual notice thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1253–1360; Dec. Dig. § 461.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Redondo Improvement Company against Catharyn O'Shaughnessy and others. Decree for complainant, and defendants appeal. Affirmed.

Lucius M. Fall, of Los Angeles, for appellants. Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for respondent.

HENSHAW, J. This is an action to foreclose a mortgage. Defendant O'Shaughnessy, mortgagor and former owner of the property, executed her note and mortgage in 1904. The debt matured three years thereafter. In 1905 she sold and conveyed the mortgaged property to Ellen O'Brien, who afterward conveyed it to Alice B. Sullivan. She in turn conveyed it to George L. Mullen, and he in turn to Ida B. Moreland, defendant and appellant. Ellen O'Brien held record title to the property only from the 25th day of July, 1905, to the 1st day of August, 1905, when her conveyance to Alice B. Sullivan was recorded. It is stipulated by the parties that the original owner and mortgagor, O'Shaughnessy, and her grantee by mesne conveyance, Alice B. Sullivan, were and remained continuously out of the state of California. Alice B. Sullivan made her conveyance to George L. Mullen by deed of quitclaim on the 2d day of March, 1911. This deed was recorded upon the 9th day of October, 1911. On that same day George L. Mullen's quitclaim deed to defendant and appellant Ida B. Moreland was recorded. This action was commenced on October 14, 1911, within a few days after the recordation of the deed from Alice B. Sullivan to George L. Mullen and his quitclaim deed to appellant Moreland. It was, however, commenced more than four years after the maturity of the note and mortgage. Judgment passed for plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Ida B. Moreland, the present holder of the record title, appeals, urging that the judgment is erroneous in that the running of the statute of limitations in favor of a subsequent grantee of mortgaged premises is not suspended by absence from the state or by any other act of the original owner or mortgagor. This principle is well established. Lord v. Morris, 18 Cal. 483; McCarthy v. White, 21 Cal. 496, 82 Am. Dec. 754; Grattan v. Wiggins, 23 Cal. 25; Lent v. Morrill, 25 Cal. 499; Barber v. Babel, 36 Cal. 11; Wood v. Goodfellow, 43 Cal. 185; California Bank v. Brooks, 126 Cal. 198;[1] Filipini v. Trobock, 134 Cal. 441, 62 Pac. 1066, 66 Pac. 587; Brandenstein v. Johnson, 140 Cal. 31, 73 Pac. 744. Respondent does not question it, but points out its inapplicability to the facts in the case at bar; the vital difference being that it is not asserted here that the running of the statute of limitations is suspended because of the act or absence of the mortgagor after she had parted with title, but because, in turn, her grantee, Alice B. Sullivan, herself was and remained out of the state of California. Consequently, during the time of such absence, the running of the statute was suspended in plaintiff's favor, and its right of foreclosure could not be barred if, as here, after the lifting of the suspension, the action was timely brought. In brief, up to 1911 the only two persons necessary and proper parties defendant in the action to foreclose were both out of the state. Their absence worked a suspension of the running of the statute of limitations against plaintiff's right of action. Code Civ. Proc. § 351. Respondent's position is well taken.

[2] Appellant contends that from a different source she has become the owner of this property, freed from the mortgage lien. This source, as set up in her answer, is the following: She asserts that in 1907 one John F. Sullivan was the owner of the mortgaged property; that in February of that year, under execution sale on a judgment secured by her against John F. Sullivan, she received a sheriff's deed to the property. It is not contended that John F. Sullivan had any record title to the property. Indeed, it is conceded that he never did have such a record title. But appellant sought to introduce evidence showing that she was in fact such owner, and that plaintiff had knowledge of her claim of interest in the land growing out of this sheriff's deed prior to the maturity of the note. This evidence was excluded by the court, and it is here argued was erroneously excluded. Respondent's position is that, as Sullivan never held any record title, the sheriff's deed of his interest to Ida B. Moreland and her recordation of that deed could not affect the rights of the mortgagee under his mortgage; appellant's contrary position being that the mortgagee would be bound by actual notice that she claimed ownership under the sheriff's deed.

Appellant, however, confuses the application of the doctrine of notice in fact with the doctrine of constructive notice by recordation. Her reliance upon the language of Filipini v. Trobock, supra, is misplaced. In that case this court was dealing with the effect of a deed made prior to the making of the mortgage but recorded thereafter. The rights of a mortgagee in such a case are defined by section 1214 of the Civil Code. Unless such a prior conveyance is first recorded, it is void as against a mortgagee "in good faith and for a valuable consideration, whose conveyance is first duly recorded." But one cannot be such a mortgagee in good faith if he has actual notice of the prior conveyance. So when it is said in Filipini v. Trobock, supra, "the deed under which the appellant claims was recorded before the maturity of the note, and it is the record of such a deed, not actual notice, which determines the right of the grantee to be made a party to the foreclosure in order to be bound by the decree," the court is there dealing only with the right of a grantee to be made a party to the action of foreclosure, and is simply declaring that this right depends upon the recordation of the instrument and not upon actual notice of its existence, as declared in section 726, Code of Civil Procedure. It is not referring to any actual notice given to a prospective mortgagee, by virtue of which actual notice he could not successfully assert that he was a mortgagee in good faith with a mortgage claim superior to that of the grantee, who had served upon him actual notice. So in Hibernia Savings & Loan Society v. Farnham, 153 Cal. 578, 96 Pac. 9, 126 Am. St. Rep. 129, the same question was involved of the right against the mortgagee of a prior grantee of the mortgaged property. And, having reference to the position of the plaintiff as an innocent incumbrancer in good faith, it is there said:

> "The opinion in this case clearly indicates the conclusion compelled by the express terms of section 1214 of the Civil Code, viz., that the statute of limitations cannot begin to run in favor of one claiming under an unrecorded conveyance as against a mortgage given subsequent to the execution and delivery of the conveyance, for a valuable consideration, which is first duly recorded, in the absence of actual notice of such conveyance to the holder of the mortgage, until such conveyance is recorded."

Where, however, as in this case, the grantee is not a prior grantee, and therefore, as to him, no question can arise of the good faith of the mortgagee in accepting his mortgage, the rights of such a subsequent grantee as against the mortgagee arise only from the recordation which our law prescribes. It never arises from mere notice. On this, the language of this court in Hager v. Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68, is conclusive:

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[1] 59 Pac. 302.

> "The presence, or absence, of the subsequent conveyance upon the record in the proper office when the action is commenced is the exclusive test as to whether the holder thereof need or need not be made a party defendant, so as to bind him by the foreclosure decree."

It was not error, therefore, for the court to reject this offered evidence touching some unrecorded deed which some one saw in the hands of John F. Sullivan, nor evidence that appellant claimed some interest in the property through and by virtue of such unrecorded instrument and that plaintiff knew it. Under these circumstances, of course, against this respondent, the sheriff's deed to appellant conveyed nothing.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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25 Cal. App. 282

NORTHERN LIGHT MINING CO. v. BLUE GOOSE MINING CO. (Civ. 1225.)

(District Court of Appeal, Third District, California. Aug. 7, 1914.)

1. Mines and Minerals (§ 70*)—Mining Lease—Royalties — Action — Complaint —Demand.

A complaint alleging the execution of a mining lease, defendant's entry into possession thereunder, extraction of a certain value of gold, the amount due plaintiff under the lease, and payment of all such amount, except $2,611.68, no part of which had been paid, stated a cause of action for the recovery of such sum.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

2. Mines and Minerals (§ 70*)—Placer Ground—Leases—Construction.

Where a placer mining lease provided for the payment of specified royalties during the year without specifying any particular day for payment, the whole amount of the annual rent matured at the end of the year, and, if not paid, an action would lie whether the rent was payable in money or gold dust.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

3. Mines and Minerals (§ 70*)—Leases—Rent—Place of Payment.

Where a mining lease omitted to specify the place where rent or royalties were payable, payment should have been made on the premises, and the fact that defendant withheld payment for that reason was no defense to an action to recover the rent or royalties, in the absence of notice to plaintiff to designate a place for payment.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

4. Mines and Minerals (§ 70*)—Leases—Action for Breach and Royalties—Demand.

Where, in an action for breach of a mining lease and for royalties, defendant denied the breach and alleged a total defense to the cause of action for royalties, so that it appeared that a demand would have been a mere idle ceremony, the making of a demand was not a condition precedent to plaintiff's right to sue.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

5. Pleading (§ 349*)—Judgment on Pleadings—Admitted Facts.

Where, in an action for royalties under a mining lease, the admitted facts showed that plaintiff was entitled to judgment for a specified sum, judgment was properly rendered on the pleadings for such amount, though the answer denied that anything was due.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1067–1069; Dec. Dig. § 349.*]

6. Mines and Minerals (§ 68*)—Leases—Breach — Defenses — Subsequent Contract.

Where, after defendant had notified plaintiff of its intention to remove its dredger from leased premises prior to the expiration of a mining lease requiring defendant to continue the work as steadily and continuously from the date of the lease as the weather and season of each year would permit during the term, and was actually engaged in moving the dredger off the claims, plaintiff employed defendant to work out and extract the gold from certain pieces of unworked ground which had been left unworked by plaintiff in its previous operations on the claims, under a new agreement, such agreement constituted no defense to defendant's liability for breach of the original lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

7. Pleading (§ 98*)—Answer—Responsiveness.

In an action for breach of a mining lease and for royalties, an allegation of a custom among miners in the district that, unless it was specifically required by the lease that the lessee operate the leased premises during the whole term, the lessee might cease working and remove from the leased premises whenever he chose was unresponsive to the complaint and stated no defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 200, 201; Dec. Dig. § 98.*]

8. Mines and Minerals (§ 68*)—Mining Lease—Breach—Evidence of Custom.

Where a mining lease obligated the lessee to work as steadily and continuously from the date of the lease as the weather and season of each year would permit during the term, a custom among miners in the district that, in the absence of a contrary provision, the lessee was authorized to cease work under the lease whenever he chose was irrelevant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

9. Mines and Minerals (§ 68*)—Leases—Breach—Damage—Evidence.

In an action for a lessee's breach of a mining lease by refusal to continue mining to the end of the term and to pay the prescribed royalties, plaintiff proved the total number of cubic yards of gold-bearing gravel that defendant could have mined between the date work was suspended and the end of the season, the average gold value of such gravel per cubic yard, and the best obtainable or market percentage of royalty for working the claims at the date of the breach or thereafter. *Held*, that damages figured on the basis of such evidence were not objectionable as uncertain.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

10. Mines and Minerals (§ 68*)—Leases—Obligation of Lessee—Duty to Work Mine—"From Date of This Lease."

Where a mining lease provided that the lessee agreed to work all the gold-bearing gravel on the claims from rim to rim, wherever it was practical to work the dredger, and to do the work as continuously and steadily from the date of the lease as the weather and season would permit during the term, the lessee was bound to continue the work as steadily as permitted by the weather during the season of each year until the termination of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

11. Evidence (§ 21*)—Judicial Notice—Custom of Miners.

The court will not take judicial notice of a custom of miners that the lessee under a mining lease, in the absence of an express provision to the contrary, should be authorized to cease work under the lease at his election.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 25; Dec. Dig. § 21.*]

12. Mines and Minerals (§ 68*)—Leases—Breach—Duty of Lessor.

Where defendant contracted to mine placer ground under a royalty lease for a specified term, and refused to continue the work at the royalty specified before the end of the term, the lessor was not required to work the ground itself or obtain another lessee to do so as a condition of its right to recover damages against defendant for breach of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

13. Mines and Minerals (§ 56*)—Lease or License—"Lease."

Where an instrument under which defendant took possession of placer claims called itself an indenture of lease, the parties being referred to as lessor and lessee, and provided that the lessor "grants, demises, leases, and lets" unto the lesee for a term of three years, not only the right to mine, but the land itself, and that the lessee should pay "rent," and contained forfeiture and entry clauses, together with clauses against assigning or subletting, the instrument was a lease and not a mere license.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 166; Dec. Dig. § 56.*]

14. Mines and Minerals (§ 68*)—Mining Lease—Breach—Proof of Damage.

Where, in an action for breach of a lease, plaintiff offered the best evidence attainable from which to ascertain its damages, and the difficulty of ascertaining exactly how much plaintiff was injured arose from defendant's breach of the lease, scant attention would be paid to its claim that the damage was not proved with sufficient certainty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

15. Mines and Minerals (§ 68*)—Leases—Breach—Damage.

Under a placer mining lease, defendant was bound to operate its dredger on the claims, not only during the entire period that it operated, but for 67 days additional, and plaintiff was entitled to a specified percentage of what was extracted, however much or little, and of what would have been extracted had the work continued for the entire term. After notifying plaintiff of its election to abandon operations, and before answer, defendant proceeded to move the dredger off the premises, but on the way out it discovered some rich spots on which it worked five days and extracted gold of the value of $13,545.36. Had the dredger continued to work on the ground contiguous to that on which it was working when the notice was given, it would have taken out during the five days a total of $2,500 worth. *Held* that, in determining plaintiff's damage for breach of the lease, defendant was not entitled to credit for the difference between the amount secured from the rich spots and $2,500, which it would otherwise have extracted, but plaintiff was entitled to royalty on the amount obtained; defendant obtaining credit only for the five days actually consumed out of the total number of working days remaining under the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. § 68.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Northern Light Mining Company against the Blue Goose Mining Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fink & White, of San Francisco, for appellant. W. S. Andrews and A. H. Brandt, both of San Francisco, for respondent.

BURNETT, J. The complaint was in two counts to recover damages for different breaches of a written contract providing for the lease of certain gold mining claims, in which plaintiff was the lessor and defendant the lessee. The first count was based upon defendant's failure to pay plaintiff the sum of $2,611.68, the amount due as rent and royalty under the terms of said lease, and the second count sought damages for defendant's refusal to continue dredging on the demised premises for the balance of the term.

Respondent moved for judgment on the pleadings as to the first count, and the motion was granted, and from said order the defendant has appealed. There was a trial as to the second count, and plaintiff obtained a judgment thereon for $8,375, from which also defendant has appealed.

As to the judgment on the pleadings, error is claimed for the following reasons: (1) That the first count of the complaint does not state a cause of action. (2) That the answer thereto states three complete defenses, to wit: There was no money due; there was an executed oral agreement modifying the lease; and a custom existed permitting the abandonment of leased mining ground.

The said first count, after alleging the incorporation of plaintiff and defendant and the execution of said lease, a copy of which is attached and made a part of the complaint, proceeds:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "(4) That in and by said written agreement or lease the plaintiff granted, leased, demised, and let unto the defendant for a period of three years commencing on the 10th day of May, 1907, and expiring on the 10th day of May, 1910, certain placer mining claims [describing them].
>
> "(5) That in consideration of said lease the lessee, the defendant herein, covenanted and agreed with the plaintiff to enter upon said mining claims and premises above described and to work the same mine fashion with its steam dredger, known as the 'Alpha,' in a manner necessary to good and economical mining, so as to take out the greatest amount of gold and precious metals possible, with due regard to the safety, development, and preservation of said premises as workable mines; further, the defendant agreed to work all the gold bearing gravel on said claims from rim to rim wherever it was practical to float said dredger and to do said work as steadily and continuously from the date of this lease as the weather and season of each year would permit during the aforesaid term; and said defendant further agreed to pay and deliver to said lessor as royalty and rent 33⅓ per cent. of all gold and precious minerals extracted from said premises during any single year until the gross yield during any single year should have amounted to $50,000, and thereafter during said year to pay and deliver to said lessor as rent and royalty 40 per cent. of all gold and precious minerals extracted from said premises in excess of said $50,000, until the gross yield during any single year should have amounted to $200,000; and defendant further agreed to pay to the plaintiff as rent and royalty for said premises 50 per cent. of all gold and precious minerals extracted in any single year in excess of $200,000. These royalties to be so paid were to be of like assay as those retained by the lessee, and payment was to be made at such time and place as the lessor, the plaintiff herein, should direct.
>
> "(6) That thereafter, upon the execution and delivery of said agreement of lease, the defendant entered upon the aforesaid described premises and commenced mining thereon as aforesaid; that during the year 1909 the defendant extracted gold from said premises valued in the sum of $62,084.64; that of said sum of $62,084.64 the plaintiff was entitled under its said contract to the sum of $21,500.51; that the defendant has paid to the plaintiff the sum of $18,888.83 and no more; and that there is now due, owing, and unpaid to the plaintiff from the defendant the sum of $2,611.68."

[1] In brief, then, the complaint sets out the execution of a lease of mining property by plaintiff to defendant, the entry thereunder by the latter into possession of said premises, the extraction therefrom of a certain value of gold, the amount due plaintiff under said contract of lease, and the payment of all said amount, except the sum of $2,611.68, no part of which has been paid.

Upon a general view we would conclude that there are thus exhibited all the elements that are usually found and that the rules of pleading require in a cause of action like this. And it may be said that a deliberate consideration of the specific criticism of appellant does not disturb the impression created by a cursory reading of the complaint.

[2] No allegation of a demand for the payment of the rent was essential to the statement of a cause of action. While the lease is somewhat uncertain as to whether the rent or royalty was to be paid in gold dust or bullion alone or in money, the more reasonable construction seems to be the one obviously placed upon the lease by the parties themselves and followed by the court below. The terms used in said lease would indicate that gold dust and money were considered as equivalent, and in the answer it is alleged, substantially, that appellant paid respondent as rent under the lease the sum of $18,888.83. The construction of the lease adopted and acted upon by the parties to it should, of course, prevail, where uncertainty exists as to the precise meaning of any of its terms. The lease also specified the time within which the payment should be made. While no particular day, for obvious reasons, is designated for payment, the defendant was obligated "thereafter during said year to pay and deliver to said lessor as rent and royalty" the amount set forth. The precise time of payment and whether it should be made in more than one installment was left to the discretion of the defendant, but it is clear that the whole amount of the annual rent would be due at the end of the year, and, if not paid, then an action would lie for its recovery, and this complaint was filed after the end of the year. The same result would follow whether the payment was to be made in gold dust, bullion, or money.

[3] Neither can it be said that the designation of a place for the payment was a condition precedent to the accruement of the cause of action. This was a privilege accorded to plaintiff, but, if it failed to exercise the option, the payment should be made upon the premises. If defendant was withholding what was due on the ground that plaintiff had not designated a place for the payment, notice to that effect should of course have been given by the former to the latter. The recital of the foregoing considerations shows that no demand for the payment or delivery of the amount claimed was required before plaintiff would be authorized to institute the action. It is simply the case of an amount clearly due under the terms of the contract when the complaint is filed, and the situation is entirely different from those instances where the cause of action does not accrue until a demand for payment is made. The matter seems so simple as hardly to justify the citation of authorities, although many cases are noted by respondent in support of the action of the court below as to this point.

[4] Manifestly, also, as suggested by respondent, a demand would have been entirely futile. In its answer appellant denies that the lease bound it to work for the full term, and also denies that there is owing to respondent any sum whatever. It also sets up what was conceived to be a perfect defense to the first count of the complaint. To be consistent, then, appellant would have refused to comply with any demand for payment. But the purpose of a demand in a case like this is to afford defendant an op-

portunity to comply with it without the annoyance and expense of suit; but, when it appears that it would have been unavailing and a mere useless and idle ceremony, the law does not require it. Cox v. Delmas, 99 Cal. 120, 33 Pac. 836. It is clear, therefore, that, if any defect in that regard existed in the complaint, it is shown by the answer to have been entirely without prejudice.

[5] With no less certainty can it be affirmed that the court was justified as to the first count, in awarding judgment to plaintiff on the pleadings.

It was alleged that gold of the value of $62,084.64 was extracted in 1909. This was not denied in the answer. Of this it was alleged that plaintiff was entitled to $21,500.51. This is a matter of computation based upon the terms of the lease. The execution of the lease and entry thereunder are not denied. The complaint alleges that respondent has received of this sum of $21,500.51, on account of said rent, the sum of $18,888.83 and no more. This is not denied in the answer. From the admitted facts, therefore, the conclusion necessarily follows that plaintiff is entitled to judgment for the sum of $2,611.68. In view of the foregoing, it is patent that the denial in the answer "that there is now due, owing, or unpaid to plaintiff from defendant the sum of $2,611.68 or any other sum or sums whatever" involves a mere legal conclusion, arising probably from a misconstruction of the terms of the lease. The proper way to present an issue as to this material question was to set forth facts showing that plaintiff was not entitled to said sum of $21,500.51 or to allege that the full amount had been paid.

[6] Likewise there is no semblance of defense in the claim of an executed oral contract. There is a missing link between it and the written contract of lease upon which plaintiff relied. The allegation is "that after defendant had notified plaintiff of its intention to remove its dredger from said premises, and, while defendant was actually engaged in the moving of its said dredger off the said placer mining claims, plaintiff, through its agents thereunto duly authorized, employed defendant to work out and extract the gold and gold dust from certain small pieces or blocks of unworked ground, which had been left unworked by plaintiff in its theretofore mining operations upon said placer claims, and which were covered with tailings and tailing piles; and in this connection plaintiff agreed to pay and deliver to defendant, as compensation for working out said small pieces or blocks of unworked ground, 80 per cent. of the gross product of gold derived therefrom," and that defendant accepted said employment, and under this agreement took out gold of the value of $13,543.36, and delivered to plaintiff 20 per cent. thereof as agreed, but there is nothing to show that this contract was intended as a substitute for the one set out in the complaint, or, indeed, that the two were related in any manner. We must assume that they were entirely disassociated and distinct. In other words, this declared defense utterly lacks responsiveness and relevancy to the cause of action. Of course it is elementary that, if the answer sets up an affirmative defense, it must state facts which are related to the facts averred by plaintiff and which constitute a defense thereto. 31 Cyc. 157. In the absence of any allegation or circumstance showing that this oral agreement had any relation to the written contract or was intended to modify or affect it in any manner, we must regard said oral agreement as a matter utterly extraneous and inapposite.

"As a matter of pleading, appellant could not avoid a contract alleged in the petition by answering that he had made with appellee another and different contract." Tyler v. Coleman (Ky.) 97 S. W. 373.

Other valid objections to the so-called defense are urged by respondent, but we deem further inquiry as to this point unnecessary and inadvisable.

[7] The third defense is equally without merit. The claim is that it was "a custom among miners of Alaska that, unless it is specifically set forth in the lease that the lessee shall continue to operate the leased premises during the whole term for which the lease is given, a lessee is permitted and has the right to cease working under the lease, and remove from the leased premises whenever he chooses so to do." This is also entirely unresponsive to the complaint. It does not appear how this custom could or did impair the right of plaintiff to receive the rent or royalty provided for in the lease, or in what manner this custom affected the acts of the parties to said contract.

[8] Besides, the terms of the contract as to the time of operation are plain enough, and no evidence of custom would be admissible upon the subject. A contract cannot be varied by evidence of usage. Custom can be shown only when the terms of the contract are obscure or uncertain. Code Civ. Proc. § 1870; Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

In dismissing this first branch of the case, it may be said that no offer was made by defendant to amend its answer, and we must assume that its defense was as fully set forth as the facts would warrant.

In considering the judgment on the second count, we note preliminarily that during the seasons of 1907 and 1908 defendant operated under the terms of the written lease, and the dredge was left at a certain point on the claim during the winter of 1908–09, and on June 4, 1909, work was again started and continued till the 12th of August following. On August 11th preceding, the "manager" and the "managing owner" sent to plaintiff a telegram to the effect that, unless the royalty were reduced to 10 per cent., operations would be suspended. The next day, without waiting for an answer, they abandoned operations and proceeded to move the dredger off the premises. On the way out they were engaged for five days in dredging a rich spot from which was realized quite a sum of money, and on September 1st they left plaintiff's property and did not thereafter return.

Plaintiffs' theory, as stated by its counsel and as appears from the record, was that the defendant was answerable to it for the damage occasioned by the deliberate breach of its affirmative obligation to work the property. It is not disputed by appellant that it did abandon the work, nor is it claimed that the ground into which the dredger was entering on August 12th was not dredgable, or that the season prevented further operations. The sole contention of defendant seems to have been that it was justified in discontinuing the work, for the reason that the remaining ground was not rich enough to enable defendant to dredge it at a profit, and that, if it continued work, the dredger would be so far south at the end of the season that the whole of the next season would be lost in moving upstream to the scene of its next operations.

The measure of damage claimed by respondent was the percentage of the amount of gold that defendant could have extracted after August 12, 1909, had it operated until the end of the season, obtained by deducting from the percentage of royalty, provided for in the agreement, the greatest obtainable or "market" percentage of royalty for working the property at the date of the breach or thereafter. The fairness of the rule is not called in question, but it is claimed by appellant that no damage should have been allowed, for the reason stated above.

[9] In support of its theory plaintiff introduced evidence to show: (1) The total number of cubic yards of gold-bearing gravel that defendant could have mined between August 12th and the end of the season; (2) the average gold value of this ground per cubic yard, and (3) the best obtainable or "market" percentage of royalty for working the claims at the date of the breach or thereafter.

The court found that on August 12, 1909, there still remained on the premises over 70,000 cubic yards of dredgable gold-bearing gravel which had not been worked; that there remained, excluding the five days that defendant used in dredging said rich spot, 67 working days during which it could have mined the premises had defendant continued operations; that the capacity of the dredger was 1,000 cubic yards per day; that the gold-bearing gravel which remained and could have been worked by defendant averaged in value 50 cents a cubic yard; that the greatest obtainable or market royalty for working the premises was on August 12th the date of the breach, and at all times thereafter, not greater than 15 per cent. of the gross amount of gold extracted. It was further found that the defendant had extracted, under the lease, during the year 1909, gold of a value greater than $50,000. By simple calculation, therefore, the conclusion was reached that plaintiff was entitled to damages in the sum of $8,375.

As to these findings of fact, it may be said generally that they are all supported by the evidence, some of which may appear in the consideration of some of the contentions of appellant.

[10] There is no doubt that by the terms of the lease defendant bound itself to work continuously, as far as the weather and the season of the year would permit. Otherwise, what do the following words mean: "To do said work as steadily and continuously as the weather and the season of the year will permit"?

While it is not expressly provided that the work shall continue until the end of the lease, this is necessarily implied in the use of the phrase "from date of this lease." It is thus to be seen that no warrant exists for the contention that appellant might discontinue the work if it proved unprofitable, or by reason of any such custom that was supposed to prevail. It could hardly be made to appear more clearly that appellant was obligated to continue dredging during the entire term of the lease, except when prevented by the weather and the season of the year.

[11] To what we have said as to custom may be added the consideration that no evidence whatever was offered at the trial in proof of such custom, and it is not a matter of which the court would take judicial notice. Section 1875, Code Civ. Proc.

As to the declared executed oral agreement, it was not pleaded to the second count of the complaint, nor was there any evidence offered in its support, and no further comment seems called for.

[12] It is contended that plaintiff could have worked the ground itself or obtained a lessee to do so at a greater profit than it would have received from defendant if it had continued working to the end of the term. The finding of the court, however, is directly opposed to this view, and it is amply supported by the evidence. Of course it is true also that plaintiff was not required to work the ground, but it had a right to rely upon the faith of defendant pledged to the observance of all the terms of the lease.

[13] What has been said is probably a sufficient answer to the claim that the instrument under which defendant took possession of the premises constituted a mere license. It may be added that the instrument is called an "indenture of lease"; the parties are named "lessor" and "lessee"; that by its terms the lessor "grants, demises, leases, and lets" unto the lessee for a term of three years, not only the right and privilege of mining but the land itself, that it provides for the payment of "rent," and contains the forfeiture and entry clauses, and those against assigning or subletting, which are usually found in leases. When the intention of the parties to the instrument has been ascertained, and there is nothing therein oppos-

ed to public policy, the covenants must be observed, although it may develop that the bargain may be unprofitable to one or both of said parties.

The point is hardly worth further consideration, and we need not refer to the many cases cited, but we add the following quotation from Walker v. Tucker, 70 Ill. 527, a similar case to the one at bar:

> "The courts must enforce contracts as the parties made them. They cannot superadd conditions or restrictions which the parties have not themselves thought fit to impose, in making their contract. There is nothing in this instrument which authorizes a suspension or abandonment of mining, because it has become unprofitable. * * * It is elementary law that, when the contract is to do a thing * * * possible in itself, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it, for it was his own fault to run the risk of undertaking to perform an impossiblity, when he might have provided against it by his contract."

Respondent has also cited figures from the record to show that, had defendant continued its operations under the lease till the end of the term, it would at least have made a reasonable profit, but we deem this immaterial.

It is argued that the damages were so uncertain as to be impossible of ascertainment. Of course, reasonable probability is all that is required. To demonstrate the amount of the loss of respondent, it would be necessary to dredge all the gold-bearing ground that could have been worked in the number of days that defendant was idle but should have been employed. This was impracticable, but great care seems to have been taken in furnishing the most satisfactory evidence that was available. The capacity of the dredger, the number of working days left, and the character and quality of the unworked soil were inquired into and disclosed by the testimony of witnesses, and these elements were made the basis of the court's conclusion as to the damage suffered by respondent.

[14] But it is the doctrine of common justice, as well as of the authorities, that, since the difficulty of ascertaining exactly how much plaintiff was injured arose from defendant's breach of its contract, scant attention will be paid to its complaint that greater accuracy was not obtainable. It is said, in Shoemaker v. Acker, 116 Cal. 244, 48 Pac. 64, that:

> "'Prospective profits,' as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. * * * But, where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages" (citing cases).

[15] Another contention of appellant, in which it seems to have considerable confidence, may be stated as follows: During the five days defendant worked on the isolated rich spots, it extracted gold of the value of $13,545.36. Had it been working on the ground contiguous to that on which it was working, on August 12th it would have taken out, on the ground value found by the court, $500 per day, or the total of $2,500. The claim is therefore that it should be given credit for the difference between $13,545.36, which it actually extracted, and $2,500, which it would have extracted if it had worked according to its contract, or with 22 days' work, which would have been required to extract the larger amount from the cheaper ground. In either event, the result would be to reduce the judgment by $2,761, which is 25 per cent. of $11,045. The court, however, held that appellant was only entitled to a credit for the five days actually consumed in working the said rich spots out of the total of 77 days remaining.

There can be no doubt of the soundness of the court's conclusion. It is not a question of the relative richness of the various spots of gold-bearing soil. Under the contract, it was the duty of defendant to operate its dredger, not only during the entire period that it was operated, but also for 67 days additional. It is equally true that respondent was entitled to the specified percentage of what was extracted, however much or little, and of what would have been extracted had the work continued for the entire term. It was the good fortune of appellant to strike a rich spot, but its operation there was affected by the same terms of the contract, as applied to the other ground. Appellant was bound to pay and deliver to respondent a certain percentage "of all gold and precious minerals extracted" during the entire season.

There is no more merit in the claim that, since no witness testified directly that the unworked ground would average 50 cents per cubic yard in value, the finding to that effect is unsupported. It is not denied that one witness testified that it would average 55 cents a cubic yard, and another that it would average 60 cents a cubic yard; and it is therefore argued that the finding should have been in accordance with one of these figures or a less one, as testified by another witness. Since a higher value would have been supported, appellant is in no position to attack the finding of a lower value. The greater includes the less.

The various positions of appellant, when carefully examined, lead necessarily, we think, to the conclusion that this appeal is quite destitute of merit, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 314

PEOPLE v. PARRISH. (Cr. 267.)

(District Court of Appeal, Third District, California. Aug. 26, 1914. Rehearing Denied by Supreme Court Oct. 22, 1914.)

1. Criminal Law (§ 742*) — Trial — Jury Question—Credibility of Prosecutrix.

In a prosecution for rape of a female under the age of consent, the credibility of the prosecutrix is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719–1721; Dec. Dig. § 742.*]

2. Criminal Law (§ 369*)—Evidence—Habits of Accused.

Where it appeared that accused had for nearly a year habitually had intercourse with prosecutrix, evidence of his habitual conduct is admissible, though it includes acts of intercourse after she had reached the age of consent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

3. Rape (§ 40*)—Defenses.

In a prosecution for rape on a female under the age of consent, it is immaterial whether accused was the first to have intercourse with the prosecutrix.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55–59; Dec. Dig. § 40.*]

4. Criminal Law (§ 1169*)—Appeal—Harmless Error.

In a prosecution for rape on a female under the age of consent, error in allowing the prosecutrix to testify that accused was the first to have intercourse with her, and that thereafter she had intercourse with others, is harmless, where the evidence of accused's guilt was conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

5. Criminal Law (§ 1170*)—Appeal—Harmless Error.

In a prosecution for rape, where it appeared that accused had, for nearly a year, habitually had intercourse with the prosecutrix many times a week, error in excluding a question to the prosecutrix whether accused maintained his marital relations was harmless, where accused's wife, to rebut the prosecutrix's claim, was allowed to testify that accused continued marital cohabitation during that time.

[Ed. Note—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

6. Criminal Law (§ 683*)—Trial—Rebuttal.

In a prosecution for rape on a female under the age of consent, evidence that accused pulled the covers off of the prosecutrix and another girl, and that he was always fondling the prosecutrix, is not proper rebuttal, and should have been introduced in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615–1617; Dec. Dig. § 683.*]

7. Criminal Law (§ 1168*)—Appeal—Harmless Error.

The improper admission of evidence on rebuttal is harmless, where similar facts were shown by testimony properly introduced in chief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3125, 3129–3136, 3144; Dec. Dig. § 1168.*]

8. Rape (§ 54*)—Evidence—Corroboration of Prosecutrix under Age of Consent.

In a prosecution for rape of a female under the age of consent, the prosecutrix need not be corroborated.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

9. Rape (§ 44*)—Evidence.

In a prosecution for rape, evidence that accused called the prosecutrix from the room in which she and the witness were, and had intercourse with the prosecutrix in the next room without closing the door, is admissible, although the improbability of the occurrence goes to its weight.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 63; Dec. Dig. § 44.*]

10. Criminal Law (§ 1171*)—Appeal—Harmless Error.

In a prosecution for rape on a female under the age of consent, the prosecutrix was allowed to testify, over accused's objection, that two other men were being punished for having intercourse with her, but upon the answer being given, the court directed the jury to disregard it. In argument the district attorney attempted to influence the jury, claiming that accused was the principal, and that he should not escape when the others had been punished, and the court, on objection of accused, instructed the jury not to regard anything but the evidence. *Held*, that the conduct of the district attorney, while improper, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

11. Criminal Law (§ 369*)—Evidence—Other Offenses.

In a prosecution for rape, evidence of other acts of intercourse are admitted only to show the predisposition of the parties to have intercourse with one another.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. § 369.*]

12. Criminal Law (§ 1186*)—Appeal—Harmless Error.

In view of Const. art. 6, § 4½, prohibiting reversals for immaterial errors, the giving of an instruction on the purpose for which evidence of other acts of intercourse was received in a rape case, which possibly caused the jury to believe that such acts rendered it probable that accused was guilty, is not reversible error where the evidence of his guilt was strong.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. § 1186.*]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

W. J. Parrish was convicted of rape, and from the conviction and an order denying new trial, he appeals. Affirmed.

W. H. Carlin, of Marysville, and L. G Faulkner, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the State.

CHIPMAN, P. J. Defendant was convicted of the crime of rape, having had sexual intercourse with one Gertrude Genant, a girl under the age of consent, and was sentenced to state's prison for the term of 15 years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] There is no distinct claim in defendant's brief that the evidence was insufficient to justify the verdict, although it is suggested that much of it is unworthy of belief. The claim is, rather, that defendant did not have a fair trial because of certain alleged errors

in the rulings of the trial court and of the alleged misconduct of the district attorney in his address to the jury. Some objections are also urged to the instructions to the jury.

The prosecutrix was 15 years old on March 4, 1912, and the sexual intercourse complained of was alleged to have occurred on or about June 20, 1912, at the county of Butte. Defendant and his wife conducted a boarding and lodging house in the city of Chico. The prosecutrix went to work for the defendant and his wife about May 28, 1912, and continued in their service until some time in August of that year, when she left, returning after a week or 10 days and remained until in January, 1913, when she went away again and was gone about three weeks, returning and remaining until some time in May, 1913, when she left finally because of some trouble she had with defendant's wife. The story of her conduct while at the Parrish House presents a case of shocking moral obliquity scarcely believable in one of her apparent intelligence. She testified that she at first roomed with another of the hired girls, one Annie Hansen, who left about three weeks after the prosecutrix went to work, and she slept alone until Olive Patterson came, she thought two or three weeks after the Hansen girl left. It was after the Hansen girl left and before the Patterson girl came that the first act of sexual intercourse with defendant is claimed to have taken place. She testified: That in the afternoon, towards evening, defendant, his wife, and some of the men boarders were assembled on the porch of the house; that some of the men, she did not know who, sent for beer, and that she drank as much as eight glasses without becoming intoxicated. "After supper he [defendant] wanted me to go to my room with him, and I wouldn't do it, and he asked me if I had ever had intercourse, and I told him no, and he told me that he would show me how, that I was old enough to learn." She was asked if anything happened to her during the month of June, and answered: "After Annie Hansen left, Parrish came in there one morning. He came in and turned on the light, and pulled back the covers, and used me just as he wanted to," which she explained to mean that he had sexual intercourse with her, and that it happened before the Patterson girl came. As stated by the district attorney, "to show the disposition of the parties on the subject," and over defendant's objection, the prosecutrix testified that this sort of intercourse was kept up between them during her stay at the Parrish House and up to the time she finally left, "maybe it would be every other day, or maybe once or twice a day, or maybe every day, maybe once a week." Without objection, she testified as follows:

> "Q. And is it not a fact that you had sexual intercourse with several other men during that time? A. Yes, sir. Q. Where? A. At the Parrish House. Q. Always? A. Yes. Q. And did these young men room at the Parrish House? A. Yes."

It appeared, in the course of her examination and cross-examination, that some six or seven men had these same relations with her, on account of which two of them are serving sentence in the state's prison. She was very searchingly cross-examined, the result being to show a depraved condition of mind, but not necessarily discrediting the incriminating features of her story. Some corroborating circumstances were shown, such as kissing and hugging of the prosecutrix by defendant, and one instance where the witness, Mrs. Marshbank, testified to having seen the parties in the act of copulation. This is said to have occurred in April, 1913, after the prosecutrix had passed her sixteenth year, and the evidence is made the subject of alleged error which will hereinafter be noticed. The defendant testified in his own behalf and flatly contradicted the prosecutrix as to his relations with her, and denied ever having carnal knowledge of her. There was testimony by defendant's wife and by several lodgers and boarders to the effect that they never "saw anything out of the way" between the defendant and the Genant girl, and Mrs. Parrish testified that she saw nothing to arouse her suspicions that anything wrong was going on between them. It was very satisfactorily shown, and much reliance is placed upon the fact by defendant's counsel, that the Patterson girl came to the Parrish House not later than two or three days after the Hansen girl left, disputing the prosecutrix, who testified that it was two or three weeks. It will be observed, however, that she testified that she did not remember exactly how long it was, but she was positive that the first act of intercourse occurred after the Hansen girl left and before the Patterson girl came, and while she was sleeping alone. It was for the jury to reconcile whatever conflict appeared in the testimony, and we find no warrant in the record for disturbing their finding upon the important fact that sexual intercourse took place between the parties as alleged in the indictment.

[2] 1. Defendant's first point is that it was error to allow the prosecution to prove, not only the act charged, but subsequent acts. It is admitted that, in People v. Castro, 133 Cal. 11, 65 Pac. 13, the contrary is held, but it is claimed that what was there said was obiter, and nonconcurred in by one of the justices. Attention is called to the objection made to the testimony of Mrs. Marshbank, who testified to having seen defendant and the prosecutrix in the act, in May, 1913, after the prosecutrix had passed the age of 16. Upon this latter fact we cannot see that the matter of her then age would make any difference in respect of showing the carnal disposition of the parties for which alone it was admissible. It was while the prosecu-

trix was at the Parrish House, and was but one of an unbroken series of like acts from about May 20, 1912, for nearly a year. Upon the point raised, however, the rule is as stated in People v. Castro, supra. It is well settled that evidence of similar acts of sexual intercourse, both before and after the act charged, is admissible. People v. Gregory, 8 Cal. App. 746, 97 Pac. 912; People v. Soto, 11 Cal. App. 436, 105 Pac. 420; People v. Jacobs, 16 Cal. App. 480, 117 Pac. 615; People v. Williams, 133 Cal. 168, 65 Pac. 323; People v. Mathews, 139 Cal. 530, 73 Pac. 416; People v. Koller, 142 Cal. 624, 76 Pac. 500.

[3, 4] 2. Without objection from defendant, the prosecutrix testified to similar acts during the time she was at the Parrish House with several other men rooming there. Defendant says of this that "necessarily the defense did not, and in the nature of things would not, object to such testimony" inasmuch as "it tended to show the degraded character of the prosecutrix, and later on, as will appear from her cross-examination, she unblushingly admitted a course of conduct on her part with other persons which was and is almost unparalleled." Immediately following this testimony the following question was asked of the prosecutrix: "Q. When was the first time that you performed an act of sexual intercourse with any one?" The question was objected to, but was allowed, and the witness answered that the act charged in the indictment was the first. It was strongly urged that this was very damaging testimony and gravely prejudicial, citing People v. O'Brien, 130 Cal. 3, 62 Pac. 297, that it placed the defendant in the position of having seduced the girl and having made a common prostitute of one of prior chaste character. It was immaterial whether defendant or some other person first had sexual intercourse with the prosecutrix, and the objection should have been sustained. It will be recalled that the prosecutrix testified, without objection, that she told the defendant that she had never had sexual intercourse when solicited by him, and he replied that she was old enough to learn, and that he would teach her. She was then not under oath as when she replied to the question now objected to. It was error to allow the question, but, in view of the evidence tending strongly to show defendant's guilt, we do not think the defendant was prejudiced by the answer.

[5] 3. Upon cross-examination of the prosecutrix the following question was asked by defendant, objected to by the district attorney, and the objection sustained:

> "Q. As you observed it there, what were the relations of Mr. and Mrs. Parrish—were they friendly—did they get along well, as you saw it?"

The objection was that the question was immaterial and incompetent. The purpose of the question, as is claimed, was to show the improbability of the prosecutrix's story of daily sexual intercourse with defendant while his relations with his wife were unaffected; that her story was "a sexualogical impossibility." The defendant was permitted to show, by the testimony of Mrs. Parrish, and did show very clearly what he sought to show rather vaguely by inference in the question objected to, namely, that cohabitation was uninterrupted between them. We discover no prejudicial error here. Defendant seems to have been a man of extraordinary virility if the prosecutrix is to be believed.

[6, 7] 4. Witness Millie Reese, over objection, was permitted to testify in rebuttal that on one morning when she and the prosecutrix were in bed together, the defendant came into their room "and pulled the covers down off their heads." The objection is that it was not admissible at all, but if admissible should have been offered in chief, as it was in no sense rebuttal. Another witness in rebuttal, Mrs. Roberts, was asked whether or not she saw anything familiar or any improper conduct between Mr. Parrish and Gertrude Genant. An objection was overruled, and she answered:

> "He seemed to think a lots of the girl, and he was always picking at the girl and playing with her, and I have seen him pick her up in his arms."

The testimony of these witnesses can hardly be said to be legitimate rebuttal, and such as it was should have gone in as part of the case in chief. But we cannot see that it was of much importance in view of the conduct of defendant otherwise shown.

[8, 9] 5. The principal corroborating testimony was given by Mrs. Marshbank, above referred to, and is particularly attacked as wholly unworthy of belief. She testified that one afternoon defendant came into the room then occupied by her and the prosecutrix, invited the latter to go with him into the next room, which she did, and, without closing the door behind them and in plain view of witness, he forthwith had sexual intercourse with the girl. The alleged improbability is twofold—the shamelessness of defendant and gross immodesty of the witness in standing by as a looker-on. It is not essential that the prosecutrix be corroborated, and hence this testimony may be rejected. We may remark, however, that, in view of testimony given that the Marshbank woman was discharged for having been caught in like performances with a lodger of the Parrish House, and in view of the evidence as to defendant's immoderate passion, the jury, without much stretch of the imagination, might have believed the testimony of this woman, nor is it entirely improbable that this witness saw what she said she did. At any rate, it was admissible, and, whether believable, was with the jury.

[10] 6. Among the assignments of error is the alleged misconduct of the district attor-

ney. When the prosecutrix was being examined in chief, she was permitted, over defendant's objection, to testify that Van Noy and Reitz (two of defendant's lodgers) had committed acts of sexual intercourse with her. "Q. And they are now paying the penalty for it? A. Yes, sir." The court sustained an objection to this question and answer, and instructed the jury "not to consider it. Leave that entirely out of the case." When he was addressing the jury the district attorney, alluding to these other convictions, said:

> "Ask yourselves why the little fellow should suffer when the man who runs the house—
>
> "Mr. Carlin (interrupting): Note an exception to this statement. There is no evidence on it at all. We ask the court now to instruct the jury, and reprimand the district attorney for this statement.
>
> "The Court: Gentlemen of the jury, you will not consider anything that is not in the evidence. You will remember the evidence, and try the case solely, as I told you, upon the evidence and the instructions of the court and nothing else."

It is complained:

> "That the court declined to instruct the jury to disregard such statements, simply stating that they were to consider nothing but the evidence. That wasn't curing the error. It was dodging it, and you will note that the district attorney, continuing his argument, follows up practically the same line, and finally in the middle of page 200 says: 'Are you going to say that the big fellow who has the money and brings for counsel the shrewd, keen, clever, calculating Carlin, is going to get away with it? * * * $20 tears, that's all.'"

Testimony had gone before the jury without objection that the prosecutrix had cohabited with several men other than defendant. Had the question above noted stopped with naming Van Noy and Reitz, defendant could not complain, but apparently the object was to enable the district attorney to get out the fact that these men were suffering imprisonment and thus lay the groundwork for his appeal to the jury against allowing the defendant to escape because he had money to employ able counsel. But the court had sustained the objection, and the district attorney was guilty of grave impropriety in reminding the jury of a fact which the court in effect told them they must not consider, and seeking to influence them by an unworthy appeal to class prejudice. In a case of considerable doubt, such conduct might require a reversal. In the present case, however, we feel assured that it did not result in a miscarriage of justice. It is fair to assume that the admonition of the court cured the error when first committed. In repeating it later on the record fails to show objection or a call upon the court to compel a withdrawal of the improper remarks.

7. People's instruction numbered 3 is called to our attention as having been "disapproved by our appellate courts, and should not be given." It was upon the question of the credibility of witnesses. Appellant does not point out his ground of objection, nor does he cite any case where such an instruction has been disapproved. In some cases the phraseology used may have required disapproval. We find no error in the form here adopted and given to the jury.

[11, 12] 8. People's instruction numbered 6 was as follows:

> "You are further instructed, that evidence of subsequent acts of sexual intercourse between the defendant and the prosecutrix, and of improper familiarity on the part of the defendant towards and with the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence solely to prove the disposition of the defendant herein toward Gertrude Genant, and as having a tendency to render it more probable that the act of sexual intercourse charged in the information [indictment] was committed by the defendant on the person of said Gertrude Genant, and is to be considered by the jury for that purpose only and for no other."

The objection urged is that this is a charge "upon pure questions of fact"; that all such acts were denied "and the court had no right to assume the facts." This instruction is a correct statement of the law governing the admissibility of the kind of evidence referred to, and, no doubt, was intended to explain the limited purpose for which it is admissible, and we think the jury must have received it in that light alone. It would have been more in keeping with the strict rule forbidding the court from assuming the existence of facts which are controverted, had it declared the rule in the abstract. The instruction, as framed, was liable to be understood by the jury, not only as indicating the purpose of the evidence of subsequent acts, but that the evidence in fact had a tendency to make probable the commission of the act charged. Conceding error, we do not think there was such prejudice as to justify a reversal of the judgment. Section 4½, art. 6, of the Constitution.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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25 Cal. App. 303

CALIFORNIA CANNERIES CO. v. CANTON INS. OFFICE, Limited. (Civ. 1227.)

(District Court of Appeal, Third District, California. Aug. 20, 1914.)

1. INSURANCE (§ 646*)—ACTIONS ON CONTRACTS—BURDEN OF PROOF.

In an action on a contract of marine insurance, where the answer raised an issue as to whether the contract covered the particular loss for which suit was brought, it was incumbent upon plaintiff to show that defendant had promised to indemnify against such loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. § 646.*]

2. INSURANCE (§ 124*)—CONTRACTS OF INSURANCE—WRITINGS CONSTITUTING.

A certificate issued to plaintiff by brokers certifying that there was insured with defendant $8,098 for account of plaintiff on certain cases of canned goods, loss, if any, payable to assured or order on surrender of the certificate, and that it was understood and agreed that the certificate represented and took the place of the original policy, and conveyed all the rights of the original policy holder for the purpose of collecting any loss or claim as fully as if the property was covered by a special policy, direct to the holder of the certificate, did not purport to be, and was not, a contract or part of a contract of insurance, but a mere memorandum that the brokers had effected insurance with defendant, and as it presupposed the issuance of a policy, it necessarily put plaintiff upon inquiry to ascertain the terms of the policy in order to determine what rights were secured thereby to the policy holder.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.*]

3. Insurance (§ 665*)—Insurance Agents—Authority—Sufficiency of Evidence.

In an action on an alleged contract of marine insurance, evidence *held* insufficient to show that brokers, who issued to plaintiff a certificate certifying that they had effected insurance with defendant, were agents of defendant, or authorized to issue such certificate for defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707–1728; Dec. Dig. § 665.*]

4. Insurance (§ 651*)—Construction of Contract—Parol Evidence.

In an action on a certificate certifying that plaintiff was insured on certain cases of canned goods on board a steamer "as per policy No. 76491 (English policy conditions)," subject to all the terms and conditions of such policy, evidence was properly admitted that there was a standard form of policy used by all marine insurance companies, known as the English Cargo form policy, and as to the provisions of such policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1673–1675; Dec. Dig. § 651.*]

5. Insurance (§ 477*)—Marine Insurance—"Particular Average."

Under a marine insurance contract subject to the conditions of a standard form of policy containing a warranty against particular average, where a part of the goods insured were so spoiled by leakage that they were thrown away, there was no total loss or general average loss, but only a partial and "particular average" loss, which means a partial loss as distinguished from a total or general average loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1248, 1249; Dec. Dig. § 477.*

For other definitions, see Words and Phrases, First and Second Series, Particular Average.]

6. Insurance (§ 477*)—Marine Insurance—"General Average."

"General average" is a contribution by the several interests engaged in a maritime venture to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board, or for extraordinary expenses necessarily incurred for the common benefit and safety of all.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1248, 1249; Dec. Dig. § 477.*

For other definitions, see Words and Phrases, First and Second Series, General Average.]

7. Insurance (§ 478*)—Marine Insurance—Partial Loss—Entire or Severable Contract.

Under a marine insurance contract, containing a warranty against particular average, there could be no recovery for the total loss of a part of the goods, unless the various lots of goods were separately insured, and there was a total loss of one of such lots.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. § 478.*]

8. Insurance (§ 646*)—Actions on Contracts—Burden of Proof.

In an action on a marine insurance contract containing a warranty against particular average, assuming that there was a separate insurance upon the various lots of goods covered thereby, the burden was on plaintiff to prove that the goods lost constituted all of one of such lots.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. § 646.*]

9. Insurance (§ 640*)—Actions on Contracts—Answer—Admissions.

In an action on a marine insurance contract, the allegations of the answer that the steamship when she left port with the insured goods on board was in an unseaworthy condition, one or more of the plates in her hull having been weakened and damaged by a collision previously sustained, was not an admission that the collision occurred after its liability arose, so as to permit a recovery for a partial loss, notwithstanding a warranty against particular average, unless the damage was caused by collision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609–1612, 1614–1624; Dec. Dig. § 640.*]

10. Insurance (§ 654*)—Actions on Contracts—Evidence—Admissibility.

Under Civ. Code, § 2681, providing that in every marine insurance contract a warranty is implied that the ship is seaworthy, and section 2682, providing that a ship is seaworthy when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage contemplated by the parties, in an action on a marine insurance contract, evidence that the vessel upon which the insured goods were shipped had been injured in a collision was admissible as tending to show that the vessel was unseaworthy, and that no liability attached, the implied warranty being violated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1683–1685; Dec. Dig. § 654.*]

11. Insurance (§ 651*)—Actions on Contracts—Burden of Proof.

In an action on a certificate of marine insurance on goods "as per policy No. 76491 (English policy conditions)," subject to all the terms and conditions of such policy, the certificate should be supplemented by proof of the policy itself if actually issued, or if not actually issued, of the form of policy to which the certificate referred.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1673–1675; Dec. Dig. § 651.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by California Canneries Company against the Canton Insurance Office, Limited. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Andros & Hengstler, of San Francisco, for appellant. Asher, Meyerstein & McNutt, of San Francisco, substituted for Barclay Henley, deceased, for respondent.

BURNETT, J. [1] The action is on an insurance policy to recover damages caused by injury to certain canned goods shipped from San Francisco to New York. The alleged value of the goods was $8,098, and plaintiff sought to recover the sum of $2,567.95, and obtained judgment for $2,500. As to the policy and the risks covered by it, we find in the complaint the following allegation:

"That on the 17th day of December, 1909, at said city and county of San Francisco, the said defendant in consideration of $121.47 to it then and there paid, executed to said plaintiff a policy of insurance upon said goods, whereby it promised to pay to the plaintiff, within 30 days after proof of loss and interest, all loss and damage accruing to said plaintiff by reason of the destruction or injury of the said ship or or said goods during the ensuing voyage from the port of San Francisco to the port of New York; and wherein and whereby the said defendant undertook and promised to pay to the said plaintiff whatever damage should result to the said goods, occasioned by collision with any other vessel."

As to this the answer contains the following:

"Admits that, on the 17th day of December, 1909, at San Francisco, defendant executed to plaintiff a certificate of insurance upon 2920 cases canned goods shipped on board the steamship J. L. Luckenbach on her voyage from San Francisco to New York, but denies that it then or there promised, in said certificate, or at all, to pay to plaintiff, within 30 days after proof of loss and interest, or proof of loss or interest, or at all, all loss or damage accruing to said plaintiff by reason of the destruction or injury of said ship or of the said goods during the ensuing voyage from the port of San Francisco to the port of New York, and denies that defendant therein and thereby, or therein or thereby, promised or undertook to pay to plaintiff whatever damage should result to the said goods, by any perils of the sea; but, on this behalf, defendant alleges that it then and there promised to insure plaintiff in accordance with the terms and conditions of its English cargo policy, and not otherwise."

While the terms and conditions of the English cargo policy are not set forth in the answer it is clear that an issue was presented as to whether the particular loss claimed by plaintiff to have been produced by the perils of the sea was covered by the policy which was issued. As to this, the policy being the basis and measure of defendant's liability, it was, of course, incumbent upon plaintiff to show that by its said undertaking defendant promised to indemnify against whatever damage was shown.

Recognizing this duty, the plaintiff introduced in evidence, without objection, what is denominated: "Certificate of Insurance effected by Bates & Chesebrough." From the face of this certificate we quote the following:

"This is to certify, that on the seventeenth day of December, 1909, there was insured with Canton Insurance Office, Ltd., eight thousand and ninety-eight dollars for account of California Canneries Co. on 2920 cases canned goods as per back, valued at sum insured per Str. J. L. Luckenbach, at and from San Francisco, Calif., to New York. Loss, if any, payable to assured, or order, on surrender of this certificate. It is understood and agreed that this certificate represents and takes the place of the original policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liabilities for unpaid premiums.

"[Signed] Bates & Chesebrough.

"Not valid unless countersigned by
"[Signed]
"Countersigned
"J. Servaes."

On the margin of said certificate appear the capital letters: "F. P. A. E. C." On the back of the certificate were the following words and figures:

"A N. Y.	350	cases	canned	goods	for	$1015 00
"B N. Y.	300	"	"	"	"	810 00
"C N. Y.	500	"	"	"	"	1425 00
"D N. Y.	300	"	"	"	"	765 00
"E N. Y.	300	"	"	"	"	915 00
"F N. Y.	350	"	"	"	"	963 00
"G N. Y.	275	"	"	"	"	765 00
"H N. Y.	500	"	"	"	"	1275 00
"H. & F. N. Y.	45	"	"	"	"	165 00
	2920					$8098 00"

Julius Servaes was called as a witness for plaintiff to explain this document, and after stating that he was in the employ of Bates & Chesebrough he testified:

"That is a certificate issued by ourselves for insurance placed with the Canton Insurance Office. We handed that to Mr. Jacobs and received—and the Canton issued a policy themselves or certificate. Q. Well, which? That is the question, Mr. Servaes. You say a policy or certificate? A. Well, it was a certificate in this case, I think. Q. Yes, certificate, and that is the certificate, is it? A. No, this is our certificate. As you say, they were issued with the Canton Insurance Office. It says here distinctly, 'It is understood and agreed that the certificate represents and takes the place of the original policy.'"

After some discussion between counsel as to whether a policy was actually issued by the insurance company, and, if so, what had become of it, defendant, through its attorney, stated that a certificate was issued by defendant and handed to plaintiff and that said certificate was as follows:

"Canton Insurance Office, Limited, of Hong Kong. Parrott & Company, Agents, San Francisco. This is to certify that California Canneries Co. are insured to the amount of $8,098, valued at $8,098 United States gold coin, for account of concerned, on 2,920 cases canned goods marked (blank) shipped on board the S. S. J. L. Luckenbach on her present voyage from San Francisco to New York as per policy No. 76491 (English policy conditions).

"This certificate is subject to all the terms and conditions of said policy; and in case of loss payment will be made only upon its surrender properly indorsed and receipted. Loss, if any, payable in San Francisco to assured or order.

"In witness whereof, the undersigned on behalf of the said Canton Insurance office, Limited, have hereunto set their hands in San Francisco this 30th day of December, 1909.

"[Signed] Parrott & Co., General Agents.
"[Signed] R. H. Menzies, Secy.
"Approved: J. J. Theobald, Manager."

The two foregoing are the only instruments received in evidence which, by any possibility, could be claimed to constitute a contract of insurance. Of course, neither constitutes a "policy" of insurance as that term is generally used and understood, but it is not uncommon for an insurance company to issue a certificate or memorandum of insurance which may answer the purpose of a more formal policy, or may operate as a temporary expedient until the policy itself can be issued.

Of the foregoing certificates it was insisted by the plaintiff that the first, designated "Exhibit A," constituted the contract of insurance upon which the action was founded. It was declared by plaintiff's counsel that it was "the only paper respecting the insurance." Defendant's counsel insisted that "counsel show his contract. He has now introduced a document showing a part of his contract, and showing that on the face of it that this is not the whole contract; and I insist before any further evidence be introduced in this case that the contract, the complete contract, shall be shown." Then the record shows the following:

> "Mr. Henley: What do you mean by the contract?
>
> "Mr. Hengstler: The contract that he sues on in this case, the contract of insurance.
>
> "Mr. Henley: Very well. We sue on this certificate.
>
> "Mr. Hengstler: Read that certificate. It shows on the face of it that it is incomplete.
>
> "Mr. Henley: No, it don't. Well, the language speaks for itself."

The second document as above set out was repudiated by plaintiff, and indeed it was claimed that it had not been admitted in evidence. The sole reliance was based upon said Exhibit A.

[2] But it seems clear that said Exhibit A does not purport to be nor is it a contract or part of a contract of insurance. Appellant's contention is that Exhibit A is a "mere memorandum made by Bates & Chesebrough, brokers for plaintiff, which informs its holders that Bates & Chesebrough have procured certain insurance upon certain goods from the Canton Insurance Office, Ltd. It does not purport to insure. It is simply a notice signed by Bates & Chesebrough, plaintiff's brokers, which certifies that they *have effected* insurance with a certain company. Such is the explanation of this instrument made by plaintiff's own witness, Mr. Servaes." This statement of appellant is true as far as it goes, but the certificate means a little more than that. It purports to assign or transfer to the plaintiff "all the rights of the original policy holder for the purpose of collecting any loss or claim." It thus presupposes the issuance of a policy of insurance, and necessarily puts the plaintiff upon inquiry to ascertain the terms of said policy in order to determine *what rights* are secured thereby to the policy holder.

It is equally clear that the policy itself or evidence of its terms should have been introduced in evidence to show the risks that were covered by the insurance and the extent of defendant's obligation. Assuming that said exhibit was admissible against defendant, it manifestly does not constitute the entire contract, and it refers to another instrument which must be considered as a part of the complete agreement.

[3] Moreover, for said exhibit to be of any force and effect against defendant, it was, of course, necessary to show that said defendant authorized the execution of said exhibit, or else that the principle of estoppel can be properly invoked. On neither ground, however, can respondent's position be maintained. There is no contention of estoppel, and the evidence is insufficient to warrant the conclusion that Bates & Chesebrough were acting as the agents of defendant. It is true that the following appears in the direct testimony of Julius Servaes:

> "Well, now, then, were Bates & Chesebrough authorized by the Canton Insurance Company to issue this paper? A. Yes. Q. And pursuant to that authority you did issue the paper countersigned by yourself? A. Yes, sir."

But his subsequent testimony shows that he was simply expressing his opinion as to the authority of Bates & Chesebrough. This appears from the following questions and answers:

> "Q. Mr. Servaes, does the Canton Insurance Company know anything of this memorandum that Bates & Chesebrough delivered? A. That I really don't know. I think I told them—of course, it has some—
>
> "Mr. Henley (interrupting): I want to know in plain terms about it.
>
> "Mr. Hengstler: Wait a minute. Let him first answer the question. A. Well, it is really rather hard to recall this. It is two years ago. I don't know whether I actually told them that we had issued the certificate or not as far as that goes.
>
> "Mr. Henley: Q. I want to know now in plain terms were Bates & Chesebrough authorized by the Canton Insurance Company to issue that paper? A. That I couldn't tell you."

[4, 5] The only other evidence to the point is directly opposed to the theory of respondent. Mr. Theobald, the marine manager for Parrott & Co., the Pacific Coast agents for defendant, testified that he had never seen Exhibit A "before to-day in this court," that his office had nothing to do with the issuance of it, and that Bates & Chesebrough were not authorized by the Canton Marine Insurance Office "to issue this kind of a document." He further testified that the other certificate to which we have already referred was the only one issued in this case by defendant. In fact, it seems quite apparent from the whole record that plaintiff must look to this certificate as the only basis for its cause of action. It is therefore vitally important that the terms of said certificate be understood and construed. That certificate shows that the insurance was in accordance with the "English policy conditions." What that expression means is then a *proper*, and, indeed, a *necessary* subject of inquiry.

Mr. Theobald was properly permitted to explain this technical term and he declared that:

> "All over the civilized world there is a standard form policy, which was started in England, and which is used by all marine insurance com-

panies, which is called the English cargo form policy. The main clause in this policy, as well as I can recollect it, is warranted free from particular average unless the vessel be stranded, sunk, burned, or the damage be caused by collision with another ship or vessel. * * * And if I may be allowed to add to that, if the brokers required a different form of policy, what we call a policy of particular average design, they state on their application that they desire an English form policy, we will say, with a 5 per cent. particular average clause added. * * * Q. In other words, if a merchant desires to insure his goods against partial loss, there is a method of doing that, is there? A. By paying an additional premium at the time the risk is placed with the insurance company. And it is so stated on the application and on the certificate."

Indeed, it is not denied that the law of marine insurance has always recognized two distinct classes of insurance, one against *total loss only* and the other against *total or partial loss*, and this distinction finds expression in section 2711 of the Civil Code:

> "Where it has been agreed that an insurance upon a particular thing, or class of things, shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured."

"Particular average means a partial loss as distinguished from a total loss or a general average loss." 26 Cyc. 670. Many cases are cited by appellant to illustrate the distinction, among them being Chadsey v. Guion, 97 N. Y. 333, wherein there was a policy on 1,650 barrels of potatoes, "warranted by the assured free from average unless general." The vessel arrived at its destination, and after 109 barrels had been unloaded, it sank with the remainder on board. It was held that the insurers were not liable because of the warranty against particular average; there being no total loss.

[6] "General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifice of a part of the ship or cargo to save the residue of the property and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred for the common benefit and safety of all the interests in the adventure." 36 Cyc. 372.

It is entirely clear that within the meaning of these terms there was here no *total* loss or a *general average* loss, but only a *partial* and *particular average* loss.

As pointed out by appellant, the goods insured are alleged in the complaint to be "2920 cases of canned fruits to the value of $8098" and the loss alleged is a particular average loss, to wit:

> "That * * * said vessel became leaky while at sea, which caused the waters of the ocean to flow into and around and upon said merchandise * * * which resulted in the determination and spoiling of said merchandise to the extent of $2,567.95, in which sum plaintiff has been damaged."

The total damage was thus alleged to have been less than one-third the value of the goods, and the evidence shows that *at most* 361 cases were totally lost. These, however, were thrown away after the vessel arrived at New York.

[7, 8] But, assuming that this loss was covered by the policy, it can be of no avail to plaintiff, since there is no evidence that the various lots of goods were separately insured. There is no ground, therefore, for the contention that the F. P. A. clause should be separately applied to each of said lots.

> "Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, whether the policy be valued or undervalued, unless the contract contained in the policy, be apportionable; but if the contract be apportionable the assured may recover for a *total* loss of any apportionable part." Chalmers and Owen Digest of Marine Insurance (2d Ed.) p. 119.

The only pretense for the contention that there was a separate insurance on the various lots of goods is based upon the said enumeration on the back of said Exhibit A; but, as already seen, that instrument does not constitute the contract of insurance between the parties. Moreover, upon the assumption that there was a separate insurance upon the various lots, there is no evidence that the said 361 cases constituted all of one of said lots; in other words, that there was a total loss of any of said lots. The burden of such proof is, of course, upon plaintiff. Merchant's Mut. Ins. Co. v. Wilson, 2 Md. 217. It is equally clear that the evidence does not take the case out of the operation of said F. P. A. clause. The only pretense to the contrary is found in the suggestion that the damage was caused by a collision.

[9] In the first count of plaintiff's complaint it was alleged:

> "That said vessel while in the Bay of San Francisco was run into and collided with the steamship Tallac; that according to the information and belief of plaintiff said collision resulted in weakening one of the plates in the hull of the said steamship J. L. Luckenbach."

While not expressly alleged, it must have been known to plaintiff that this collision took place before defendant insured said cargo. Plaintiff virtually admitted such to be the fact when it confessed the demurrer to the first count on the ground that it did not state a cause of action for the reason "that the allegations showed that the vessel J. L. Luckenbach was unseaworthy at the beginning of her voyage." The trial was had on the second count of the complaint, which contains no allegation as to said condition. The answer does allege, indeed, the collision as follows:

> "And in this behalf defendant alleges, on information and belief that said steamship J. L. Luckenbach, when she left the port of San Francisco, with plaintiff's merchandise on board, was in an unseaworthy condition, one or more of the plates in her hull having been weakened and damaged by a collision previously sustained"

—but, manifestly, this affords no warrant for the intimation that the collision occurred after defendant's liability arose. Indeed, respondent can hardly be serious in the claim since it objected to any evidence as to when the collision took place.

[10] In this connection it may be said that we see no reason why it was not proper for defendant to offer evidence that the vessel had been injured in a collision. This would be a circumstance tending to show that the vessel was unseaworthy within the contemplation of sections 2681 and 2682 of the Civil Code, and therefore that the implied warranty was violated and no liability of defendant attached.

Other important points are made by appellant, but we deem consideration of them unnecessary, further than to say that no judgment for appellant can be directed here upon this record. The findings support the judgment rendered for plaintiff, but they do not warrant nor could they support a judgment for defendant. The most important question that we have considered, of course, relates to the insufficiency of the evidence to support a material finding of the court, and that error can be corrected only on a new trial.

[11] We may suggest, in conclusion, that if on a new trial plaintiff cannot show that "Exhibit A" was authorized by defendant, and it must rely upon the certificate admittedly executed by defendant, this certificate should be supplemented by proof of the policy itself if actually issued or, if not actually issued, of the form of the policy to which said certificate refers.

We think the judgment and order should be reversed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

24 Cal. App. 386

MASON v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 1569.)

(District Court of Appeal, Second District, California. May 1, 1914.)

MANDAMUS (§ 31*)—JUDICIAL PROCEEDING—TRIAL AND DETERMINATION OF CAUSE.

Where plaintiff, in an action for the annulment of a marriage, had taken all the necessary steps and was properly in court, he was entitled to a timely determination thereof, and the continuance of the trial, on the ground that he had obtained an interlocutory decree and that he wanted to marry again, was arbitrary and unwarranted, and mandamus would issue to compel the court to set the case down for trial and to give it precedence over all cases set for trial subsequent to the day on which it had been continued.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.*]

Mandamus by John B. Mason against the Superior Court of the State of California, in and for the County of Los Angeles, and Charles Monroe, Judge. Alternative writ made peremptory, with directions.

Hart & Cunningham, of Los Angeles, for petitioner. Ticknor & Carter, of Pasadena, for respondent.

SHAW, J. Upon application of petitioner, an alternative writ of mandate was heretofore issued, directed to the Honorable Charles Monroe, judge of the superior court of Los Angeles county, department 13 thereof, commanding him to proceed with the trial of a certain case, entitled, John B. Mason v. Mamie Wallick Neilly, Also Known as Mamie Wallick Mason, then pending therein, or show cause at a time and place specified why he should not so proceed.

It appears from the petition that petitioner, as plaintiff, commenced an action in said court, the purpose of which was to obtain a decree for the annulment of the marriage of himself and the defendant named in said action. Due service was had upon defendant, who made default therein, whereupon the case was set for trial in said department 13 of said superior court on March 12, 1914, at which time it was called for trial, and plaintiff by his attorneys, after paying the fees of the reporter and complying with all rules prevailing in said court, proceeded with the trial of the case, when, after certain proceedings had and testimony taken, said court did, as alleged, "arbitrarily and without any reason whatsoever, stop the said trial, refuse to hear any other or further testimony or to proceed in any other respect with the said trial, or to grant or deny a decree, or to take the matter under consideration, or to dismiss the said cause, or to nonsuit the plaintiff, or to take any step whatsoever in relation thereto, except to so refuse to further proceed," all of which the return to the court admits, with the qualification, however, that at said time the court continued the further hearing of the case to the 13th day of October, 1914; the reason assigned for so doing being, as appears from a transcript of the testimony taken in said matter, though no answer was filed, that plaintiff in said action had theretofore, on October 9, 1913, obtained an interlocutory decree of divorce from the defendant in said action. The learned judge, as appears from this transcript, was of the opinion that plaintiff was desirous of marrying again. In speaking of the decree of divorce, the judge stated:

"He (plaintiff) got what he asked for. Now, what does he want to do, marry right away?"

And when plaintiff's attorney suggested, that since it had been discovered that defendant was not capable of contracting the marriage (a fact not known to petitioner when the decree of divorce was granted), plaintiff was entitled to an annulment thereof, notwithstanding the fact that an interlocutory decree of divorce had been granted, and asked to submit authorities upon the question, the court replied:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Well, you could submit authorities, but I am going to continue the case. I am not going to hurry this up just because a man wants to hurry it up to get married."

There was no evidence that petitioner contemplated marriage.

When properly in court and complying with the rules thereof, litigants are entitled to an orderly and timely determination of causes wherein they are interested, even though they "want to get married." While the law and public policy may place restrictions upon the contracting of marriage, it is not the province of a court so to do. According to the admitted facts, plaintiff was clearly entitled to a trial of his case and to the judgment of the court upon the facts adduced, and the action of the court in arbitrarily continuing the trial thereof was, as shown by the return, wholly without warrant.

It further appears from the return that, since the unwarranted continuance of the case and refusal to try the same, the court has set 40 to 50 cases for trial, which will occupy the time of the court until June 12th or 15th, and that this case cannot be tried earlier than June 15th without discommoding other litigants. Plaintiff should not be deprived of an early trial of this case because of the unwarranted action of the court in continuing the same, and his right and convenience entitle him to have his case restored to the place upon the trial calendar in advance of the cases so wrongfully given precedence in setting them for trial.

The alternative writ will be made peremptory, and the trial court directed to set the case down for trial at the earliest date consistent with the orderly and usual disposition of cases, save and except that this case shall be given precedence over all cases set for trial subsequent to March 12, 1914.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 151

ANDERSON, State Superintendent of Banks, v. NAWA et al. (Civ. 1359.)

(District Court of Appeal, First District, California. July 17, 1914. Rehearing Denied by Supreme Court Sept. 15, 1914.)

1. Appearance (§ 9*)—"General Appearance"—What Constitutes.

An appearance solely for the purpose of moving to dismiss the complaint for delay in the service of process is not a general appearance, within Code Civ. Proc. § 1014, declaring that a defendant appears when he answers, demurs, or gives the plaintiff written notice of his appearance, which subjects the defendant to the jurisdiction of the court for all purposes of the action.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42–52; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

2. Dismissal and Nonsuit (§ 60*)—Delay in Service of Summons.

An unexplained delay of two years and ten months in the service of summons after the commencement of an action will warrant a dismissal of the action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

2. Dismissal and Nonsuit (§ 60*)—Delay in Service of Summons—Ground for Dismissing.

Where the state bank commissioner, who took charge of the assets of a bank for liquidation, delayed for two years and ten months in serving defendants with summons, in an action begun to recover upon their stockholder's liability, the right of defendants to demand that the action be dismissed because of the delay cannot be defeated because the bank's affairs had not been liquidated, and the amount of their liability had not been ascertained; it not being shown when the affairs of the bank, if ever, would be liquidated, that ground being a reason for delay of trial, rather than delay in the service of summons.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

4. Dismissal and Nonsuit (§ 60*)—Failure to Serve Summons—Excuses.

Where a bank commissioner, who had taken charge of the assets of an insolvent bank, delayed for nearly three years in serving defendant, a known stockholder, with summons in a suit on the stockholder's liability, the delay cannot be excused on the ground that the whereabouts of other stockholders could not be ascertained, for under Code Civ. Proc. §§ 414, 578, and 579, governing proceedings where there are several defendants, judgment can be rendered against part of the defendants alone, and so the action might have been proceeded with against defendant, whose whereabouts were known.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

5. Dismissal and Nonsuit (§ 60*)—Grounds for Dismissal—Delay in Service of Summons.

The fact that delay in the service of summons may not have prejudiced defendant is no ground for refusing to dismiss, where the delay is unreasonable.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

6. States (§ 191*)—Actions by State Bank Commissioner—Nature of Action.

An action by the state bank commissioner to recover against the stockholders of an insolvent bank is for the benefit of the creditors of the bank, and not on behalf of the state in its sovereign capacity; and hence, if the commissioner unduly delay in serving stockholders with summons, the suit may be dismissed, regardless of the rule that laches and limitations does not run against the sovereign.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179–184; Dec. Dig. § 191.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alden Anderson against Y. Nawa and others and the Swayne & Hoyt Company. From judgments dismissing the action as to the individual defendant and as to all other defendants, plaintiff appeals. Affirmed.

F. A. Cutler, of San Francisco, A. A. De Ligne, of Sacramento, and H. W. Johnson, Jr., of San Francisco, for appellant. J. J. Lermen, C. L. Tilden, and W. F. Postel, all of San Francisco, for respondents.

LENNON, P. J. Pursuant to the provisions of the Bank Act (Stats. 1909, § 136, p. 115), this action was instituted by the plaintiff, as state bank commissioner, against the defendants, as stockholders of a banking corporation in liquidation, known as Kimmon Ginko (Golden Gate Bank). Upon motion of the defendant Swayne & Hoyt Company, the action was dismissed upon the ground of unreasonable delay in the service of summons. Judgment was thereupon entered in favor of said defendant. Subsequently the court of its own motion dismissed the action as to all of the defendants on the ground that summons had not been served and returned within three years from the commencement of the action, and thereupon rendered and entered judgment in favor of all of the defendants, including Swayne & Hoyt. The plaintiff has appealed from both judgments. Both appeals purport to have been exclusively taken and perfected under the new or alternative method provided by sections 941A, 941B, and 941C of the Code of Civil Procedure. It is conceded by the plaintiff that both appeals were so taken and perfected, and that the record before us would not support an appeal from either judgment under the old method of appeal. It is further conceded by the plaintiff that, in so far as the appeal from the second judgment is concerned, the essential requirements of the new or alternative method of appeal were not complied with, and that as a consequence we have not before us, under either method of appeal, a duly authenticated record of the proceedings had in the lower court upon the rendition and entry of the second judgment. This being so, it is finally conceded (as indeed it must be) that we have no jurisdiction to hear and determine the second appeal, and that the same must be dismissed.

[1] With reference to the appeal from the first judgment, the record shows that the action was commenced by the filing of the plaintiff's complaint on January 5, 1910, and that summons was issued upon the same date, but not served upon the defendant Swayne & Hoyt until the 16th day of October, 1912. The motion to dismiss was filed November 7, 1912, and granted January 13, 1913. The defendant did not otherwise or for any other purpose appear in the action. The notice of motion to dismiss expressly declared that the defendant appeared in the action solely and specifically for the purpose of the motion; but, even if the notice had been silent in this behalf, the mere making and presentation of the motion was not a general appearance of the defendant in the action which would subject him to the jurisdiction of the court for all of the purposes of the action. Code Civ. Proc. § 1014; Steinbach v. Leese, 27 Cal. 295; Powers v. Braly, 75 Cal. 237, 17 Pac. 197; Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Witter v. Phelps, 163 Cal. 655, 126 Pac. 593.

[2, 3] The motion to dismiss was supported by the affidavit of R. H. Savage, which, after reciting the institution of the action and the failure of the plaintiff for two years and ten months thereafter to serve the defendant Swayne & Hoyt with summons in the action, alleged certain facts and circumstances, which tended to show that the summons could have been served upon the defendant without the slightest difficulty, had the plaintiff so desired, at any and all times after the institution of the action. The averments of the affidavit offered upon behalf of the defendant, and received in evidence in support of the motion to dismiss, were not controverted by the counter affidavit of the plaintiff; and therefore it was an admitted fact upon the hearing of the motion that the plaintiff, if he so desired, could, at all times after the institution of the action, have readily, and without difficulty of any kind, served the defendant with summons in the action.

The power of the court to dismiss upon a showing of undue delay in prosecuting the action is not disputed; and it is conceded that the unexplained and inexcusable failure to serve the summons within two years and ten months from the date of its issuance prima facie constituted good and sufficient ground of dismissal. It is insisted, however, that the showing made by the plaintiff justified and excused the delay in the service of the summons; and that therefore the court below abused its discretion in dismissing the action. This contention is rested primarily upon the assumption that the uncontradicted affidavit made upon behalf of the plaintiff in opposition to the motion to dismiss affirmatively established, not only the fact that the delay in the service of summons was unavoidable, but that such delay helped rather than harmed the defendant.

In this connection the affidavit offered and received in evidence upon behalf of the plaintiff recited in substance that the business and assets of the Kimmon Ginko (Golden Gate Bank) were taken possession of by the plaintiff for the purpose of liquidation prior to the institution of the action; that the outstanding credits due the bank were largely unsecured, and due almost wholly from Japanese clients, and consisted of more than 1,000 separate accounts; that the complicated condition of the affairs of the bank at the time of its suspension rendered necessary a thorough investigation, in order to ascertain what amount, if any, would be required from the stockholders to supply the deficiency existing between the liabilities and the assets of the bank; that, pending such investigation, the action was instituted for the purpose of preventing the statute of limitations from running against the claims of the creditors of the bank and in favor of the defendants as stockholders thereof; that the action could not be fairly and justly pressed against the defendants as stockholders without first ascertaining how much would be realized from the assets of the bank; that the defendant was in no way injured by the delay in serving the summons, because every defense available at the time the action was instituted was just as available after the summons had been served; that the defendant was benefited by the delay in serving the summons in the particular that the plaintiff was thereby enabled to definitely ascertain the exact amount of the defendant's liability; that, because of the large number of stockholders, it required much time to locate many of them; and that, until all of them could be found and served with summons, it was impracticable to press the prosecution of the action.

We are not convinced that the court below would have been justified in finding from the showing of the plaintiff that the delay in the service of the summons inured to the benefit of the defendant. The affidavit made in behalf of the plaintiff in opposition to the motion discloses that the business of the bank was taken over by the plaintiff on July 1, 1909, and that an investigation of its affairs was at once commenced and was still under way at the time of the making of the motion to dismiss. It will thus be seen that for more than three years prior to the motion to dismiss the plaintiff was engaged in investigating the affairs of the bank; and the affidavit in opposition to the motion contains no averment that such investigation had been completed, or that it would ever be completed. Such investigation, perchance, might have resulted in benefit to the defendant; but the defendant was not required to indefinitely postpone its motion to dismiss, nor could it be denied the advantage of the motion merely because the complicated condition of the bank's affairs prolonged the investigation of the plaintiff; and, in the absence of an affirmative showing that such investigation had developed a definite result favorable to the defendant, we are at a loss to comprehend how it was benefited by the delay.

But even if it be conceded that the allegations of the plaintiff's affidavit show that the investigation instituted by the plaintiff would ultimately have resulted in collecting and conserving the assets of the bank, and that thereby the defendant's liability as a stockholder would be correspondingly reduced, this in effect would be asking to excuse the delay in the service of summons upon the ground that the plaintiff was occupied during the two years and ten months immediately following the institution of the action in endeavoring to procure evidence which would definitely fix the amount of the defendant's liability. The necessity for such evidence doubtless would have been favorably considered by the lower court and the defendant as a ground for the postponement of the trial of the action after issue joined; but it could not operate to excuse an unreasonable delay in the service of summons. Caldwell v. The Regents, etc., 23 Cal. App. 29, 136 Pac. 731.

[4] The affidavit interposed upon behalf of the plaintiff, in so far as it related to the claim that the delay in the service of process was unavoidable because of the multiplicity of defendants, was manifestly deficient in not affirmatively and unequivocally alleging that the plaintiff had in good faith endeavored to serve the several defendants with process. The allegation that "it had taken a great deal of time to ascertain the whereabouts of many of them" is very indefinite and uncertain, and is far from being an allegation that the plaintiff had made any effort to serve any of the several defendants after they had been located. Moreover, whatever difficulty the plaintiff may have encountered in locating any one or more of the defendants was not in and of itself a sufficient excuse for delaying service of process upon a defendant whose whereabouts was at all times known to the plaintiff. We know of no good reason why it was impracticable to press the prosecution of the action "until all of the defendants had been found who could be served with summons." The liability of the defendant as a stockholder of the defunct bank was primary and independent, and in no sense and to no extent dependent or contingent upon the liability of the remaining defendants, and the court below, in its discretion, might have rendered a several judgment against the defendant without regard to the liability of the remaining defendants, and regardless of whether or not any or all of the remaining defendants had been served with process. Code Civ. Proc. §§ 414, 578, 579.

[5] The fact that the delay in the service of summons did not operate to deprive the defendant of any defense which he may have had to the action will not suffice to excuse such delay. It cannot be assumed that the defendant did not have a valid defense merely because the action was only to enforce a stockholder's liability. For aught that appears in the showing made by the plaintiff, the delay in the service of summons may have impaired the preparation and presentation of whatever defense the defendant may have had to the action. But, aside from these considerations, the dismissal of an action because of unreasonable delay in the service of the summons may be made "without regard to the merits or demerits of the

cause of action. The motion is granted as to a meritorious cause of action, as well as to one without merit, because in either case there has been a failure upon the part of the plaintiff to use the diligence which the law requires to make an end of litigation." Bell v. Solomons, 162 Cal. 105, 121 Pac. 377.

[6] In addition to the showing made upon the motion, it is insisted that the action was instituted by the plaintiff upon behalf of the state in its sovereign capacity, and that, inasmuch as laches, as a matter of law, cannot ordinarily be imputed to the state, the motion to dismiss should have been denied for that reason alone. We are not prepared to say that the general rule in this behalf would operate to excuse an unreasonable delay in the service of summons, in an action instituted by the state in its sovereign capacity, for the purpose of asserting a public right or protecting a public interest; but we are satisfied that the present action does not involve in the slightest degree any such capacity, right, or interest. It will be noted that the present action was not instituted in the name of the state; and doubtless this is so because the statute under which the action was instituted neither directs nor contemplates the interposition of the state in its sovereign capacity. The power conferred by the bank act on the state banking commissioner to enforce by suit the liability of stockholders in an insolvent bank involves but an incidental duty of his office, which, when occasion arises, he must perform solely for the benefit of the creditors of the bank. Obviously, in the performance of such duty, he must be acting for the benefit of private parties. From the very nature of the action it is apparent that the state has no interest in the subject-matter of the litigation, in the sense that it has anything to gain or lose in the determination of the action. This being so, it must be held that the plaintiff in bringing the action was not invested with the sovereignty of the state. Stern v. Board, etc., 50 Wash. 100, 96 Pac. 693; State v. Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; People v. Jefferds, 126 Cal. 296, 58 Pac. 704. It follows that the plaintiff is not immune from the operation and effect of the rule generally applied to ordinary litigants, which requires due diligence in the prosecution of an action.

The conclusion which we have arrived at upon the merits of the action, upon which the first judgment is based, makes it unnecessary for us to determine the question as to whether or not the court below had jurisdiction to render the second judgment after an appeal from the first judgment had been taken.

For the reasons stated, the first judgment is affirmed, and the appeal from the second judgment is dismissed.

We concur: RICHARDS, J.; KERRIGAN, J.

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25 Cal. App. 799

ANDERSON, State Superintendent of Banks, v. NAWA et al. (Civ. 1324.)

(District Court of Appeal, First District, California. July 21, 1914.)

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alden Anderson, Superintendent of Banks, against Y. Nawa and others and J. J. Lermen. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

F. A. Cutler, of San Francisco, A. A. De Ligne, of Sacramento, and H. W. Johnson, Jr., of San Francisco, for appellant. J. J. Lermen, C. L. Tilden, and W. F. Postel, all of San Francisco, for respondents.

LENNON, P. J. The parties to the above-entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent J. J. Lermen present questions identical to those presented in the appeals in the case No. 1359 (Alden Anderson v. Y. Nawa et al., 143 Pac. 555, opinion filed July 17, 1914), and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having further stipulated that all briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, supra), may be considered as made and filed in the appeals from the judgments in favor of said respondent J. J. Lermen, now, therefore, it is hereby ordered, upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded December 12, 1912, in favor of said respondent J. J. Lermen, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

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25 Cal. App. 801

ANDERSON, State Superintendent of Banks, v. NAWA et al. (Civ. 1539.)

(District Court of Appeal, First District, California. July 21, 1914.)

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alden Anderson, Superintendent of Banks, against Y. Nawa and others and T. Shibata. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

F. A. Cutler, of San Francisco, A. A. De Ligne, of Sacramento, and H. W. Johnson, Jr., of San Francisco, for appellant. J. J. Lermen, C. L. Tilden, and W. F. Postel, all of San Francisco, for respondents.

LENNON, P. J. The parties to the above-entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent T. Shibata present questions identical to those presented in the appeals in the case No. 1359 (Alden Anderson v. Y. Nawa et al., 143 Pac. 555, opinion filed July 17, 1914), and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne &

Hoyt, a corporation (being case No. 1359, supra), may be considered as made and filed in the appeals from the judgments in favor of said respondent T. Shibata, now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent T. Shibata, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

25 Cal. App. 802

ANDERSON, State Superintendent of Banks, v. NAWA et al. (Civ. 1359.)

(District Court of Appeal, First District, California. July 21, 1914.)

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Alden Anderson, Superintendent of Banks, against Y. Nawa and others and C. L. Tilden. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

F. A. Cutler, of San Francisco, A. A. De Ligne, of Sacramento, and H. W. Johnson, Jr., of San Francisco, for appellant. J. J. Lermen, C. L. Tilden, and W. F. Postel, all of San Francisco, for respondents.

LENNON, P. J. The parties to the above-entitled cause having stipulated that the appeals from the two judgments rendered in the said action in favor of the respondent C. L. Tilden present questions identical to those presented in the appeals in the case No. 1359 (Alden Anderson v. Y. Nawa et al., 143 Pac. 555, opinion filed July 17, 1914), and the said parties having further stipulated that the facts in both cases upon which the judgments of dismissal are respectively based are in all respects substantially the same, and having further stipulated that the transcript and briefs and arguments filed or made on the appeal from the judgment in favor of respondent Swayne & Hoyt, a corporation (being case No. 1359, supra), may be considered as made and filed in the appeals from the judgments in favor of said respondent C. L. Tilden, now, therefore, it is hereby ordered upon the authority of the said case (No. 1359), and for the same reasons stated in the opinion filed therein, the first judgment, to wit, the judgment entered and recorded January 14, 1913, in favor of said respondent C. L. Tilden, is affirmed, and the appeal from the second judgment, to wit, the judgment entered and recorded February 14, 1913, is dismissed.

168 Cal. 328

SMITH v. MURPHY. (L. A. 3343.)

(Supreme Court of California. Sept. 29, 1914.)

1. CONTINUANCE (§ 14*)—REFUSAL—AMENDMENT OF COMPLAINT.

The refusal of a continuance to enable defendant after amendment to procure evidence that when he signed the contract sued on he was so sick that he did not know what he was doing was not error, since such evidence would come from defendant himself, and no extension of time was necessary for its procurement.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 25, 99–112; Dec. Dig. § 14.*]

2. JURY (§ 13*)—RIGHT TO JURY TRIAL—FORECLOSURE OF MECHANIC'S LIEN.

In an action to foreclose a lien for extra work and material, an amendment to the complaint, stating that after completion of the work defendant had agreed to pay a specified sum therefor, instead of that he had agreed to pay the balance due, did not entitle the defendant to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 35–83; Dec. Dig. § 13.*]

3. EVIDENCE (§ 448*)—PAROL—WRITTEN CONTRACT.

Parol evidence was inadmissible to show what was said by the contracting parties at the time of signing the specifications of a building contract, where the specifications did not leave the intentions of the parties in doubt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. § 448.*]

Department 2. Appeal from Superior Court, Los Angeles County; J. A. Allen, Judge.

Action by Jackob Smith against R. H. Murphy. From judgment for plaintiff and denial of new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Milton K. Young and W. D. Finch, both of Los Angeles, for appellant. G. C. De Garmo, of Los Angeles, for respondent.

PER CURIAM. This action was brought to foreclose a mechanic's lien asserted to be due for extra labor and material used in the construction of defendant's residence. The whole of the original contract price had been paid. The contract provided that any additions or extras not mentioned in the contract should be added to the contract price. Defendant filed an answer and cross-complaint. After trial judgment passed for plaintiff, and from that judgment, and from an order denying his motion for a new trial, defendant appeals.

[1, 2] Plaintiff's original complaint, in setting forth the items of extra work and material and the values thereof, declared that no prices for these items had been agreed upon, but that after completion of the building the defendant agreed to pay the balance due on account of this extra work and material. Shortly after the trial of the action began plaintiff sought and obtained leave of court to amend this averment by alleging that after the work was completed the defendant had agreed to pay a named and specified sum therefor. Appellant first complains of the injury inflicted upon him by the court in allowing this amendment, and in so doing denying a continuance of the action and a trial by jury. An inspection of the record shows that plaintiff's attorney was willing to accord any reasonable time to defendant to gather his evidence to meet the changed form of the issue, but it appears from the statement of defendant's attorney that all that he expected to show was that the defendant, at the time he signed the statement agreeing to pay the specified amount, was in such a condition of ill health as not to know what he was doing. It required no extension of time to produce this evidence, since naturally it would be the evidence of Mr. Murphy himself. And, it may be added that plaintiff's attorney agreed in open court that if later in the case a continuance should become necessary for this purpose, he would readily assent to it. The amendment did not entitle the defendant to a trial by jury.

Appellant argues that as to certain items the findings are not supported by the evidence. We need not particularize upon these matters, since it would carry this opinion through an entirely useless detailed consideration of numerous small items of labor and material and the value thereof. It is sufficient to say that the findings are supported in some instances and in others there are no specifications of insufficiency so as to justify our consideration of them.

[3] Certain questions propounded by defendant's attorneys were objected to and the objections sustained. Thus, the following is asked of defendant Murphy:

"Q. What was said by either yourself or Mr. Smith at the time of the signing of the specifications in reference to a hot water system for heating the building?"

To this and similar questions objections were properly sustained. The specifications themselves, whatever they may have been (and they are not before this court) embodied and expressed the contract between the parties. Antecedent conversations were entirely irrelevant saving in case of doubt over the construction of those specifications to show what the parties actually intended, but no such situation is here presented.

The judgment and order appealed from are therefore affirmed.

168 Cal. 342

SCHOTT v. SCHOTT. (L. A. 3328.)

(Supreme Court of California. Sept. 30, 1914.)

1. DEEDS (§ 211*)—VALIDITY—FRAUD—EVIDENCE—SUFFICIENCY.

In consolidated actions by a son against his mother for partition and to recover rents and profits, wherein defendant claimed that the price was paid by her alone, and that title to the property was taken in the names of plaintiff and defendant, as joint tenants with the right of survivorship, in consideration of plaintiff's agreement to reside with and care for her during the balance of her life, evidence *held* insufficient to show that the property admittedly given by plaintiff in exchange for his interest in the land had been previously procured from defendant through fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

2. DEEDS (§ 19*)—FAILURE OF CONSIDERATION—REMEDY.

That a son breaches his contract to care for and provide for his mother during her life does not, in the absence of fraud, entitle the mother to set aside a deed giving the son an interest in land in consideration of such contract; the mother's remedy in such case being an action for damages.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Victor L. Schott against Ada L. Schott. From judgment for defendant, and denial of new trial, plaintiff appeals. Reversed.

Porter & Sutton, of Los Angeles, for appellant. Porter, Morgan & Parrot, of Los Angeles, for respondent.

ANGELLOTTI, J. Two actions were commenced by the plaintiff against the defendant. One was an action instituted in the superior court for the partition of three parcels of land situated in the city of Los Angeles; the plaintiff claiming that he and the defendant were the owners thereof in joint tenancy. The other action was one for the recovery of certain rents and profits for one of said parcels, instituted in the justices' court, and transferred to the superior court for the reason that the defendant claimed that title to the real property was involved therein. By consent the actions were consolidated and tried together in the superior court. Judgment went for the defendant, and we have here an appeal by plaintiff from such judgment and from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

All the property involved stands on the records in plaintiff and defendant, as joint tenants with the right of survivorship; the same having been acquired by three deeds from third parties, one bearing date April 30, 1907, another bearing date October 23, 1908, and the third bearing date November 18, 1908. In the first of these deeds the grantees were described as "Ada L. Schott and Victor L. Schott, * * * or the survivor of them," in the second as "Ada L. Schott and Victor L. Schott (her son) as joint tenants with the right of survivorship and not as tenants in common," and in the third deed "Ada L. Schott and Victor L. Schott, her son, as joint tenants with the right of survivorship." By her amended cross-complaint the defendant alleged substantially that she bought all of said property; "that at the time of the making of said conveyance the plaintiff and the defendant were residing together; that the consideration for the transfer to the plaintiff of plaintiff's alleged interest in said property was that the plaintiff would continue thereafter to reside with the defendant during the balance of her life and care for, protect, comfort, and maintain her; that the plaintiff agreed to care for, protect, comfort, and maintain the defendant during the balance of her life and in consideration of such promise and for no other reason whatsoever, at all, defendant was induced to have the conveyances of the property heretofore described made to the plaintiff and the defendant in joint tenancy; that the said conveyances to the plaintiff of his alleged interest in said property were made wholly upon the aforesaid representations and for no other reason whatsoever, at all, and the plaintiff has failed and still fails to care for, protect, comfort, and maintain the defendant during her old age; that the defendant verily believes that the plaintiff made the aforesaid representations for the sole purpose of inducing this defendant to have the aforesaid property conveyed to plaintiff and defendant in joint tenancy, and that the plaintiff never had any intention to fulfill the same; that for the reasons heretofore set forth the defendant has received no consideration from the plaintiff or from any one for the conveyance of said property, to the plaintiff in joint tenancy with this defendant."

The court found in accordance with these allegations of the cross-complaint, further finding that the plaintiff never did fulfill the promises made to defendant, but that he deserted the defendant soon after acquiring an interest in the said property.

[1] The evidence in support of the finding that defendant purchased entirely with her own money the various parcels of real property is very unsatisfactory, but we will assume in favor of the finding of the trial court that there was sufficient evidence to legally support such finding as to the land conveyed to the parties by the second and third deeds hereinbefore referred to. As to the land described in the first deed, which is the only improved real estate here involved, namely, lot 10 as the same is shown on a certain map entitled "Strong & Dickinson's Main Street and Moneta Avenue Tract," the evidence is uncontradicted that a portion of the consideration was certain real property of which plaintiff had the legal title. It is true that defendant testified that she paid for such real property so standing in the name of plaintiff, and gave the property to him; "the consideration being that he should live with me, * * * on his promise to live with me." Plaintiff testified positively that such property so standing in his name was purchased with his own money. Assuming the testimony of the defendant above referred to to be true, it furnishes no warrant for a conclusion that such property was not the absolute property of plaintiff. Her testimony was that she gave the property to plaintiff on this promise, and there was neither any finding nor any evidence to sustain a finding that this promise was fraudulently made, or that it was not fully complied with from the time of the acquirement of the property to the time of its disposition in part exchange for the land described in the first deed. There was no foundation in the evidence for any conclusion of actual fraud as to this conveyance to plaintiff, and there was neither in the pleadings nor evidence any vestige of a foundation for a conclusion of constructive fraud. There was no allegation whatever in the pleadings showing any relationship of any kind between the parties, and, so far as anything intimating fraud was concerned, defendant's cross-complaint proceeded entirely on the theory of the actual fraud involved in the making of a promise without any intention of performing it. The evidence, therefore, is insufficient to sustain the conclusion of the trial court that the property described in the first deed was purchased by defendant with her own money.

The property described in the first deed is the only property as to which the evidence may fairly be held to be legally sufficient to support the conclusion of the trial court that the conveyances in joint tenancy were made in consideration of any promise or undertaking on the part of plaintiff to live with and care for defendant. We say "legally" sufficient, for the evidence in support of such a conclusion as to even this property is exceedingly unsatisfactory. But there was no evidence to support such a conclusion as to the property described in the second and third deeds. So far as this appeal is concerned, this disposes of the case as to the latter property, and requires a reversal.

[2] As to the property described in the first deed, there is nothing whatever in the evidence to sustain the conclusion of the trial court that the promise found to have been made by plaintiff was made without any intention of performing it. There is nothing in the facts shown to warrant any such inference. As a matter of fact, plaintiff did live with defendant for over two years after the time the promise was alleged to have been made, and it is not intimated that he did not during the whole of this time faithfully do all it was claimed he promised to do. The evidence was not sufficient to support a conclusion that there was any actual fraud.

As to the property described in the first deed, defendant's remedy at most, in view of the pleadings and evidence, there being no actual fraud, was an action for damages. As was said in Lawrence v. Gayetty, 78 Cal. 132, 20 Pac. 385, 12 Am. St. Rep. 29, of a case somewhat similar in principle:

> "The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance."

Under such circumstances, in the absence of fraud, actual or constructive, defendant would have no right to rescind, or to have the deed set aside. See Hartman v. Reed, 50 Cal. 485; Lawrence v. Gayetty, supra; Albert v. Albert, 12 Cal. App. 268, 107 Pac. 156.

It is manifest from what we have said that a reversal must be had, and it appears to be unnecessary to consider other points made.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

168 Cal. 415

SOUTHERN PACIFIC CO. v. EDMUNDS.

(L. A. 3329.)

(Supreme Court of California. Oct. 1, 1914. Rehearing Denied Oct. 30, 1914.)

1. Judgment (§ 713*) — Conclusiveness — Matters Concluded—Issues Which Might Have Been Raised.

A former judgment between the parties to an action is conclusive, in all subsequent actions involving the same question, as to all matters belonging to the subject of the controversy, and properly within the scope of the issues which might have been raised and determined; the presumption being that such issues were presented and decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

2. Judgment (§ 713*) — Conclusiveness — Matters Concluded—Presumption.

The presumption that matters which might have been litigated and decided in a former suit were actually decided is rebuttable, and, if it appears that the issue was withdrawn from consideration at the trial by consent of the parties, it is not concluded by the former judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

3. Judgment (§ 729*) — Conclusiveness — Matters Concluded — Issue Withdrawn by Consent.

In an action for personal injuries, where the defense was a release, which the plaintiff contended was procured by misrepresentation, and where the plaintiff tendered an instruction that the jury, if they found for him, should credit the amount paid for the release upon the award of damages, which was refused, and one was given, by consent of both parties, that the jury should find the full amount of plaintiff's damages without giving any credit for the amount paid for the release, the issue of defendant's right to credit for the release was by consent withdrawn from the former case, and was not concluded by the judgment therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1262; Dec. Dig. § 729.*]

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Suit by the Southern Pacific Company against Edward G. Edmunds. Judgment for the defendant, and plaintiff appeals. Reversed.

See, also, 18 Cal. App. 532, 123 Pac. 811.

J. W. McKinley, of Los Angeles (Allen W. Ashburn, Jr., of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

LORIGAN, J. Plaintiff having declined to amend its complaint after a demurrer to it was sustained, judgment was entered against it, from which it appeals.

The complaint alleged: That on December 19, 1909, defendant herein, while riding in a mail coach in a train operated by plaintiff, was, through an accident occurring from its negligence, seriously injured, to his damage in the sum of $5,000. That on January 11, 1910, plaintiff and defendant agreed to settle and compromise the claim of defendant for said injuries for the sum of $1,250, which plaintiff then paid him, and the latter thereupon executed and delivered to plaintiff a full release of all claims on account of said injuries. That thereafter, and on February 21, 1910, defendant commenced an action against plaintiff to recover $30,000 damages on account of said accident, claiming that said settlement had been procured through false representations made by plaintiff to defendant. That plaintiff answered in said action, and, among other defenses, set up, as a bar to any recovery by defendant, the making of said settlement and the execution of said release. That thereafter said cause was tried before a jury, and on the trial defendant introduced evidence tending to prove that the making of said settlement and the execution of said release were procured by misrepresentations on the part of plaintiff. That, before the submission of said cause to the jury, defendant herein requested the court to instruct the jury as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "You are instructed * * * then you will disregard said release or said settlement (referring to the $1,250 theretofore paid), except, if you find for the plaintiff damages as defined in the instructions herein, you will credit the sum by the amount of money admitted to have been received in such settlement."

That said instruction was rejected by the court, and thereupon, with the consent of both parties, the court instructed the jury that:

> "In case you find for the plaintiff, you are instructed that you shall find and insert in your general verdict the full amount of his damages without crediting defendant for the $1,250 which it has paid, and without making any allowance therefor"

—and gave no instruction as to the amount of damages to be allowed, or as to any deduction on account of the previous payment to defendant of the sum of $1,250. That the jury returned a verdict for defendant herein, assessing his damages at $5,000, and judgment in his favor was entered accordingly, which on appeal by plaintiff, was affirmed by the district court of appeal. That thereafter plaintiff tendered to defendant the sum of $4,360.72, being the amount of said judgment and interest, less the sum of $1,250 and interest thereon, and demanded that defendant accept said amount and satisfy said judgment, which he refused to do. That thereupon plaintiff paid the defendant $4,360.72 under a stipulation between the parties that such payment should not constitute a waiver by defendant of his right to recover the full amount of said judgment, nor of the right of plaintiff to have a deduction of $1,250, with interest from the amount of said judgment; it being agreed that plaintiff should commence an action at once to determine the claims of the respective parties, and that execution on the judgment should be stayed until the question should be determined. That defendant has never tendered or refunded said $1,250 to plaintiff, nor has plaintiff received any credit in any way for the payment of said amount.

The relief asked was that it be decreed that plaintiff is entitled to a credit for said $1,250 and interest on said judgment; that it has made full payment thereof to defendant; and that defendant be required to enter a satisfaction of said judgment. The trial court sustained a demurrer to the complaint on the ground that the matter of credit set up in the present action was res adjudicata by the judgment in the damage suit.

[1] The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided. Bingham v. Kearney, 136 Cal. 175, 68 Pac. 597; Rucker v. Langford, 138 Cal. 611, 71 Pac. 1123.

[2] As to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This presumption is, however, a disputable one, and may be overcome by showing that, although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action. If this is the situation here, defendant certainly cannot invoke the doctrine of res adjudicata against the assertion by plaintiff in this action of a right to the credit claimed. He cannot assert the conclusiveness of the former judgment on that matter, if he consented with plaintiff that it might be withdrawn from consideration by the jury as an issue in the former action, and it was in fact withdrawn.

[3] While it is doubtless true that this credit for the amount paid as a release was technically within the issues raised in the damage suit, it was never an issue over which there was any controversy between the parties in that action; there never was any question made on the part of the defendant but that plaintiff was entitled to a credit for that amount in any assessment of damages which the jury might make against it. The real issue in the case (because the defendant did not deny that the injuries to defendant were caused by its negligence) was as to the release—its validity. And, however that question of validity might be determined by the jury, the plaintiff here was entitled to the benefit of the $1,250 it had paid defendant, because, if the release was valid, such payment was in satisfaction of the claim of defendant for damages, and, if it was invalid, the plaintiff was undoubtedly entitled to it as a credit against any verdict or judgment which might be found against it. As we have said, the right of plaintiff to the credit was not questioned by defendant in the damage suit. He knew that, as a matter of law, plaintiff was entitled to it in some way, and conceded that it might be given to plaintiff by the jury in the damage suit, when estimating his damages if their verdict was favorable to him, because he asked the court to so instruct the jury to credit plaintiff with that amount in any verdict it might find. This, however, the court refused to do. It does not appear that the defendant objected to the giving of this instruction; it is rather a reasonable assumption to make that it did not. The refusal of the court to so instruct at the

request of defendant was followed by the giving of the consent instruction heretofore quoted, in which the jury was told that, in any verdict for damages, they might find they were not to credit defendant with the $1,250 it had paid, and without making any allowance therefor. Had this consent instruction not been given, and had plaintiff itself failed to ask an instruction to the jury to credit it with this $1,250 payment in estimating any damages against it, there might be room for the application of the doctrine of res adjudicata as defendant invokes it. But the giving of this consent instruction obviated any necessity on the part of plaintiff of asking for a credit instruction or complaining of the action of the court in refusing the credit instruction asked by defendant because the consent instruction withdrew that issue entirely from the case. As the defendant was conceding that plaintiff was entitled to the credit and had asked the court to so instruct the jury, and there was no dispute but that, as a matter of law, the latter was entitled to it, the apparent purpose of the consent instruction immediately following the refusal of the court to give the credit instruction was to withdraw the matter of the right of plaintiff to such credit from present consideration by the jury, leaving its application on any judgment which might be obtained against plaintiff for consideration when it should be called on to satisfy it. Plaintiff, by consenting to the instruction given, was probably entirely willing and prepared to have the jury try out the question of the validity or invalidity of the release, unembarrassed by any question of credit payment, reserving that matter for consideration at some future time, and defendant, as he freely conceded its right to this credit, was agreeable that this might be done. In any event, the consent instruction withdrew the matter from the case, and, being so withdrawn, it was not a matter which was concluded by the judgment in the former action.

The judgment is reversed.

We concur: HENSHAW, J.; MELVIN, J.

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168 Cal. 353

SANDERS v. DUTCHER. (L. A. 3220.)

(Supreme Court of California. Sept. 30, 1914. Rehearing Denied Oct. 30, 1914.)

1. PUBLIC LANDS (§ 106*)—OFFICERS OF LAND DEPARTMENT—QUESTIONS OF FACT—QUESTIONS OF LAW—DETERMINATION—CONCLUSIVENESS.

While decisions of the officers of the land office on questions of fact, in the absence of fraud or imposition practiced on them, on evidence tending to prove the same, are conclusive on third persons, errors of law committed by such officers so as to deprive a person having a valid claim under the land laws of the United States of his vested rights may be reviewed in a proper proceeding in a court of equity.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

2. PUBLIC LANDS (§ 135*)—DESERT LAND ENTRY—RIGHTS—ASSIGNMENT.

Desert Land Act (March 3, 1877, c. 107, 19 Stat. 377) § 5, as added by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096 (U. S. Comp. St. 1901, p. 1550), provides that no land shall be patented thereunder unless the applicant "or his assignors" shall have expended in the necessary irrigation, reclamation, and cultivation of the land an amount equal to at least $3 per acre, and section 7 provides that on proper proof a patent shall issue to the applicant or his assigns, but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than 320 acres of such land. *Held*, that a desert land entry may be assigned, and that an agreement of the entryman to sell the land after title has been obtained from the United States does not affect the validity of his entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 351–362; Dec. Dig. § 135.*]

3. PUBLIC LANDS (§ 37*)—DESERT LAND ENTRY — RECLAMATION IMPROVEMENTS — PERFORMANCE—EMPLOYMENT OF OTHERS.

An applicant for public land under the desert land act is not required to perform the required reclamation improvements herself, but may employ others to do the required work.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

4. PUBLIC LANDS (§ 128*) — PATENTS — WRONGFUL ISSUE — PATENTEE — IMPLIED TRUST.

Where complainants obtained a patent to a certain desert land entry as the result of errors of law committed by officers of the land department in dismissing the claim of defendant's assignor, who was, in fact, entitled to a patent, complainants would be held to hold the title in trust for defendant and be required to transfer the title to defendant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. § 128.*]

In Bank. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Louis N. Sanders against Gordon L. Dutcher. Judgment for plaintiff, and defendant appeals. Reversed.

Conkling & Brown, of El Centro, for appellant. Trask, Norton & Brown, of Los Angeles, Frank E. Dunlap, of Stockton, and Dan V. Noland, of El Centro, for respondent.

SHAW, J. The complaint avers that the plaintiff is the owner of a tract of land in Imperial county; that he was unlawfully ejected therefrom by the defendant; that defendant has no right, title, interest, or estate in the land, but that he asserts some title or interest therein which is without foundation; and that since he took possession he has remained in possession to the damage of plaintiff. He prays for possession of the property, that the defendant's claim be declared invalid, and for the recovery of damages. To this complaint the defendant answered, setting out the nature of his claim and praying for the affirmative relief that he be declared to be the equitable owner of the land and to have conveyed to him the legal title thereto acquired by plaintiff from the United States. In effect, the defense was a cross-complaint for the affirmative relief.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Thereupon the plaintiff moved for a judgment upon the pleadings. This motion was granted by the court, and judgment entered accordingly that the plaintiff recover possession, that the defendant had no right, title, or interest in the property, and for $300 damages. From this judgment the defendant appeals.

Prior to the inception of the claims of either of the parties the land in question was public land of the United States. It appears from the pleadings that one Orpha C. Johnson made a desert land entry upon said land for the purpose of acquiring the same from the United States under the desert land law of 1891; that thereafter the defendant was in possession thereof by assignment from Orpha C. Johnson; that thereupon, upon the application of the plaintiff, the land office canceled the entry of the defendant as assignee of Orpha C. Johnson, and accepted the application of Sanders as a claimant under the homestead law; that thereafter he commuted his homestead entry to a desert land entry, made his final proof thereunder, and made the necessary payments, and received his final certificate. These proceedings were the subject of an appeal to the Commissioner of the General Land Office, who affirmed the decision of the register and receiver of the land office at Los Angeles, and the plaintiff became thereupon entitled under the land laws to receive a patent from the United States. The question presented by the record is whether or not the facts alleged in the answer would entitle the defendant to have the plaintiff declared trustee of the land for the benefit of the defendant, so that whatever title the plaintiff should receive would in equity belong to the defendant and should be conveyed to him.

These facts are stated as follows: On February 9, 1903, the lands were unoccupied public lands of the United States open to desert land entry. On that day Orpha C. Johnson made such entry of this land. Thereafter, prior to July 13, 1905, she complied with all the laws of the United States with reference to said entry, made the reclamation thereof required by law, and made final proof of such reclamation and final payment therefor, and received from the register and receiver of the land office a receipt showing such final payment. Thereafter, and prior to December 17, 1907, she sold, assigned, and transferred all her right, title, and interest in the land to defendant, Gordon L. Dutcher, who entered into possession under the conveyance, and has since expended large sums of money upon the land in the reclamation and improvement thereof. On January 7, 1908, Louis N. Sanders began a contest against the Johnson entry, alleging that Johnson had not reclaimed nor irrigated or improved the land, or any part thereof, at the time she made final proof, and that before she made such final proof she had entered into a contract with one M. V. Dutcher to sell the land to Dutcher or his assigns, receiving from said Dutcher the sum of $75 therefor, and that the final proof of Orpha C. Johnson was, for these reasons, fraudulent. This contest came on for hearing at the land office; both parties being present in person and by counsel. Evidence was submitted by both parties, and the register found that the final proof of Johnson was fraudulently made by virtue of the fact that she had not personally made the reclamation of the land, and because the final proof was made after and under the contract with M. V. Dutcher above referred to. The register therefore canceled the entry of Orpha C. Johnson, whereupon the appeal was taken, the contest confirmed, and the plaintiff was declared to be entitled to the land as a homestead. Thereafter Sanders made his homestead entry, the same was accepted by the land office in pursuance of the aforesaid decision and afterwards, on November 13, 1911, Sanders, having commuted his homestead and made his proofs, received his final certificate as a desert land entry and secured an apparent title to the land; that these proceedings were taken by Sanders in pursuance of a conspiracy with one F. E. Jordan, by which Sanders agreed to do as above stated, and Jordan agreed to pay the expenses he would be put to, and was thereafter to receive a deed from Sanders for the land, and in consideration of which he agreed to pay Sanders $2,500.

In explanation and avoidance of this decision of the land department and the certificate issued to Sanders, the following facts were stated: At the hearing before the register no evidence was offered tending to prove that Orpha C. Johnson had not reclaimed or irrigated the land, but, on the contrary, it was admitted that she had done so. The proof on this point was that she had not done so personally, but had procured these things to be done by others at her own charge and expense. The only evidence offered to show that the final proof was fraudulently made under the contract above referred to between Johnson and M. V. Dutcher consisted of declarations made by Dutcher to third persons tending to prove the allegations of the contest to the effect that, prior to final proof under the Johnson entry, Orpha C. Johnson had agreed to sell the land to Dutcher, as before stated. The register and receiver believed the law to be that a reclamation not made by the claimant personally, although made at her instance, was invalid, and that therefore Orpha C. Johnson had not reclaimed or irrigated the land within the meaning of the desert land law. The said register and receiver also concluded, as matter of law, that the final proof made after and under the contract by Orpha C. Johnson to sell her right to M. V. Dutcher was invalid, because said contract was contrary to the policy of the law, and that for these reasons the claim and entry of Orpha C. Johnson and her assignee were invalid and should be canceled, and upon that ground the same was canceled by them. The commissioner of the land office, in affirming the decision of the register and receiver, acted under the same misapprehension as to the law governing the case. It is alleged that these proceedings were carried on by Sanders and Jordan for the fraudulent purpose of depriving Orpha C. Johnson and her assignees of the land and of acquiring the same for Jordan.

Upon these allegations it is claimed that in equity Sanders stands as the trustee for the defendant of the land, and that a court of equity will compel him to make the proper conveyances of the land to the defendant.

[1] It is a well-established proposition, and it is not disputed by the appellant, that the decisions of the officers of the land department on questions of fact, upon evidence tending to prove the same, are conclusive upon third persons, at least in the absence of fraud or imposition practiced upon them. But it is also settled that, where these officers err in matter of law, in such a way as to deprive a person who has a valid claim under the land laws of the United States of the rights vested in him, their decisions may be reviewed in a proper proceeding, and that a court of equity, in such a proceeding, will give appropriate relief to the injured party against the party who obtains title by the erroneous decision. Thus, it is said:

> "If they err in the construction of the law applicable to any case, or a fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department. * * * It may also be, and probably is, true that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented at the time, would have changed the action of the land officers; but, except in such cases, the ruling of the department on disputed questions of fact, made in a contested case must be taken, when that ruling is collaterally assailed, as conclusive." Shepley v. Cowan, 91 U. S. 340, 23 L. Ed. 424.

And again, in Marquez v. Frisbie, 101 U. S. 476, 25 L. Ed. 800, the court says:

> "In this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief."

This is quoted from the decision in Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848. The court says further:

> "If it can be made entirely plain to a court of equity that on facts about which there is no dispute or no reasonable doubt those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

[2] The conclusion of the land department that a desert land entry perfected after and in pursuance of an agreement between the entryman and another to sell the land to such other person after the title is obtained from the United States is invalid under the desert land law was a clear mistake of law. There is no principle of common law which forbids such a contract nor any which declares the title received thereunder invalid. Such proceedings are against the policy of the law only in cases where such policy is declared by the law. If this entry of Orpha C. Johnson had been made under the pre-emption law formerly existing, or under the homestead law, in each of which there is a declaration in effect forbidding such assignment, their conclusion would have been correct. But the desert land law is wholly different in this respect. It not only does not forbid the assignment of such contracts after entry made under its provisions; it expressly recognizes that such assignments may be made. The necessity for extensive works of reclamation of land taken up under the desert land law, in order to make such land of any value, evidently was deemed sufficient to make it expedient to authorize transfers of such land pending proceedings to obtain a title. Section 5 of the law declares:

> "That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented" in the manner described in the section.

Section 7 provides that at any time after the filing of the declaration, and within four years, upon proof of the expenditure of such money and of citizenship and payment of one dollar per acre for the land—

> "a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land."

Thus it will be seen, the assignment from Johnson to M. V. Dutcher was not contrary to law, but was a valid transfer, and did not in any way justify a cancellation of the entry.

[3] It is not necessary to cite authorities to show that the land department erred as to the law in its conclusion that the entry of Orpha C. Johnson was invalid because she hired others to do the reclamation work required, and had not accomplished it by her own personal labor. The proposition is self-evident. There was no question of fact to be determined by the land department. The only facts alleged in the contest of Sanders were those above stated. They were not sufficient in law to invalidate the entry attacked by him. It is therefore entirely plain under the facts stated that the officers of the land department by mistake of law deprived

the assignee of Orpha C. Johnson of the right he possessed under the law to complete his entry and obtain title to the land from the United States. The motion for judgment on the pleadings admits all facts averred in the answer. It appears therefrom that the defendant, Gordon L. Dutcher, has succeeded to all the rights of Orpha C. Johnson and M. V. Dutcher under said desert land entry. It further appears that this was done by the fraudulent contrivance of the plaintiff and said Jordan.

[4] Under these circumstances, and upon the authorities above referred to, it is clear that the defendant is entitled to the relief prayed for in the answer; that is, to a decree declaring the plaintiff a trustee for him and directing that any title obtained by the plaintiff should be conveyed to the defendant. The court below therefore erred in granting the motion for a judgment on the pleadings.

The judgment is reversed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(168 Cal. 360)

ELLSWORTH v. PALMTAG. (L. A. 3353.)

(Supreme Court of California. Sept. 30, 1914.)

1. Quieting Title (§ 44*)—Evidence—Sufficiency—Mistake in Description.

In an action to quiet title and to require defendant to execute a deed to plaintiff in lieu of a deed which he had wrongfully procured from a depository and destroyed, evidence *held* insufficient to show that a mistake was made in the description of land in the deed destroyed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

2. Quieting Title (§ 44*)—Material Issues—Adequacy of Price Paid.

Where, in an action to quiet title and to require defendant to execute a deed in lieu of one wrongfully procured by him from a depository and destroyed, it appeared that plaintiff and defendant had purchased the land as tenants in common, and that the destroyed deed was executed pursuant to an agreement to partition the land, the adequacy of the consideration paid by plaintiff for his interest was immaterial.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

3. Witnesses (§ 275*)—Examination—Exclusion of Question.

In an action involving the title to land, a question propounded to plaintiff on cross-examination inquiring whether he had cultivated "a portion of the 40 acres" was properly excluded, even had it been permissible for defendant to have shown, on the issue of mistaken description in the deed that plaintiff was cultivating a part of the 40 acres outside of the 10 acres claimed by him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967–975; Dec. Dig. § 275.*]

4. Witnesses (§ 269*)—Cross-Examination.

Where plaintiff had not testified in chief concerning a well or a contract for sinking it, it was improper to inquire of him on cross-examination as to who dug the well, and whether he was not present when the place for the well to be dug was designated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

5. Evidence (§ 471*)—Opinions of Witness—Examination—Exclusion of Question.

In an action wherein the interpretation of a contract was in controversy, questions relating to the contract and so framed that the witness' answers would reflect defendant's interpretation of it rather than its terms were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

6. Quieting Title (§ 44*) — Issues — Evidence.

Where, in an action to quiet title and require defendant to execute a deed in lieu of one wrongfully destroyed, it appeared that all the parties had agreed for a well to be located at a certain point on the land, evidence as to who proposed the location of the well was immaterial on the issue of mistake in the description in the deed destroyed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

7. Witnesses (§ 286*) — Redirect Examination.

A matter concerning which there had been no cross-examination was not a proper subject for redirect examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994–999; Dec. Dig. § 286.*]

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by John C. Ellsworth against G. Palmtag. From a judgment for plaintiff, defendant appeals. Affirmed.

R. E. Bledsoe and Willis & Guthrie, all of San Bernardino, for appellant. Halsey W. Allen, of Redlands, for respondent.

MELVIN, J. Defendant appeals from a judgment against him. The complaint alleged: That on May 25, 1909, plaintiff and defendant were the owners as tenants in common, each entitled to an undivided half interest, of the following described real property in San Bernardino county:

> "The south one-half (S. ½) of the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼) of section numbered five (5), township one (1) south, range three (3) west, San Bernardino Base and Meridian."

That on the above date plaintiff and defendant agreed to partition this land, and in the execution of said arrangement plaintiff was to convey his undivided half interest in the land to Palmtag and the latter was to convey to Ellsworth the south one-half of the said tract. That deeds were executed by the respective parties accordingly and were delivered to J. A. Scott of San Bernardino with the agreement between Ellsworth and Palmtag that Scott should place the deeds with the Redlands National Bank there to be held until defendant should demand the deed of plaintiff's interest to him. And that upon delivery of the last-mentioned deed, then the deed of Palmtag to Ellsworth should be delivered to the latter. It is further alleged that Scott deposited the deeds with the Redlands National Bank; that the bank thereafter delivered both deeds to Palmtag, who immediately placed of record the one in which he was mentioned as grantee and then conveyed the north half of the property to one Hanson; and that he refuses to deliver the other deed to Ellsworth, his grantee thereunder. The prayer is for a decree declaring that Palmtag has no estate or interest in the south half of the described tract; that Ellsworth's title is valid; that Palmtag be enjoined and debarred from asserting title to said premises adverse to Ellsworth; that Palmtag be required to deliver to Ellsworth the deed to the south half of the described land, or, if that be impossible, to execute a new deed in lieu thereof, or, if he refuse to do either, that a commissioner perform that function for him. Damages are also prayed for.

[1] The court found in substantial accordance with the demands of plaintiff, decreeing that the property should be deeded to Ellsworth, and awarding $75 as damages and the costs of suit amounting to $110.60. Without reviewing the evidence, it is sufficient to say that all of the findings are abundantly sustained by it. Defendant did not deny the execution of the deeds as pleaded, but testified that by a mistake the description of the property in the instrument referred to the south half of the land which he and Ellsworth apparently held by tenancy in common instead of the south half of another tract of twenty acres which Palmtag had bought from Wendleborn and Leipsic, being the north half of the southwest quarter of the northeast quarter of section 5, township 1 south, range 3 west, S. B. M. The court found that this was not true and that there had been no mistake. Defendant swore that Ellsworth had paid nothing for the half interest which stood in his name prior to May 25, 1909, but that he himself had bought it from one Hill, but had taken the title through three different grantees of whom plaintiff was the last, because his (Palmtag's) wife was adverse to signing deeds. There was evidence in opposition to this, which the court evidently believed, that Palmtag wanted to prevent one Rouse from acquiring the half interest in the property and planned to buy it for $200; that he sent the money and had the deed executed to Boyd, who afterwards conveyed to Derchelborer, who then conveyed to plaintiff who had paid Palmtag $230, an amount equal to that which Palmtag had sent to Hill plus $30 expended for taxes; and that the reason for the use of the name of Boyd as grantee in the deed from Hill was Palmtag's unwillingness to let Rouse know of his connection with the matter.

In support of his theory that a mistake had been made, Palmtag proved that a well had been sunk on the south part of the tract under an agreement between himself, Ellsworth and Hanson that he was to have half of the flow and Ellsworth and Hanson each one-quarter of the water. It was proven that they had not yet paid for one-half of the construction of the well and pumping plant, and the court so found; but the mere fact that the land now owned by Ellsworth contains this well and equipment, in which both parties to this action may have an interest if the terms of their contract be fulfilled, does not show that Palmtag must have been mistaken in consenting to let his former tenant in common take that land. His deed did not convey title to the pumping plant nor abrogate the contract for sharing the water.

[2] Counsel for appellant insist that there was a gross inadequacy of the price paid for the land by Ellsworth. In the first place, this is not an action for specific performance of a contract of sale and purchase, and the adequacy of the consideration is not involved; and in the second place there was evidence, not contradicted by Palmtag, that the price paid to Hill was $30 less than that paid by Ellsworth for the same interest.

[3] Certain rulings of the court made during the examination of witnesses are specified as erroneous. We have examined these assignments and find them without merit. On the cross-examination of Ellsworth counsel asked if he had been present when the site for the well was selected. Objections to questions along this line having been sustained, the following question was then propounded: "Weren't you cultivating a portion of that tract of land out there—a portion of the 40 acres?" A general objection to this question was sustained. Appellant insists that he was entitled to show that Ellsworth was cultivating a part of the 40 acres outside of the 10 acres now claimed by him; but, even if that were true, the question as propounded did not have any tendency to develop that fact. The ruling was correct.

[4] The court also sustained the objections, on the grounds of immateriality and that they were not proper cross-examination, of the following questions propounded to plaintiff on cross-examination:

> "Who dug that well and put that plant up there?" "You say you were on the ground at the time the place was designated where the well should be sunk?" "You were a party to a written contract with Palmtag and Hanson to sink that well on the premises out there?"

Clearly these questions were not within the scope of proper cross-examination. Plaintiff had not testified in chief about the well or the contract for sinking it. These matters were all included in Palmtag's defense, and, if admissible at all, were not properly brought into the case under the guise of cross-examination.

[5-7] Objections by respondent's counsel to certain questions propounded by defendant's counsel to defendant on redirect examination were sustained. All of these questions

related to supposed agreements for the division of water or to the selection of the place for the well. The questions relating to the contract were framed so that answers would reflect defendant's interpretation of the agreement, rather than the terms thereof, and therefore the objections were properly sustained. It made no difference who chose the place for the well, and therefore the objections to the questions upon that subject should have been sustained. The matter was not a proper one for redirect examination. There had been no cross-examination with reference to the selection of the location for the well. The court found that Palmtag, Hanson, and Ellsworth agreed upon the place at which boring for water should be conducted which was to be on the southerly 10-acre tract near the east end thereof, and near the line between the property deeded to Hanson and that claimed by Ellsworth. Since all of the parties agreed upon that place, it matters not who proposed the location. Appellant insists that he could have proved that Ellsworth selected the place for the well, without his (Palmtag's) knowledge, and never made any claim to the south 10 acres until after the well was partly constructed. But even if that were true, it would not prove that Ellsworth claimed no interest in the 10 acres in question. The well had to be on property belonging to some one of the parties to the agreement, and, since Ellsworth was to get only one-fourth of the water, the placing of the well on his property might have been or might not have been an advantage to him. The questions were neither proper redirect examination nor were they addressed to relevant matters.

No other alleged errors require comment. The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 351

CRAW v. CRAIG et al. (L. A. 3365.)

(Supreme Court of California. Sept. 30, 1914.)

1. Appeal and Error (§ 1011*)—Findings of Fact—Conflicting Evidence.

A finding on conflicting evidence, as to the amount due on an offset, could not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Mortgages (§ 581*)—Foreclosure—Attorney's Fee—Discretion as to Amount.

An allowance of $150 as attorney's fees for foreclosure of a mortgage securing a note for $1,500 and interest was not an abuse of the discretion vested in the trial court, where the mortgage stipulated for a reasonable attorney's fee, though the pleadings were exceedingly simple and the trial required less than an hour.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669–1679; Dec. Dig. § 581.*]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Mrs. A. C. Craw against Hattie M. Craig and others. From denial of new trial, defendants appeal. Affirmed.

John L. Campbell, of San Bernardino, and John W. Craig, of Corona, for appellants. W. S. Clayson, of Corona, for respondent.

MELVIN, J. Defendants appeal from the order of the superior court denying their motion for a new trial.

The action was one to foreclose a mortgage. Defendants answered, not denying their liability for the payment of the note for $1,500 and interest, secured by the mortgage, but they pleaded an offset for $350 due for a certain crop of oranges which the defendants, the Craigs, had permitted the plaintiff's agent to sell, and for which plaintiff had promised to pay them the reasonable value. The court found that the defendants, the Craigs, owed the plaintiff the principal sum of $1,500 on their note, together with $200 accrued interest and $150 attorney's fee. Against this a set-off of $150 for the orange crop was awarded the defendants. Judgment was for $1,550, together with attorney's fees of $150, with costs of suit, and a decree of foreclosure and sale was entered as prayed.

There was evidence to support the finding of the value of the orange crop as $150. Both Joseph Riley, son and agent of plaintiff, and R. W. Evans testified that the Sparr Fruit Company, of which the latter was the manager, bought the crop of oranges, growing on the mortgaged land, for $150, and Evans stated under oath that he considered the price paid the reasonable value of the fruit at that time. As opposed to this testimony was that of defendant John W. Craig, who placed the value of the oranges sold at a sum much larger than $150.

[1, 2] Of course we cannot disturb a finding based upon such a conflict of testimony, and indeed appellant does not contend that the court erred seriously in failing to accept Mr. Craig's estimate of the value of the fruit, but it is earnestly contended that the court abused the discretion with which it is clothed, when so large a sum as $150 was allowed as attorney's fees. We are reminded that the pleadings were exceedingly simple, and that the actual trial of the cause required less than one hour of time. Counsel for appellants is of the opinion that the sum allowed by the court for such service was grossly exorbitant. We do not feel called upon, however, to reverse the order of the lower court because of the amount of this fee. In the mortgage agreement appellants promised to pay a reasonable attorney's fee in the event of a suit to foreclose. The amount of such a fee is peculiarly within the discretion of the trial court. We see no circumstances of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

oppression in the allowance of the sum which the court held to be a proper charge for the work performed. Under the rule announced in such cases as Patten v. Pepper Hotel Co., 153 Cal. 472, 96 Pac. 296, we do not feel justified in interfering with the action of the lower court.

The order from which appellants prosecute their appeal is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 339

In re McKENNA'S ESTATE. (L. A. 3736.)

(Supreme Court of California. Sept. 29, 1914.)

1. Descent and Distribution (§ 35*)—Source of Title—Whole and Half Blood.

Civ. Code, § 1394, providing that kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case those who are not of the blood of such ancestors must be excluded, had no application to real property acquired by a wife by gift from her husband, who was the father of only one of her two children, even assuming that the husband was the ancestor of the wife, since, while the children were kindred of the half blood as to each other, their mother was, as to both of them, of the whole blood.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 102–107; Dec. Dig. § 35.*]

2. Costs (§ 260*)—On Appeal—Penalty for Frivolous Appeal.

Where, in a suit involving a deed of gift from a husband to his wife, a judgment adjudging that title to the land was vested in the two children of the wife individually as her heirs, and that neither had any right, title, or interest in the land otherwise, was affirmed, and the appellate court also held that the wife had acquired title by prescription, even though the deed was not effective, an appeal subsequently taken by one of the children from a decree distributing the property equally to the wife's two children on the ground that appellant's half-sister, not being of the blood of the husband, was not entitled to inherit, was frivolous, and the decree would be affirmed, with a penalty of $50.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983–996, 1002, 1003; Dec. Dig. § 260.*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Anna N. McKenna, deceased. From a decree distributing the property equally between J. Irving McKenna and Addie Norah Thompson, J. Irving McKenna appeals. Affirmed.

Catherine A. McKenna, of Los Angeles, for appellant. Joseph Scott, of Los Angeles, for respondent.

MELVIN, J. This is an appeal from a decree of distribution by which the property of the deceased, Anna N. McKenna, was distributed in equal shares to her children, J. Irving McKenna and Addie Norah Thompson.

Respondent makes the initial objection that the appeal is by J. Irving McKenna in his capacity of administrator, and that it may not be considered, because in such a case the administrator, as such, has no appeal from a decree of distribution. The notice of appeal is, to say the most that can be said of it, somewhat ambiguous. It announces that "the administrator, J. Irving McKenna, hereby appeals," etc., while the final paragraph states that "the said J. Irving McKenna does hereby appeal * * * by the procedure allowed by section 953a, Code of Civil Procedure." It might well be argued that the specification of the procedure to be followed by the "said J. Irving McKenna," who had been previously described as an administrator taking the appeal, would not amount to a declaration that he appealed also in his personal, and not in his representative, capacity, but we will assume, for the purposes of this opinion, without so deciding, that he is here on appeal personally and as an heir, because the lower court decided the question of distribution correctly.

In 1869 John McKenna owned the real property here in question. Thereafter he married Anna N. Butler (the decedent Anna N. McKenna of this proceeding). She had one daughter at that time, who is the respondent here. Subsequently J. Irving McKenna was born to Anna N. and John McKenna. On May 23, 1891, John McKenna died intestate, leaving his widow and his son, J. Irving McKenna, as his heirs. More than six months before his death John McKenna had executed a deed of gift to his wife, conveying the property to her. The facts are fully set forth in Thompson v. McKenna, 22 Cal. App. 130, 133 Pac. 512. Indeed, that case is conclusive of this matter. The same property was there involved, and the District Court of Appeal affirmed a judgment that title was vested in J. Irving McKenna and his half-sister, Addie Norah Thompson, individually, as heirs of Norah Anna McKenna, deceased, subject to administration in her estate, and that neither had any right, title, or interest in the land otherwise. The appellate court approved the finding of the lower court that Norah Anna McKenna's title to the property was founded also upon open, notorious, and exclusive possession thereof for more than 20 years. A motion for rehearing was denied by this court.

[1] In the face of the above judgment the appellant here contends that the estate should not be distributed in accordance with section 1386, subd. 1, of the Civil Code, but that section 1394, Civil Code, applied to the facts of this case, would exclude Mrs. Thompson from participating in the distribution of the land which had once been the separate property of her stepfather. That section is as follows:

"Kindred of the half blood inherit equally with those of the whole blood in the same de-

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gree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

We cannot see how the section quoted above can possibly have any sort of application to the facts of the proceeding at bar. While the appellant and respondent are, as to each other, kindred of the half blood, their mother was, as to both of them, of the whole blood. Some effort has been expended by counsel for appellant to convince us that, in contemplation of law, John McKenna was the "ancestor" of his wife, and that, inasmuch as the respondent here was not of his blood, she may not take any of the property which was his separate estate when he married. But even that interpretation would not make Mrs. Thompson of the half blood of her mother and bring her under the provisions of section 1394. As was said by this court in the opinion In re Pearsons, 110 Cal. 526, 42 Pac. 961:

> "Our Code has no allusion to 'the blood of the first purchaser,' and makes no attempt at any distinction founded upon the sources from which the estate of a decedent may have been derived—except in the single instance of kindred of the 'half blood.'"

[2] But eliminating all question of appellant's asserted right by inheritance to property which had once been the separate estate of his father, he knew when he took his appeal that the court of last resort had finally sustained a solemn adjudication that his mother, long after his father's death, had acquired title to the property by prescription, even if the deed had not been effective. The very question presented upon this appeal —namely, the unqualified title to this real property in his mother's estate—had been finally determined. In spite of that knowledge, he took this frivolous appeal.

Let the judgment be affirmed, with a penalty of $50 to be paid by appellant to respondent.

We concur: LORIGAN, J.; HENSHAW, J.

(168 Cal. 336)

BROWN v. NATIONAL ELECTRIC WORKS. (L. A. 3210.)

(Supreme Court of California. Sept. 29, 1914.)

1. MASTER AND SERVANT (§ 20*)—CONTRACT FOR EMPLOYMENT—DURATION—REASONABLE TIME.

Where a contract to employ plaintiff on his purchase of stock in defendant corporation fixed no time during which the employment was to continue, a reasonable time was implied, and the discharge of plaintiff without good cause after three months' employment amounted to a breach of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 19; Dec. Dig. § 20.*]

2. CORPORATIONS (§ 80*)—SUBSCRIPTIONS TO STOCK — RESCISSION — PARTIAL FAILURE OF CONSIDERATION.

Where a corporation agreed to sell stock to plaintiff and to give him employment, and plaintiff paid the par value of the stock, the breach of a contract by the discharge of the plaintiff without good cause entitled him to rescind and recover the amount paid for the stock under Civ. Code, § 1689, subd. 2, permitting rescission when the consideration, through the fault of the opposite party, fails in whole or in part.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 382–387, 395; Dec. Dig. § 80.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Eltinge T. Brown against the National Electric Works. Judgment for the defendant, and plaintiff appeals. Reversed.

Flint, Gray & Barber, of Los Angeles, and Rupert B. Turnbull, of Pasadena, for appellant. Geo. W. Dryer and W. T. McNeely, both of Los Angeles, for respondent.

SHAW, J. This is an appeal on the judgment roll, by the plaintiff, from a judgment in favor of the defendant. The action was to recover the sum of $5,000, paid by plaintiff to the defendant in consideration of certain shares of its capital stock and of the agreement by the defendant to employ the plaintiff. The plaintiff claims that the contract was broken and that because of the breach he rescinded the same. The decision of the case depends upon the facts stated in the findings. In January, 1911, plaintiff and defendant made an agreement whereby the defendant agreed to sell to plaintiff 5,000 shares of its capital stock and to employ the plaintiff in its business at a salary of $125 per month, in consideration whereof the plaintiff agreed to purchase the said stock and to enter upon said employment and to pay the defendant the sum of $5,000, the same being the par value of the stock. In pursuance of this agreement the plaintiff purchased the stock, paid the $5,000 therefor, and entered upon the employment of the defendant at the salary of $125 a month. He was retained in the service of the defendant for a little over three months, and was then discharged without cause. Thereupon the plaintiff gave notice to the defendant that he rescinded the agreement and returned the certificate of stock, at the same time demanding repayment of the said sum of $5,000, but the defendant refused to pay the same, and refused to consider the contract rescinded. No fraud is alleged in the making of this agreement or in the breach thereof, and there is no finding of fraud. Upon these facts the trial court concluded that the plaintiff was not entitled to rescind the contract and that his only remedy was an action for damages for breach of the contract of employment. Upon this theory judgment was given for the defendant.

[1] Although the contract did not fix any period of time during which the defendant was to keep the plaintiff in its service it is well established that under such circumstances there is an implied agreement to con-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tinue the employment for a reasonable time, and that the contract is broken if the employé is discharged without good cause. Pierce v. Tennessee, etc., Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; Harrington v. Kansas City, etc., Co., 60 Mo. App. 223; Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (N. S.) 579; Brown v. Crown, etc., Co., 150 Cal. 385, 89 Pac. 86.

[2] The agreement to employ the defendant was a material part of the consideration for which he paid the $5,000. When this part of the agreement was broken the plaintiff became entitled to rescind the contract and demand a return of the money paid. Section 1689 of the Civil Code provides that a party to a contract may rescind the same:

> "2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part.
>
> "3. If such consideration becomes entirely void from any cause.
>
> "4. If such consideration, before it is rendered to him, fails in a material respect, from any cause."

The discharge of the plaintiff, without cause, by the defendant, before the reasonable time had elapsed which the contract contemplated, and in the absence of any circumstances showing good reason for the discontinuance of the employment, was a breach of the contract, and it amounted to a failure of the consideration thereof in a substantial part. This brings the case within the provisions of subdivision 2 above quoted. Plaintiff had a clear right to rescind, he availed himself of that right by giving the required notice and returning the consideration, and thereupon he became entitled to recover the money he paid upon the contract. The court erred in holding that the plaintiff's sole remedy was an action for damages.

The judgment is reversed.

We concur: LORIGAN, J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.

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168 Cal. 346

BAKER v. BAKER. (L. A. 3351.)

(Supreme Court of California. Sept. 30, 1914. Rehearing Denied Oct. 30, 1914.)

1. Divorce (§ 31*)—Nonsupport—Evidence.

A divorce on the ground of nonsupport was properly refused, where the evidence showed that plaintiff had an annual income from her property which was amply sufficient to support her; that her husband's resources and earning capacity were not great; and that she not only had failed to ask him for assistance, but had not expected him to contribute to her support during their separation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.*]

2. Divorce (§ 147*)—Desertion—Offer to Return—Good Faith—Sufficiency of Evidence—Submission to Jury.

Evidence, in a divorce action, *held* to authorize submitting to the jury whether defendant acted in sufficient good faith in offering to return, to bring himself within Civ. Code, § 102, providing that where one spouse, after deserting the other, offers in good faith to fulfill the marriage contract and solicit condonation, the desertion is cured.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 489–492, 493; Dec. Dig. § 147.*]

3. Divorce (§ 184*)—Review—Harmless Error—Immaterial Findings.

Where, in an action for divorce on the ground of nonsupport, the court found that plaintiff's income from her own property precluded her from relying on such ground, findings regarding defendant's resources and earning capacity, if erroneous because not authorized by the evidence, were harmless.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570–573; Dec. Dig. § 184.*]

4. Appeal and Error (§ 1078*)—Presentation for Review—Failure to Urge Objection.

Objections to the rulings on evidence will not be considered on appeal, where no argument relative thereto is presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

Department 2. Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action for divorce by Emma G. Baker against Milton M. Baker. From judgment for defendant and denial of new trial, plaintiff appeals. Affirmed.

E. B. Coil, of Los Angeles, for appellant. M. J. Rogers, of Ventura, for respondent.

MELVIN, J. Plaintiff sued for a divorce from her husband upon the grounds of willful desertion and willful neglect, alleging, as causes for divorce upon the latter ground failure to provide plaintiff with the common necessaries of life, defendant having the ability so to do, and omission to do so by reason of idleness, profligacy, and dissipation. The cause was duly tried upon issues joined, and the court denied the divorce. The findings in substance were that plaintiff possessed property in her own right, having a value of more than $40,000; that the income therefrom was more than sufficient to provide her and her children with the common necessaries of life; that she had received from said property a return of more than $3,000 per year net of all expenses; that certain crops planted by defendant and assigned to plaintiff by an agreement between the parties had yielded plaintiff more than $2,500; that defendant was not guilty of failure to provide plaintiff with the common necessaries of life by reason of idleness, profligacy, and dissipation; that he had never been idle, profligate, or dissipated; that defendant had not failed to provide plaintiff and her children with the common necessaries of life as alleged in the complaint; and that (to quote from the findings themselves):

"Said defendant did on or about the 9th day of August, 1909, voluntarily separate himself from said plaintiff with the intent to desert said plaintiff; that said separation was not against the will of said plaintiff or without her consent; that thereafter, to wit, during the month of August, 1909, said defendant returned to said plaintiff and offered in good faith to fulfill the marriage contract and solicited condonation; that said plaintiff did then and there refuse, and at all times since has continued to refuse, such offer and condonation; that said separation was at all times since the month of August, 1909, with the consent of plaintiff and against the will of defendant; that defendant has at all times since the month of August, 1909, been ready and willing to live with said plaintiff in the relation of husband and wife, all of which said plaintiff has well known; that said plaintiff has at all times since the month of August, 1909, refused to live with this defendant, and refused to permit this defendant to return to or reside with said plaintiff."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There were also findings that defendant was possessed of property worth no more than $500; that he was dependent upon his own labor for support; that he was not physically strong; and that he had been under the care of a physician part of the time between August, 1909, and the date of trial, but that he was ready to devote his work and earnings to his wife and children if she would resume marital relations with him. A decree, in consonance with these findings, was entered. From the judgment and from an order denying her motion for a new trial, plaintiff appeals.

There is no attack upon that part of the judgment based upon the finding that defendant was not idle or dissolute, so that may be eliminated from consideration.

[1] Appellant's principal contention is that the evidence does not support the finding with reference to the income derived by plaintiff from her sepaarte property; yet it is conceded that Mrs. Baker owns real and personal property of the value of more than $40,000. Her counsel contend that the rule announced in such cases as Washburn v. Washburn, 9 Cal. 476, and Rycraft v. Rycraft, 42 Cal. 445, is harsh and cruel and should be declared no longer of any force or effect. Both of those cases depended upon the rule that, where the earnings of the wife, being community property, are sufficient for her support, she may not secure a divorce upon the ground of failure on her husband's part to provide her with the common necessaries of life, where the evidence merely shows that he has ability to earn wages, but that he has never interfered with her earnings or other income. This case is more strongly in favor of defendant than either of the two just cited, because here it was shown that the plaintiff was wealthy in her own right, while the earning capacity of the husband was not great, and that she had not asked for assistance from him, during their separation, although he had told her that he was willing to aid her or the children. Without reviewing the testimony in detail, it is sufficient to say that it amply supports the finding with reference to the yearly income from the property of plaintiff. During the time that her property thus yields her an ample return, she has no cause of action for nonsupport. Every natural inference to be drawn from the facts shown in evidence supports the conclusion that plaintiff did not expect the defendant to contribute to her support during their separation. Johnston v. Johnston, 17 Cal. App. 245, 119 Pac. 403. The court's power to refuse a divorce upon the ground of nonsupport, where the complaining spouse has an income from separate property, is somewhat analogous to the authority to relieve a party to an action for divorce from the payment of alimony where it is not necessary, because of her wealth, for the divorced wife's maintenance. The propriety of such relief, upon proper showing, has been declared. Soule v. Soule, 4 Cal. App. 98, 87 Pac. 205.

[2] It is undisputed that defendant went away from home in August, 1909, after a quarrel with his wife over the conduct of her son by a former marriage. From all accounts of the misunderstanding, Mr. Baker was in the wrong, and his conduct in departing was childish. Appellant's counsel contends that the finding of the court to the effect that he repented of his hasty action and sought in good faith to become reconciled to his wife is without support in the evidence. While there are some conflicts in the testimony, there is ample basis for the finding which is attacked. It is in evidence without contradiction that, very shortly after he left his wife, Mr. Baker sought and obtained an interview with her at the office of his attorney. Her legal adviser was there also. According to defendant's testimony, after some talk of a possible reconciliation in the presence of the lawyers, those gentlemen went from the room, leaving the husband and wife to "talk it over alone." Defendant, according to his testimony, then went to her, told her he was sorry for the past, and asked her, for the sake of themselves and the children, to become reconciled to him. Her answer was, "Give me a bill of sale of everything, and then I will talk with you." He met this condition and then went to her home, and again asked for a reconciliation, but it was refused. Plaintiff denied that on the visit to her home her husband asked her to resume marital relations, but she did not deny that, at the office of his attorney, he repeatedly asked for a reconciliation, merely saying to questions upon that subject that she could not say he asked for pardon and a re-establishment of the former relations "in good faith." About two months after his interview with Mrs. Baker at her home, Mr. Baker sent her a birthday gift, which she refused to accept. It was for the trial court, having the opportunity to observe the witnesses, to determine from such evidence what had been done by the defendant, and whether or not he had acted in good faith, thus bringing himself within the provisions of section 102 of the Civil Code. We cannot disturb a finding based upon such

evidence. Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322.

[3] It is insisted that the sixth and last finding is without support. This finding was that the allegations in two certain paragraphs of the answer were true. In one of the said paragraphs it was alleged that defendant's property did not exceed $500 in value; that he depended on his personal exertions as a laborer for his support; that he was not a strong man; and that he had suffered from incapacitating illness during a part of the period of separation from his wife. In view of the findings regarding the plaintiff's means of self-maintenance, it is unnecessary to examine the testimony to see if it supports all of these allegations. It was shown that defendant was possessed of limited means, and that he had been working for wages. It was immaterial whether he had been ill part of the time or not. Failure to find on immaterial matters is not a cause for reversal of a judgment. Zihn v. Zihn, 153 Cal. 410, 95 Pac. 868. There was evidence to support that part of the finding based upon the allegation that defendant was willing to give his best endeavors to support his wife and children if she would return to him.

[4] Objections were made to certain rulings with reference to the rejection and admission of testimony, but, as we are favored with no argument upon them, we will not consider them. Gray v. Walker, 157 Cal. 386, 108 Pac. 278; Pigeon v. Fuller, 156 Cal. 702, 105 Pac. 976.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 364

HARPOLD v. SLOCUM et al. (L. A. 3703.)

(Supreme Court of California. Sept. 30, 1914.)

1. Appeal and Error (§ 607*) — Record — Preparation—Undertaking for Costs.

Under Code Civ. Proc. § 953a, providing that in lieu of preparing and settling a bill of exceptions an appellant may file with the clerk a notice requesting that a transcript of the testimony, etc., be made up and prepared, and section 953b, providing that at the time such notice is filed with the clerk the appellant shall file an undertaking to pay the costs of preparing such transcript, the clerk was justified in disregarding a request to have such a transcript prepared where no undertaking was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665–2672; Dec. Dig. § 607.*]

2. Appeal and Error (§ 612*) — Record — Form—Necessity of Printing.

Under Code Civ. Proc. § 953a, relative to the preparation of a transcript of the testimony, etc., by the stenographic reporter in lieu of a bill of exceptions upon request of appellant, and section 953c, providing that where the appellant elects to avail himself of the preceding sections it shall be the duty of the clerk of the court to transmit the record so prepared, and that such record shall be filed with the clerk of the court, to which the appeal is taken, and no transcript thereof need be printed, the appellant cannot elect to avail himself of section 953a to avoid printing the record, where he does not want a bill of exceptions nor anything in lieu of one, and there is a technical judgment roll which he may print in the ordinary manner; and hence, on an appeal upon the judgment roll alone, he cannot avoid printing the record as required by the rules of the Supreme Court, by giving the clerk notice to have the judgment roll prepared as a typewritten record by the stenographic reporter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. § 612.*]

3. Appeal and Error (§ 627*) — Record — Correction.

Where, after giving notice to the clerk to have a transcript prepared pursuant to Code Civ. Proc. § 953a, which the clerk disregarded because of the failure to file an undertaking, appellant proceeded under the old method of preparing transcripts by proposing a statement of the case on motion for a new trial, and after its denial procured a typewritten copy of the papers constituting the judgment roll and of such statement and of the order denying the motion, and procured the judge to certify to the correctness of the statement, and of the order, thereupon filing a typewritten transcript consisting of a single copy as though the transcript were prepared under section 953a, but it appeared that he acted in good faith and without unreasonable delay in filing what he apparently believed to be a sufficient transcript, he would be allowed to thereafter file printed copies of the transcript as required by the rules of court instead of dismissing the appeal, as the language of section 953a et seq. is obscure and frequently misunderstood, and the form of transcripts, except as there prescribed, being wholly within the control of the court, great liberality to avoid dismissals of appeals that may be meritorious should be indulged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744–2749, 3126; Dec. Dig. § 627.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by C. Harpold against Thomas A. Slocum and another. Judgment for plaintiff, and defendants appealed to the District Court of Appeal for the Second District, from which the cause was transferred to the Supreme Court. On motion to dismiss appeal. Motion denied.

B. P. Welch and J. R. Jaffray, both of Los Angeles, for appellants. Thos. O. Toland and Cedric E. Johnson, both of Los Angeles, for respondent.

SHAW, J. This case is within the appellate jurisdiction of the District Court of Appeal. Appeals were regularly taken to the District Court of Appeal of the Second District by the defendants from the judgment and from an order refusing a new trial. Thereafter a document was filed in that court purporting to be a transcript on appeal and which the appellants claim is sufficient in that respect. Upon motion of the respondent the district court dismissed the appeal, holding that the document so filed did not constitute a transcript on appeal, and that no sufficient transcript had been filed within the time prescribed by the rules of this court. Upon petition this decision was set aside and the cause was transferred to the Supreme Court for further consideration.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The appellants filed a typewritten transcript consisting of a single copy and without serving a copy thereof upon the respondent. They claim the right to proceed in this manner under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure. The facts concerning the matter and pertaining to this question are as follows: The judgment was rendered on March 3, 1913, and entered on March 5, 1913. Within ten days after the entry of judgment the defendants filed a notice with the clerk requesting the preparation of a transcript as provided in section 953a, but they did not file any undertaking to pay the costs thereof as provided in section 953b. The clerk paid no further attention to this notice and did not require the stenographic reporter to make a transcript of the record in accordance with the provisions of section 953a. Thereupon the defendants proceeded under the old method of preparing transcripts, by proposing a statement of the case on motion for a new trial. This statement was duly settled by the judge of the court below, and thereupon a motion for new trial was made and submitted to that court, and the same was denied. Upon the denial of this motion the defendants again filed with the clerk a request for the preparation of a transcript after the manner provided in 953a, but again failed to file any undertaking to pay the costs of such transcript, and again the clerk refused to require the reporter to make the same. Thereafter the defendants procured from the reporter a typewritten copy of the papers constituting the judgment roll under the provisions of section 670 of the Code of Civil Procedure and also of the above-mentioned statement of the case on motion for new trial and a copy of the order denying the said motion and of their notice of appeal. They also procured the judge of the superior court to certify to the correctness of the copy of the statement on motion for new trial and of the order denying said motion. These copies are those which they have filed as the transcript on appeal.

[1, 2] It will be observed that there was no effectual attempt to proceed under the provisions of section 953a. The clerk appears to have disregarded the request to have the transcript prepared, and, in view of the failure of the defendants to file any undertaking to pay the costs thereof, we cannot say that he was not justified in so doing. No stenographic report of the trial or of the papers mentioned in the notice to the clerk was ever made or presented to the judge for his approval, or settled by him as that section requires. In determining the scope of these three sections they must be considered together. Section 953c declares that, where "the appellant elects to avail himself of the provisions of the three (two?) preceding sections," the record prepared according to those provisions shall be filed in the appellate court, and that in these cases, that is, where the appellant has so elected, "no transcript thereof need be printed," meaning thereby no transcript of such record. Section 953a makes elaborate provisions for the preparation of a reporter's transcript in lieu of a bill of exceptions, as a part of the judgment roll, and for supplementing it with such other papers as may be necessary to present the points on appeal in cases for which there is no technical judgment roll. This comprises its entire object, purpose, and scope. This being so, the appellant cannot "elect to avail himself of" the section for other purposes, as to avoid printing under the rules; he cannot use it where he does not want a bill of exceptions, nor anything in lieu of one, and there is a technical judgment roll which he may print in the ordinary manner. In such a case the section serves no purpose and has no application. Inasmuch as the provision that the transcript need not be printed applies only where the applicant has availed himself of section 953a, and the latter section relates and applies only to cases where a reporter's transcript is prepared and settled, it follows that in cases where there is no substitute for the bill or reporter's transcript prepared, under that section, there is no statutory exemption from the necessity of printing the transcript, and the rules of the Supreme Court on the subject must prevail. The appellant did not follow section 953a, and therefore he must print the transcript and serve and file copies thereof in the manner provided by those rules.

It appears to be the theory of the appellant that these sections permit the filing of a typewritten record on appeal in all cases, including appeals from the judgment upon the judgment roll alone, meaning by that term the papers constituting the judgment roll as specified in section 670, Code of Civil Procedure. The foregoing analysis of the sections shows that this is not the case and that they have no application to such appeals. The appellant cannot avoid the rule requiring the record upon an appeal from the judgment roll alone to be printed, by giving the clerk a notice, purporting to be within the terms of section 953a, to have the judgment roll prepared as a typewritten record by the stenographic reporter. Section 953a does not apply to such a case. The case of Knoch v. Haizlip, 163 Cal. 20, 124 Pac. 997, is not contrary to this view. That case was not an appeal upon the judgment roll alone. It was the ordinary case of an appeal from the judgment and from an order denying a new trial presented upon a single transcript or record and requiring a review of the proceedings on the trial. The remark in the opinion that these sections may permit the use of a typewritten judgment roll has no necessary application to an appeal upon the judgment roll alone. The question here considered was not there involved.

[3] It does not follow, however, that the appeal must be dismissed. The provisions of the sections mentioned have been the subject of much doubt; the language is obscure and has been frequently misunderstood. Until their meaning becomes well settled by decisions of the court, the better policy is to indulge in great liberality to avoid dismissals of appeals that may be meritorious. The form of transcripts, except as there prescribed, is wholly within the control of this court and is fixed by its rules. Where they have not been strictly followed, the court may, and often does, upon a sufficient showing, relieve a party from his default and allow a proper transcript to be filed. Good faith appears and there was no unreasonable delay in filing the document which was apparently believed to be a sufficient transcript. We think a sufficient excuse for the failure appears and that the ends of justice will be subserved by allowing the appellants to file printed copies of the transcript as provided by the rules of this court.

The motion to dismiss the appeal is denied, and the appellants are allowed 40 days from this time within which to serve and file printed copies of the transcript on appeal as provided in rules 2 and 7 of this court (119 Pac. ix, xi).

We concur: HENSHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

168 Cal. 334

FISKE et al. v. GOSBEY, Judge.

(S. F. 6845.)

(Supreme Court of California. Sept. 29, 1914.)

1. Appeal and Error (§ 607*)—Record—Transcript — Preparation — Notice to Clerk—Time.

Code Civ. Proc. § 953a, provides that notice shall be filed with the clerk, stating the party's desire or intention to appeal from a judgment or their appeal therefrom, and requesting a transcript within 10 days after notice of the entry of the judgment, order, or decree appealed from. *Held*, that the filing of a notice of appeal from a judgment or order is conclusive evidence that the appellant knew of the judgment or order and its contents at the time of filing the notice, and hence the time for giving the notice to the clerk begins to run at that time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665–2672; Dec. Dig. § 607.*]

2. Appeal and Error (§ 607*)—Record—Transcript — Preparation — Notice to Clerk—Time.

Written notice of the entry of a judgment or order appealed from is not necessary to start running the time for filing the notice to the clerk of an intention to appeal and a request for a transcript provided by Code Civ. Proc. § 953a.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665–2672; Dec. Dig. § 607.*]

3. Appeal and Error (§ 607*)—Record—Transcript — Preparation — Time — Notice to Clerk.

Failure of an appellant to give notice to the clerk of his intention to appeal and request for a transcript within the time fixed by Code Civ. Proc. § 953a, deprives the appellant of the right to proceed with the preparation of his transcript in the manner prescribed by such section.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665–2672; Dec. Dig. § 607.*]

4. Appeal and Error (§ 607*)—Record—Transcript — Preparation — Notice to Clerk—Omission—Relief.

Relief from a failure to give notice of a party's intention to appeal from a judgment or order from the clerk and request for a transcript within the time specified by Code Civ. Proc. § 953a, can only be accorded, if at all, by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2665–2672; Dec. Dig. § 607.*]

In Bank. Petition for mandamus by M. F. Fiske and others against P. F. Gosbey, Judge of the Superior Court of Santa Clara county. Application denied.

Henry French, of San Jose, for petitioners.
C. C. Coolidge, of San Jose, for respondent.

PER CURIAM. This is an application on the part of petitioners for a writ of mandate requiring the respondent to settle, allow, and properly certify a transcript on appeal attempted to be prepared under the provisions of section 953a of the Code of Civil Procedure, for use on an appeal from a judgment of dismissal of an action brought by one Lorenzo Fellers v. Monterey Coal Co. et al., given and made by the clerk of said superior court of Santa Clara county on the 22d day of August, 1910, in compliance with the directions of the plaintiff therein.

The appeal was taken by these petitioners on the 21st day of February, 1911; they on that date filing with the clerk of the superior court a notice of said appeal.

No notice was filed with said clerk by petitioners stating their desire or intention to appeal from said judgment or their appeal therefrom, and requesting that a transcript be made and prepared, as required by the express provisions of 953a, until the 28th day of March, 1911. Said section in terms requires that such notice must be filed within ten days after notice of the entry of judgment, order, or decree appealed from.

The transcript which the judge was requested to settle and certify contains many matters which would have no place in a judgment roll, including affidavits, notices of motion, an order of substitution of attorneys, etc. As is shown by the petition for a writ of mandate herein, what respondents seek to have reviewed on their appeal are certain matters that would not be shown by any judgment roll; their real complaint being against certain orders of the court made prior to the judgment of dismissal, namely, an order refusing to substitute M. F. Fiske as a party plaintiff in the action in place of Lorenzo Fellers, and an order allowing a substitution of another attorney by the plaintiff Fellers in place of Henry French, the original attorney of record for the plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] As we have said, section 953a requires that the notice to the clerk referred to therein must be filed within ten days after notice of entry of the judgment, order, or decree appealed from. It was held in Estate of Keating, 158 Cal. at page 113, 110 Pac. at page 111, that the filing of a notice of appeal from a judgment or order is, of course, conclusive evidence that the appellant knew of said judgment or order, and its contents, at the time of the filing of said notice, and that this fixed the beginning of the time to give said notice to the clerk, in the absence of anything to show that he had notice thereof theretofore.

[2] It is explicitly declared that a written notice of the entry of the judgment or order is not necessary to start running the time for filing said notice to the clerk, when the appellant has actual knowledge thereof.

[3] It was further held in that case, by failing to give such notice within the time fixed by law, the appellant loses his right to proceed with the preparation of his transcript on appeal in the manner provided by section 953a.

[4] It was also held that "relief from the failure to give notice to the clerk, under section 953a, if it can be given at all, must be sought in the lower court."

We are of the opinion that, regardless of all other points made against the granting of a writ of mandate in this case, the ruling in Estate of Keating, supra, necessarily precludes the granting of the relief sought.

The application for a writ of mandate is denied.

168 Cal. 330

In re WEIR'S ESTATE.

WEIR v. SEILER.

(L. A. 3644.)

(Supreme Court of California. Sept. 29, 1914.)

1. Executors and Administrators (§ 245*)—Claims—Contest—Elements of Claim—Value—Issues.

An allegation of objections to a claim against a decedent's estate, that the claim was not a proper or legal claim against the estate, in the absence of a demurrer or any other objection, was sufficient to put in issue the value of the various elements of the claim filed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 867–869; Dec. Dig. § 245.*]

2. Appeal and Error (§ 930*)—General and Special Verdicts—Evidence.

Where general and special verdicts are in harmony on the amount awarded, and no motion was made to strike out the special findings as unsupported by the evidence, the appellate court must assume that they were supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755–3761; Dec. Dig. § 930.*]

3. Executors and Administrators (§ 254*)—Disputed Claims—General and Special Verdicts—Consistency.

Claimant demanded $1,305.68 against decedent's estate made up of three items, $600 for board and lodging for two years, $480 for nursing, sewing, and mending for the same period, and $225.68 for goods, money, material, and labor furnished. The jury found a general verdict in claimant's favor for $765.68 and by a special verdict found that the board and lodging was worth $12.50 a month and the nursing and mending $10 a month, and goods, materials, etc., furnished $117.95, and work and labor $107.73. *Held*, that the general and special verdicts were not inconsistent, and that the court erred in granting claimant's motion for judgment for the full amount claimed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 906; Dec. Dig. § 254.*]

4. Executors and Administrators (§ 256*)—Disputed Claims—Review.

Where, on a motion for judgment on a special verdict for the full amount of a claim against decedent's estate for board and lodging furnished decedent, etc., it was stipulated that the matters to be considered on the motion were the claim, the contest thereto, the general verdict, and the special verdict, an objection on appeal that there was no evidence introduced by contestant to show the value of the services rendered and the board and lodging furnished could not be considered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 850–856, 860–863, 910–919; Dec. Dig. § 256.*]

5. Appeal and Error (§ 719*)—Review—Assignments of Error—Costs.

In the absence of an assignment of error with reference to the taxation of costs, an objection that the bill of costs was not served and filed within five days after verdict as required by Code Civ. Proc. § 1033, could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. § 719.*]

Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Claim by John Seiler against the estate of John Weir, deceased. From a judgment in favor of claimant, contestant Peter Weir appeals. Modified and affirmed.

Lamy & Putnam, of San Luis Obispo, for appellant. Alex Webster, of Paso Robles, and A. E. Campbell, of San Luis Obispo, for respondent.

MELVIN, J. John Seiler filed a claim for $1,305.68 against the estate of John Weir, deceased. The items were $600, board and lodging for two years; $480 for nursing, sewing, and mending for a like period; and $225.68

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for goods, money, material, and labor furnished. The claim was allowed by the administrator of John Weir's estate and approved by the judge of the probate court. Peter Weir, a brother of the decedent, filed a contest which was tried according to the provisions of section 1636, Code of Civil Procedure. The questions of fact were presented to a jury and general and special verdicts were returned. The general verdict was in favor of the claimant, John Seiler, for $765.68. By the special verdict the jury answered "Yes" to four questions by which the jurors were required to determine whether or not the claimant had furnished the sort of service, material, etc., demanded by him. To questions regarding the value of the things for which payment was demanded the jury found that the board and lodging for two years was worth $12.50 per month; nursing and mending $10 per month; goods, materials, money, and merchandise, $117.95; work and labor, $107.73. The aggregate of these items is $765.68, the amount of the general verdict. The court received and filed the verdicts and caused them to be entered upon the minutes of the court; but it appearing to the court that the special verdict was inconsistent with the general verdict, and that upon the special verdict John Seiler was entitled to judgment for the full amount demanded, such a judgment was entered for $1,305.68, together with costs and disbursements to the amount of $133.30. The judgment was entered some days after the trial and reception of the verdicts and after motion of the claimant's counsel for such a judgment, which, by stipulation, was heard "only upon the record consisting of said Seiler's claim, the contest thereto, the general verdict, and the special verdict." This appeal is from the order granting said motion and from the judgment.

It is apparent that the inconsistency between the general and special verdict, asserted by the claimant's counsel and found by the court, is not one of arithmetic. Both respondent and the court evidently held the opinion that the *value* of the items of Seiler's claim was not in issue, but that their *validity* was, and that the finding that the estate owed the claimant for the services, materials, etc., for which payment was sought left the court no alternative except the entry of judgment for the amount demanded.

The only grounds of contest urged by Peter Weir were the following:

"(1) That said claim was erroneously and inadvertently allowed by said administrator and by the judge of this court.

"(2) That said claim is not a proper or legal claim against the said estate, or against decedent.

"(3) That if said alleged board and lodging, nursing, labor, and materials were, or either of them was furnished at all, the same were paid and discharged by decedent during his lifetime."

The amount, if any, due to the claimant from the estate, could not be in issue under the first or the third grounds of contest; but appellant insists that the second ground did make issuable the value of the services, advances, goods, etc., for which Seiler demanded payment. Doubtless that was the theory of both litigants and of the court at the trial. There was no demurrer to the contest. The questions framed for and answered by the jury involved the very matter which the court afterwards held not to be in issue. The form of the questions and the answers in the special verdict may be perfectly illustrated by quotation of the first two which were as follows:

"(1) Did John Seiler furnish board and lodging to John Weir for the two years ending February 13, 1912? A. Yes.

"(2) If your answer to the above question is 'yes,' then state what the value of said board and lodging was. A. $12.50 per month."

[1-3] It would be most unjust to deprive contestant of the fruits of his victory after a trial in which the value of the items of Seiler's account had been treated as issuable by every one concerned. While the allegation that the claim was not a "proper or legal claim against the said estate" is not a model of pleading, we hold that in the absence of demurrer or any other objection it was sufficient to put in issue the value of the various elements of the claim filed by Seiler. There was no motion to strike out the findings of value as not being supported by the evidence. The general and special verdicts are in harmony on the amount awarded. Therefore we must assume that they were supported by the evidence. There was no inconsistency between the verdicts, and the court erred in granting the motion on that ground. Irrgang v. Ott, 9 Cal. App. 441, 99 Pac. 528; Obersteller v. Commercial Assurance Co., 96 Cal. 647, 31 Pac. 587.

[4] In respondent's brief occurs the statement that "no evidence was introduced by contestant Weir" as to the values of the services rendered and board and lodging furnished. This is denied by appellant. Both statements must be ignored by this court in view of the stipulation of the parties to the contest regarding the matters to be considered on the motion. These were "Seiler's claim, the contest thereto, the general verdict, and the special verdict."

[5] The record shows that the bill of costs was not served and filed within five days after the verdict as required by section 1033, Code of Civil Procedure; but, as there is no assignment of error in the taxation of costs presented by the record before us, we may not review that matter.

The judgment should be modified by striking out the paragraph thereof in which the court expresses the view that the special findings are inconsistent with the general verdict and by awarding $765.68 on respondent's claim instead of $1,305.68. In other respects the judgment should stand affirmed, and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

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25 Cal. App. 323

KAISER v. HANCOCK, Judge. (Civ. 1288.)

(District Court of Appeal, Third District, California. Aug. 26, 1914.)

1. Mandamus (§ 160*)—Alternative Writ—Notice—Proof.

Under court rule 26 (119 Pac. xiv), providing that, when application is made for an alternative writ, an order staying the proceedings of any court or officer will not be made unless due notice shall have been given to all parties interested in the proceedings, an applicant for a stay of proceedings must furnish evidence that such notice has been given.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326–335; Dec. Dig. § 160.*]

2. Mandamus (§ 57*)—Acts of Judge—Discretion.

Under Code Civ. Proc. § 1176, providing that an appeal by defendant shall not stay proceedings upon the judgment unless the trial judge so directs, mandamus will not issue to compel the trial judge to grant a stay of such judgment, since that is a matter of discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114–120; Dec. Dig. § 57.*]

3. Appeal and Error (§ 479*)—Stay—Discretion of Trial Court—Abuse.

Where every issue raised by defendant's pleadings in an action to recover real property was found against him, and no special circumstances of hardship to the defendant were shown, the trial court will not be held to have abused its discretion in refusing a stay pending his appeal, since an abuse of discretion will not be presumed, but must be made clearly to appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251–2256; Dec. Dig. § 479.*]

Application by C. F. Kaiser against John Hancock, Judge of the Superior Court of the County of Calaveras, for a writ of mandate. Writ denied.

A. H. Carpenter, Walter T. Lynch, and Ben Berry, all of Stockton, for petitioner. Snyder & Snyder, of San Andreas, for respondent.

CHIPMAN, P. J. Petitioner seeks the writ of mandate directing respondent to make an order staying execution on a judgment against petitioner in a certain action wherein petitioner is defendant and Henry T. Higginbotham, as administrator of the estate of Mary G. Davis, deceased, is plaintiff.

It appears from the petition that the property involved is known as the Valley Springs Hotel and its equipment, situated in the town of Valley Springs, Calaveras county, belonging to the estate of said Mary G. Davis, deceased; that in the said action of said administrator against said Kaiser it was alleged that defendant therein was, on and prior to April 10, 1914, in possession of said property as tenant at will of said administrator; that, on said April 10, 1914, plaintiff, said administrator, terminated said tenancy by giving written notice to said defendant to remove from said premises and deliver said property to plaintiff within the period of 30 days specified in said notice, said notice having been duly served as prescribed in section 1162 of the Code of Civil Procedure; that all right of tenancy or claim of occupancy was thereby terminated on May 10, 1914; that said defendant did not, within said 30 days, or at any other time, surrender said property or any part thereof to plaintiff, but remained in possession thereof at the expiration of said 30 days and ever since said time; that, on May 11, 1910, plaintiff caused notice to be served upon defendant to deliver up possession of said property to him, said administrator, within 3 days from the service of said notice; that more than 30 days have expired since service of said first notice terminating said tenancy, and that more than 3 days have elapsed since said last referred to notice was served; that defendant has refused to deliver said property, or any part thereof, and unlawfully retains possession thereof; that, while defendant was in possession of said property as such tenant at will, the amount of rent paid by defendant for the use of said property was $50 per month, agreeably to the understanding between plaintiff and defendant, and by reason of the foregoing facts plaintiff has sustained damages in the value of said rent from May 10, 1914, to the commencement of this action; that plaintiff prayed judgment for the restitution and possession of the premises and for the amount of rental and such sum as may accrue from the filing of the complaint to date of judgment, and that said rental may be trebled, and that it be declared that said tenancy has ceased and that writ of possession forthwith issue. It further appears by the petition that, on June 11, 1914, defendant served and filed his answer and cross-complaint in said cause, and, issue being joined, said cause came on for trial before a jury, on July 12, 1914, and the jury returned a verdict in favor of plaintiff; that, on July 20, 1914, judgment for plaintiff was duly made and entered, and that, on July 29, 1914, defendant duly appealed to the District Court of Appeal from said judgment, under the alternative method; that, on July 30, 1914, defendant "moved John Hancock, as such judge of said superior court for an order staying execution upon said judgment pending the final determination of said appeal and at the same time offered a sufficient stay bond therefor," but the said judge refused to make such order. The petition was filed in this court August 13, 1914.

In the return respondent "admits that application was made to him on the 30th day of July, 1914, to fix the amount of a stay bond on appeal, and to order proceedings upon said judgment stayed during appeal, and denies that it was his plain or other duty to make such order, or that since, or at any time, has been his duty to make such order"; alleges that said action is one in unlawful detainer, and is prosecuted under the provisions of chapter 4, part 3, title 3, of the Code of Civil Procedure, designated as summary proceedings for obtaining possession of real property; that section 1176 of said Code provides, "An appeal taken by the defendant shall not stay proceedings upon the judgment unless the judge or justice before whom the same was rendered so directs," and that the judge before whom said judgment was rendered refused to direct that proceedings upon said judgment be stayed, and has never at any time directed that such proceedings be stayed, "and that respondent acted legally and rightfully in refusing to stay proceedings upon said judgment." It further appears by the return, and is not denied: That no copy of notice of appeal has been served upon plaintiff in said action; that no notice of intention to move for a new trial has ever been served or filed, "and no proceedings whatever have been taken by or on behalf of petitioner for a new trial of said action," or for the settlement of a bill of exceptions in said action, or towards proposing a bill of exceptions or statement of any kind, and petitioner has taken no steps toward having the testimony taken at the trial of said action written up; that petitioner states in his petition that said appeal has been taken under the alternative method, but respondent says that petitioner has never filed with the clerk a notice stating that he desires or intends to appeal, or has appealed, and requesting that a transcript of the testimony offered or taken in the same, the rulings, instructions, acts, or statements of the court, and objections and exceptions of counsel, be made up or prepared, or any notice containing any of said statements; that "he has not filed or given the notice required by section 953a of the Code of Civil Procedure, or taken any proceedings in said court under the provisions of said section; that he has filed no other notice in said matter, other than the so-called notice of appeal which is hereto attached and marked Exhibit L"; that no stipulation has ever been entered into, and no order of any kind made, extending the time for proposing, filing, or settling a bill of exceptions or statement, or giving or filing said notice required by section 953a of the said Code, and "respondent alleges that the time for taking any such proceedings has long since elapsed; and that, if said [appeal] has any virtue, it is only as an appeal from the judgment on the judgment roll, and respondent avers that there is no reasonable or probable cause for said appeal." The return then sets out copies of all the papers constituting the judgment roll in said action, certified by the clerk of the court, and also the certificate of the clerk "relating to the manner in which said appeal was attempted to be taken and of other facts in this answer." Respondent avers that "he rightfully and justly exercised the authority reposed in him by the statute in refusing to order proceedings on said judgment stayed during appeal," and he suggests that, if it was within his discretion, it was an appropriate exercise of that discretion to refuse to grant such writ. "Respondent further avers that he had no notice of any kind of the application or petition herein until served with the alternative writ herein."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Before going into the merits of the application we wish to call attention to paragraph 4, rule 26 (119 Pac. xiv):

> "When an application is made for an alternative writ, an order staying the proceedings of any court or officer, until the return of the writ, will not be made unless due notice of the application for the writ shall have been given to all the parties interested in the proceedings."

Respondent, in his return, states that he had no notice of the application for the alternative writ. Attention of petitioner's attorney, Mr. Lynch, was called to this rule when the alternative writ was applied for, and, while there was no evidence of any notice having been given the judge or the attorneys in the pending action, we were assured that verbal notice was in fact given of an intention to apply for the writ and that the parties expressed willingness that it should be made. We have no reason to doubt the good faith of Mr. Lynch in the matter. The incident furnishes occasion for calling attention to the rule and for our saying that in the future it will be strictly adhered to. Parties applying for alternative writs, in which an order is requested staying the proceedings of any court or officer until the return of the writ, must furnish evidence that notice has been given to all parties interested that such application will be made, in order that such parties may have an opportunity to oppose the issuing of the alternative writ to be applied for. The wisdom and justice of the rule are obvious, for often the lack of merit in the application may be disclosed at the hearing of the application, and injury which might ensue by the issuing of a restraining order be thus averted.

[2] Section 1176 of the Code of Civil Procedure has been under review in several cases before the Supreme Court, among them the following: McDonald v. Hanlon, 71 Cal. 535, 12 Pac. 515; Gross v. Kelleher, 73 Cal. 639, 15 Pac. 362; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048; Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Sarthou v. Reese, 151 Cal. 96, 90 Pac. 187; and also in Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014. Some of these cases were applications for supersedeas. But supersedeas is merely an ancillary process designated to supersede the enforcement of the judgment of the court below, and the writ of mandate

here sought is to accomplish the same result. It was held, in Plummer v. Agoure, supra:

> "While the action of the trial judge in refusing to direct a stay of proceedings is subject to review on appeal, and such order will be reversed for an abuse of discretion in making the ruling, it cannot be reviewed upon an application for a writ of supersedeas."

A petition for rehearing of that case was denied by the Supreme Court.

In Sarthou v. Reese, supra, the action was unlawful detainer. Defendant, in addition to denials of the matters alleged in the complaint, filed a cross-bill claiming affirmative relief, as did the defendant in the action here. The decision in the case cited and in the case here was against the defendant upon all the issues, including those in the cross-complaint, and judgment was entered for immediate restitution on the demised premises. In the case cited, defendant appealed from the judgment, as defendant has here, and the judge of the superior court before whom the action was tried refused to fix the amount of an undertaking to stay proceedings pending appeal. In the case cited, defendant petitioned the Supreme Court for a supersedeas. Said the court, by Chief Justice Beatty:

> "There can be no stay of proceedings upon an appeal from a judgment of restitution in an action of unlawful detainer unless the trial judge so directs"—citing section 1176, C. C. P.; Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048.

In Cluness v. Bowen, the court said:

> "In the absence of such direction" from the trial judge, "this court has no power to order a supersedeas" in such a case as this.

[3] If, however, as petitioner contends, the discretion given the trial judge may be controlled by mandate when abused, we fail to discover anything in the record before us showing an abuse of such discretion. It was conceded at the argument that the appeal now pending is on the judgment roll, the constituent papers of which are made part of the return. Every issue presented by defendant's answer and cross-complaint has been resolved against him, and the facts set out in plaintiff's complaint found to be true by the general verdict of the jury, crystallized in the judgment of the court. There were no special circumstances of hardship to defendant shown to the trial judge calling for the exercise of his discretion in defendant's favor, so far as we know, when a stay of execution was applied for, and none is presented here. Abuse of discretion by a judge will not be presumed; it must be made clearly to appear before his discretion will be interfered with. Viewed, then, either as a power exclusively given the trial judge, or as a power merely within his discretion, we fail to discover error in the order complained of.

The writ is denied, and the restraining order heretofore issued is dissolved.

We concur: HART, J.; BURNETT, J.

(168 Cal. 607)

CROW v. CROW. (Sac. 2105.)

(Supreme Court of California. Oct. 7, 1914. Rehearing Denied Nov. 6, 1914.)

1. Appeal and Error (§ 1009*)—Review—Findings.

Findings on conflicting evidence in equity cases will not be disturbed on appeal unless the testimony on which they are based is so inherently improbable as to constitute no evidence at all.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

2. New Trial (§ 128*) — Specifications of Error—Sufficiency.

While the ancient strictness governing the sufficiency of specifications of error on motion for new trial has relaxed, the specifications, where the sufficiency of the evidence to support the findings is attacked, must show in what particular the evidence is deficient, so that the error may be cured on subsequent trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257–262; Dec. Dig. § 128.*]

3. Appeal and Error (§ 302*)—Specifications of Error—Sufficiency.

Under Code Civ. Proc. § 659, subd. 3, providing that a party moving for a new trial must specify the particular errors relied upon, neither the trial court nor the appellate tribunal can review the sufficiency of evidence to support findings of fact where the specifications were merely general and did not show wherein the evidence was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744–1752; Dec. Dig. § 302.*]

Department 2. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Suit by Emma Jane Crow by Virginia Patchett, her guardian, against B. F. Crow. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

J. K. Johnson, of San Francisco, for appellant. Maddux & Maddux, of San Francisco, and Henry C. McPike, of Oakland, for respondent.

HENSHAW, J. This is an action to set aside a deed made by Emma J. Crow to her grandnephew B. F. Crow to 1157 acres of farm land in Stanislaus county of the admitted value of $50,000. The deed was executed on the 21st day of December, 1910. The grantor was a childless widow over 77 years of age. The grantee had been the business manager of her properties and had farmed for her on shares this particular piece of land. Close relations of trust and confidence existed between them. The complaint charged the procurement of the deed by defendant through his own fraud in which he was aided and abetted by his wife and his attorney. It is also charged that the deed was executed under a mistake of the grantor as to its true meaning and effect. Four months after the execution of the deed Emma Jane Crow was declared an incompetent, and Miss Virginia Patchett, a niece of the incompetent, with whom she had been temporarily residing, was named as her guardian. This action is prosecuted in the name of the incompetent by that guardian.

At the conclusion of the trial the court found: That Emma J. Crow executed the deed for the love and affection which she bore defendant, who was her nephew both by blood and by marriage; that the defendant had resided with Emma J. Crow and her husband from the time he was of the age of two years and was regarded by them with deep affection; that at the time of the making, execution, and delivery of the deed Emma J. Crow was desirous of conveying the land to the defendant for his better support, maintenance, protection, and livelihood, and at the time of this gift was possessed of other real and personal property of the value of upwards of $50,000; that all of her property was income-bearing, producing an income more than sufficient for her support. The findings then proceed to negative all of the allegations of fraud and deceit on the part of the defendant and ignorance and lack of understanding and misunderstanding on the part of the plaintiff, and upon these latter propositions affirmatively finds that at the time of the execution of the deed plaintiff was competent to execute it and fully appreciated and understood the nature, quality, and character of the act of conveying the real property to the defendant, and that it was her intention then and there to transfer it to the defendant, and that she had for a long time previously intended so to do.

[1] Some of the court's determinations of fact were reached under a conflict in the evidence. But throughout appellant argues the case upon equitable principles called into exercise where the facts found are the precise opposite of those here declared. Thus, to illustrate, Mrs. Crow testifies that she meant to execute a paper which would give the defendant the land upon her death but not during her lifetime. Had the court found in accordance with this testimony, the rules applied by chancellors in avoidance of acts of aged grantors would have applicability; but the finding of the court is squarely against the plaintiff's testimony in this regard. It is in effect that plaintiff understandingly and advisedly meant to do precisely what she did do. We are unable to do as appellant seemingly would have us do, treat the case as one without findings of fact. In effect, this court, under appellant's argument, is asked to sit as a chancellor and make its own findings upon the evidence favorable to her contention, when, of course, the equitable principles which she invokes would at once be applicable. Thus, if fraud were committed, it would be ground for avoidance, and we are, in effect, asked, as against the finding of the court, to declare that such fraud was committed. We are

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

likewise asked to find a lack of understanding and a consequent mistake, upon which facts being proved, an avoidance of the act of the grantor might naturally follow.

Because of the findings adverse to appellant's contention, the well-settled equitable principles announced in such cases as Richards v. Donner, 72 Cal. 211, 13 Pac. 584, Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910, and De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059, cannot avail appellant. In Richards v. Donner the deed was set aside by the trial court and this court upheld the decree. In Soberanes v. Soberanes, where, as here, the plaintiff appeared by her guardian ad litem, the trial court refused to set aside the deed, and its judgment was affirmed. In De Arellanes v. Arellanes the aged and illiterate mother sought to set aside a deed made to her son. The court's findings were against the plaintiff, and the judgment which followed those findings was here upheld, and in the course of the opinion this court felt compelled, as here it is compelled, to advert to the mistaken attitude of the appellant in regard to the evidence. This court said:

> "It should not, however, be necessary to here state that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, except, perhaps, where the testimony, in the light of the undisputed facts, is inherently so improbable and impossible of belief as to, in effect, constitute no evidence at all. See Fowden v. Pacific Coast S. S. Co., 149 Cal. 151 [86 Pac. 178]. It certainly cannot be said that defendant's testimony was of such a nature as to be placed in the category last mentioned."

Upon the second appeal in Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39, 527, the judgment of the trial court refusing to grant a new trial in favor of the plaintiff was affirmed. The language of the chief justice in his concurring opinion to the effect that if the incompetent plaintiff "had commenced the action herself, or had consented to it, or had in any way manifested a desire to set aside her conveyance, her prayer, I think, must have been granted upon the ground that the gift was of her whole estate without any reservation or power of revocation; that it was made upon the understanding that she should be supported and cared for by her donee, and that no provision or condition for her support was contained in the grant, or in any written agreement; and for the further reason that her donee occupied towards her a relation of special trust and confidence; and that she had no independent advice," is not to be construed as holding that such a result would follow if the findings of the trial court were adverse to the statement of facts therein contained. In short, as has often heretofore been pointed out, this court cannot make findings, and must accept those made by the trial court if supported by evidence. Estate of Moore, 162 Cal. 324, 122 Pac. 844. The utmost that appellant can contend against these findings is that the trial court's determination was arrived at under a conflict of evidence.

[2, 3] But there is not in the record as to most of the material findings any proper specification of objection thereto or any proper specification of error or insufficiency at all. Thus, to illustrate, the court by its findings negatived the allegations of the complaint of specific acts charged as having been done by defendant in consummation of the fraud. Thus, the court found:

> "It is not true, as stated in plaintiff's second amended complaint, that the defendant called upon the plaintiff at her place of residence on or about the 21st day of December, etc."

The specification is:

> "There is no evidence to justify the decision and finding of the court, or to prove or tending to prove, that the defendant called upon the plaintiff at her place of residence on or about the 21st day of December, etc."

Again, the complaint charged that plaintiff "signed said deed without reading it or having it read to her." The court found these and all similar allegations to be untrue in the precise words of the allegations. The specification of error is:

> "There is no evidence to justify the decision and finding of the court, or to prove or tending to prove, that plaintiff signed said deed without reading the same or having it read to her, etc."

Again the complaint charged:

> "That had plaintiff known that she was signing a deed conveying away her property when she signed the instrument she would not have signed said deed of gift."

The finding of the court is that it is not true:

> "That had plaintiff known she was signing a deed, conveying away her property she would not have signed the same."

The specification is:

> "That there is no evidence to justify the decision of the court, or to prove or tending to prove, that had the plaintiff known she was signing a deed conveying away said property at the time she signed said instrument, she would not have signed the said instrument."

The ancient strictness of the rule governing the sufficiency of specifications has by later decisions been properly much abated. Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. But nevertheless the specifications in any case must be sufficient to convey fair and correct knowledge both to the adverse party and to the trial court of the precise findings excepted to as not being sustained by the evidence, and this for the very manifest purpose that the adverse party may know what evidence by way of amendments to embody in the statement or bill and that the trial court's attention may be properly directed to these designated matters. Neither the trial court nor this court can consider the question of the sufficiency of the findings when such specifications are not made in substantial terms, for the law itself declares that unless so made they shall be disregarded on the hearing of the motion, and consequently must also be disregarded here. Code Civ. Proc. 659, subd. 3. For this additional reason, therefore, and because of this lack of adequate specification, the findings sought to be assailed are not here subject to review.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

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168 Cal. 382

WOOD v. KREPPS et al. (L. A. 3361.)

(Supreme Court of California. Oct. 1, 1914.)

1. Chattel Mortgages (§ 64*)—Validity—Memorandum of Transaction.

While St. 1909, p. 970, § 5, requires personal property brokers to give to borrowers a notice of the contents of notes and chattel mortgages taken to secure loans, and imposes a penalty for failure, the failure of a broker to give such memorandum does not invalidate a chattel mortgage and note taken to secure the loan.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 64.*]

2. Pawnbrokers (§ 4*)—Chattel Mortgages—Validity—Ordinances.

Under a municipal ordinance requiring pawnbrokers to secure a license and persons lending money upon personal property to pay a license fee, the fact that a party carried on a pawnbroking business, without the required license will not invalidate chattel mortgages taken by him for security for loans made in the business of lending money upon personal property; the two businesses being wholly distinct.

[Ed. Note.—For other cases, see Pawnbrokers, Cent. Dig. § 3; Dec. Dig. § 4.*]

3. Licenses (§ 6*)—Lending of Money upon Personal Property.

The lending of money upon chattel mortgages, and the carrying on of an habitual loan business on such security, is not contrary to public policy, and is not subject to regulation, as in the case of pawnbrokers.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

4. Pawnbrokers (§ 4*) — Failure to Pay License Tax—Effect.

Where the object of an ordinance requiring a license is to prevent improper persons from engaging in a business, the imposition of a penalty amounts to a prohibition, and a contract made by an unlicensed person is void, yet where a city imposed a license tax upon those engaged in lending money for chattel mortgages, which business was not subjected to any regulation, contracts made by one who had not procured the required license are not void; the obvious purpose of the ordinance being to raise revenue.

[Ed. Note.—For other case, see Pawnbrokers, Cent. Dig. § 3; Dec. Dig. § 4.*]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Luther B. Wood against J. E. Krepps and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Grant Jackson and Theodore Martin, both of Los Angeles, for appellants. John F. Poole, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to foreclose a chattel mortgage given as security for the payment of a promissory note for $1,000 principal, with interest at 4 per cent. per month, executed by defendants in favor of the plaintiff. The note and mortgage were executed March 7, 1910, and the mortgage was recorded the day following its execution.

The answer of the defendants set up that at the time of the execution of the note and mortgage the plaintiff was engaged in the city of Los Angeles in carrying on the business of pawnbroking and the business of loaning money for himself and others on personal security and on personal property other than carrying on the business of banking, and, as special defenses against the right of plaintiff to recover, alleged: First, that plaintiff did not at the time of the execution of the note and mortgage—March 7, 1910—nor until October, 1911, give to the defendants the memoranda or notice provided for by section 5 of an act of the Legislature defining personal property brokers and regulating their charges and business (Stats. 1909, p. 969); and, second, that plaintiff had not, at the time of the execution of said note and mortgage, procured a license, as required by an ordinance of the city of Los Angeles to authorize him to carry on the business of pawnbroking, or the business of loaning money for himself and others upon personal security and upon personal property in which he was engaged. Plaintiff moved to strike out from the answer these special defenses referred to, on the ground that they were immaterial and redundant. The court granted the motion and entered a decree of foreclosure in favor of the plaintiff. Defendants appeal from this decree, insisting that the court erred in striking out the defenses set up in their answer. This is the only point made.

[1] The theory of the defendants in alleging that plaintiff had failed to give them the memorandum or notice of the contents of the note and mortgage and other matters provided for by section 5 of the said act of 1909, at the time the note and mortgage were executed, is that such failure precluded any recovery by plaintiff. But this theory is erroneous. While the section relied on provides that when a loan such as here is made a memorandum or notice of the contents of the note and mortgage and other matters shall be given the mortgagors, it is not made by the statute essential to the validity of the transaction that this shall be done. It is a statutory duty, imposed upon the personal property broker, to be performed by him when the loan is made, but after the instrument taken as security is executed. It is a matter which does not at all enter into the contract between the parties, but is collateral to it. The statute itself provides that as a penalty for failure to give the memorandum or notice the broker shall be subjected to a fine not exceeding the specified amount. This is the only penalty which the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statute imposes. No further penalty is declared, and the contract itself is not in any manner affected by the failure to comply with this provision of the section.

[2-4] Now as to the ordinance pleaded in the answer. This ordinance, alleged to have been in force on and prior to the making of the note and mortgage, was a general license ordinance of the city of Los Angeles, which declared that it shall be unlawful for any person to commence or carry on any trade, profession, or occupation set forth in the ordinance without having first procured a license to do so; declared that the amount of such license imposed on any occupation mentioned in the ordinance shall be deemed a debt to the city, to be collected by civil action; provided that "every person, firm or corporation engaged in doing or carrying on the business of pawnbroking or the business of loaning money for himself or any other person upon personal security, upon evidences of indebtedness, assignments of salary, salary warrants or demands, or any personal property other than those carrying on the business of banking" shall pay a license of $50 per annum; and further provided that a violation of any of the provisions of the ordinance shall constitute a misdemeanor punishable by fine or imprisonment, or both.

The theory of the appellants upon this branch of the defense pleaded is that, the note and mortgage having been executed at a time when respondent was engaged in the business of a personal property broker as distinguished from that of a pawnbroker without having procured the license required by the ordinance to do so, the note and mortgage given to him were executed in violation of the law, and are void.

It is to be observed in considering this claim of appellants that while they allege in their special defenses that respondent was engaged in the business of pawnbroking and also in the business of loaning money upon personal property as a personal property broker (and the section of the ordinance just quoted fixing a license tax mentions them both), still they are there treated as separate and distinct businesses, and the transaction here involved pertains solely to the business of loaning money on personal property—the personal property brokerage business. In their answer, though not heretofore referred to, appellants set up, in connection with their pleading based on the ordinance, various regulations prescribed by it for the conduct of the business of pawnbroking and the failure of the respondent to conform to them, as well as a failure to have procured a license for carrying on the business of a personal property broker, and cite cases—notably that of Levison v. Boaz, 150 Cal 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661—where it is held that the business of pawnbroking is subject to police regulations for the benefit of the public; that it may be suppressed or licensed as a municipality sees fit; that when licensed it may be required to be conducted under rules, regulations, and restrictions; and that if conducted without a license or without conforming to the regulations imposed, contracts of pledge made in the transaction of such business are rendered void. But here we are not concerned with the business of pawnbroking or the validity of contracts made in disregard of regulations imposed by ordinance for the valid conduct of such business because the contract involved here has no relation to that business. It is one alleged to have been entered into with plaintiff while conducting the business of a personal property broker—loaning money on chattel mortgage—without a license, a legitimate business which neither called for nor was subjected to any regulation under the ordinance.

But considered even with respect to such latter business appellants insist that as the note and mortgage were executed to plaintiff while he was engaged in such business and as part of it in violation of the ordinance which forbade, under penalty, that particular business from being carried on without a license, the note and mortgage are therefore void. The position of counsel for appellants is that where a penalty is fixed in an ordinance for doing business without a license, it amounts to a prohibition against doing such business, and a contract executed in violation of such prohibition cannot be enforced. There are some authorities which sustain this position to the extreme extent which appellants claim, but it is not of general application. Whether the imposition of a penalty under a statute or ordinance is intended to be prohibitory or not is to be determined from a consideration of its nature and terms, and in determining this, certain rules have been established which are generally recognized. The general doctrine now well settled by the authorities is that when the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public or in the interest of public morals, health, or police, the imposition of the penalty amounts to a prohibition against doing the business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void. This was the rule applied in Levison v. Boaz to the pawnbroking contract there involved, and that case fairly illustrates its application. On the other hand, it is equally well settled, though it must be admitted that there are some few authorities to the contrary, that when the object of the statute or ordinance in imposing a license to conduct a harmless and legitimate business is solely for the purpose of yielding a public revenue, and not for the purpose of protection, contracts made in the course of such business are valid, notwithstanding a penalty is imposed for a failure to obtain a license to conduct it. This was the purpose—municipal revenue solely—which the municipality had in view by requiring a license for carrying on the business of loaning money on personal property or the personal property brokerage business in which plaintiff was engaged, and out of which the note and mortgage here involved arose. There is no law in this state making the business of loaning money on personal property illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. The business itself, however, is not affected. It is neither malum in se nor malum prohibitum. The ordinance does not pretend to prescribe or prohibit the business. Any one may carry it on, the only condition attached to doing so being that the person engaging in it must obtain a license. The only penalty imposed is that if he does not do so, he will not only be subject to a civil action at the instance of the city, but likewise to a penalty in a criminal proceeding for doing business without having obtained it. The carrying on of the business itself is not prohibited; it is only the carrying on of it without a license. The prohibition runs against the person engaged in it without a license, not against the business itself. The ordinance does not declare that a contract, made by any one in the conduct of the various businesses for which licenses are provided to be procured under the ordinances, shall, if a license is not obtained, be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract. The primary purpose of the ordinance is to secure revenue by the imposition of license taxes on the several occupations mentioned in it, and not to suppress or to prohibit their being carried on, and while a penalty is, as usual, imposed for failure to obtain the license, this, in the absence of any declaration of a further penalty, is the only one to which the party conducting the business without a license was intended to be subjected. The question of license is essentially one between the city and the person engaging in business within the limits of the municipality. It is not a matter in which third parties are interested. Whatever penalties are imposed upon business delinquencies are in aid of enforcing the rights of the city, and are not intended to operate further so as to defeat contracts between those engaged in business without a license and third parties, or to afford the latter an opportunity of repudiating their indebtedness or acquiring property without paying for it.

The rule just declared is supported by the weight of authority. Vermont Loan & Trust Co. v. Hoffman et al., 5 Idaho, 376, 49 Pac. 314, 37 L. R. A. 509, 95 Am. St. Rep. 186; Walker v. Baldwin & Frick et al., 103 Md. 352, 63 Atl. 362; Buckman v. Bergholz, 37 N. J. Law, 347; Toocker v. Duckworth, 107 Mo. App. 231, 80 S. W. 963; Sunflower Lumber Co. v. Turner Supply Co., 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20; Mandelbaum v. Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346; Lindsey v. Rutherford, 56 Ky. (17 B. Mon.) 245; Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215; Harris v. Runnels, 53 U. S. (12 How.) 79, 13 L. Ed. 901; Niemeyer et al. v. Wright, 75 Va. 239, 40 Am. Rep. 720; Aiken v. Blaisdell, 41 Vt. 655; Elliott on Contracts, vol. 1, § 267; Sutherland, Stat. Con. § 336.

We quote from only one of these authorities, which, however, discusses at some length the doctrine applicable in cases such as this. In Vermont Loan & Trust Co. v. Hoffman et al., cited, the action was brought to recover on certain promissory notes and to foreclose a mortgage representing a loan made by plaintiff to defendants. A statute of Idaho required a license to be procured before engaging in the business of loaning money, and declared it a misdemeanor to transact such business without having procured it. The defendants set up as a defense to the action that the loan to them was made by plaintiff while engaged in the business of loaning money without having procured such license, and that hence the transaction was in violation of the law of the state and void. In affirming the action of the trial court in sustaining a demurrer to this defense, the Supreme Court of that state said:

"From a careful study of all the authorities we think that the better class of authorities and the better reasoning leads to the conclusion that, where the prohibition is implied from a penalty imposed, as in the case at bar, the prohibition being for the protection of the public revenue, and no declaration in the statute making the prohibited act void, the doing of such act is not illegal. There is nothing in our statutes which makes it unlawful to loan money at interest. There is nothing in our statutes which says that it is unlawful to follow the business of loaning money at interest. Such business is not malum in se, nor is it malum prohibitum. Any one may conduct the business, but, under our statutes, if he does so, he must obtain the license, and if he carries on such business without paying the license tax and obtaining the license, he is guilty of a misdemeanor. The offense consists, not in doing the business, for that is not prohibited, but in failing to pay the license tax. The statute was passed, not to protect the public, not to protect the borrower, nor to prevent the loaning of money at interest, but for the purpose of raising the revenue to be derived from the license taxes to be collected from those persons who should engage in the business of loaning money at interest. * * * Take the case at bar. The respondent loaned $2,800 to the appellants. The respondent was doing the business of loaning money at interest, in violation of law, without the license. This was a fraud upon the public revenue, but was no injury to the appellants. For such failure the Legislature has said to respondent: 'You are guilty of a misdemeanor. The assessor and collector may direct suit against you, and recover the license tax imposed by statute, together with $20 damages.' The Legislature has not further said that: 'You shall not recover back any money which you may loan at interest before paying such license tax.' It is the duty of the court to construe all of our statutes which relate to the subject in question in pari materia, and ascertain what the intention of the Legislature was as to the validity of the contract in question. A careful consideration of the said statutes, of the subject-matter and object to be obtained, convinces us that it was not the intention of the Legislature that a violation of section 6983, supra, should be attended with any penalty other than those prescribed by the statutes. If the act of loaning money at interest was injurious to morals or good society or prohibited by law, we could not come to this conclusion. The Legislature may, within the limits of the Constitution, prescribe traffic regulations, and may impose upon a business a tax, and require persons intending to engage in such business to obtain, before doing so, a license; and we think the Legislature might go one step further and say that whoever should engage in any business upon which a license tax is imposed without first paying such license tax should not only be fined and imprisoned, one or both, but that such person should not recover upon any contract made by him while engaged in such business without a license. But the Legislature has not done so, nor has it shown any intention to attend such forfeiture upon a person violating the statute. Having specified the penalty for a violation of the statute, and further provided for the collection of the license tax with damages, we are authorized to and do conclude that the Legislature did not intend that any further punishment should be inflicted. This conclusion is strengthened by the well-known principle that forfeitures are not favored in law; nor does this court favor the idea of giving one's goods to another without compensation. We think that the respondent clearly has the right to recover back the money which it loaned to the appellants."

The other authorities cited declare the same doctrine.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

168 Cal. 369

WILLMON v. KOYER. (L. A. 3338.)

(Supreme Court of California. Oct. 1, 1914.)

1. LIMITATION OF ACTIONS (§ 49*)—RIGHT TO CONTRIBUTION.

Where plaintiff, at the time of paying taxes and assessments on land and attorney's fees in defending an action affecting it, was repudiating the existence of any cotenancy between him and defendant, and asserting an absolute right to, and assuming exclusive possession of, the property, and through a litigation of years excluded defendant from her rights, limitations ran from the time of making such payments against his right to contribution from defendant, since the statute operates between tenants in common as to causes of action existing between them and growing out of the relation to the same extent as upon causes of action between parties not within that relation, and begins to run, both as to the right of possession and the right to an accounting, when there is a repudiation of the relation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 266–272; Dec. Dig. § 49.*]

2. TENANCY IN COMMON (§ 30*) — RIGHT TO CONTRIBUTION—DENIAL OF COTENANCY.

That a tenant in common, at the time of paying taxes and assessments on the land and attorney's fees in defending an action affecting it, was asserting exclusive title in himself, did not defeat his right to contribution from another cotenant, since the payment of the taxes discharged the lien, and, though intended for the benefit of the tenant making the payment, inured to the benefit of the other tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 95, 96, 98, 99; Dec. Dig. § 30.*]

3. TENANCY IN COMMON (§ 30*)—RIGHT TO CONTRIBUTION — PAYMENT FOR BENEFIT OF COTENANT.

When one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled to contribution from his cotenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 95, 96, 98, 99; Dec. Dig. § 30.*]

4. TENANCY IN COMMON (§ 30*)—RIGHT TO CONTRIBUTION—INTEREST.

A tenant in common, who at the time of making payments for taxes, etc., was asserting exclusive title in himself, was not entitled to interest upon the share of such payments recoverable from his cotenant, where no demand was made until an action, in which contribution was sought, was brought shortly after the determination of his cotenant's rights, since ordinarily a tenant making payments is only entitled to interest after a demand for contribution, and such tenant could neither consistently have made a demand nor accepted payment.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 95, 96, 98, 99; Dec. Dig. § 30.*]

5. PARTITION (§ 87*)—ALLOWANCES FOR EXPENDITURES—LIENS.

In an action for the partition of land, an accounting, judgment in plaintiff's favor for one-half the amount paid by him for the common benefit of the joint property, and to fix a lien on defendant's portion of the property to secure the payment thereof, a judgment charging defendant's portion with a lien for the payment of the amount found due plaintiff was appropriate under the pleadings, and in fact is always appropriate in a partition suit.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 253; Dec. Dig. § 87.*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by J. C. Willmon against A. S. Koyer. From a decree in favor of plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Robert Young, of Los Angeles, for appellant. S. J. Parsons, T. O. Toland, L. W. Andrews, and C. E. Johnson, all of Los Angeles, for respondent.

LORIGAN, J. Defendant appeals from a decree in partition of a lot owned by the parties as tenants in common, and from an order denying his motion for a new trial.

Plaintiff, in addition to asking for a partition of the property, prayed for an accounting between himself and defendant, and a judgment in his favor for one-half of certain moneys claimed to have been paid by him for the common benefit of the joint property, and that a lien be fixed on the portion of the property set apart to defendant to secure its payment. The court decreed a partition, finding that plaintiff had made the expenditures claimed to the extent of $1,045.60 and that defendant was liable for one-half thereof, $522.80, gave judgment in favor of plaintiff therefor, and established the lien as prayed for. The only question presented on the appeal from the order denying defendant a new trial is relative to the validity of this allowance, and on the appeal from the judgment the validity of the lien to secure its payment.

[1] The expenditures claimed to have been made by plaintiff consisted entirely of the payment of taxes, a street assessment, and attorney's fees in defending an action brought by a third party affecting the common property, all paid at different dates between December 19, 1902, and October 26, 1909. There were no rents or profits from the cotenancy property. There is no dispute as to the correctness of the amounts paid out by plaintiff nor the fact of their payment. The claim of defendant is that by reason of certain facts set up in his answer, and found in his favor by the court, no allowance in the nature of contribution by defendant for one-half of these expenditures should have been awarded at all, and, in any event, the right of plaintiff to the greater part of them, if it ever existed, was barred by the statute of limitations (subdivision 1, § 339, Code Civ. Proc.), which defendant had appropriately pleaded. These facts relied on by the defendant are, that after plaintiff and defendant, in May, 1902, had entered into an agreement between them to purchase the lot involved in the partition for their joint benefit, plaintiff violated the agreement, took title to the whole property in his own name, asserted ownership to the entire lot in himself, and repudiated all claim of the defendant to any interest therein; that in August, 1903, defendant brought an action to establish his title as joint owner with plaintiff in said property, which plaintiff resisted, claiming that he was the sole owner thereof and that defendant had no interest therein; that such litigation continued until January 10, 1910, when a judgment establishing the title of defendant to one-half of said lot as tenant in common with plaintiff was entered; and that in establishing his title to said property he was compelled to expend in counsel fees and costs a large sum of money. This action in partition and for an accounting was commenced by plaintiff March 30, 1910, a few months after the final judgment in favor of defendant just referred to was entered. Under these facts as found the position of defendant is that the court should have further found that all the items of expenditure made by the plaintiff up to two years prior to the bringing by him of this action in partition, as far as it involved an accounting between the parties, were barred by the statute of limitations which defendant pleaded, but on which the court found against him.

We are satisfied that this contention of appellant based on the statute of limitations is well taken. That statute operates between tenants in common as to causes of action existing between them and growing out of the cotenancy relation, to the same extent that it operates upon causes of action between parties not within that relation. While there is some difference in the authorities as to when it begins to run as to actions arising from the cotenancy, there is a uniform agreement in them that, when there is a repudiation of the relation of cotenancy, from that date the statute begins to run, both as to the right of possession and the right to an accounting. Here the plaintiff, from the time that it was claimed by defendant that such cotenancy existed, denied any such relation, took the conveyance of the property in his own name, asserted absolute right to and assumed exclusive possession of the cotenancy property, and through a litigation of years excluded the defendant from her rights as a cotenant with him and repudiated the existence of any such cotenancy. Under such circumstances the parties became adversaries, and as to any right or cause of action growing out of the cotenancy relationship, which might be asserted by either against the other, the statute of limitations immediately began to run. As an incident to cotenancy relationship, either cotenant has a right to demand of the other an accounting as to rents and profits of the cotenancy, which, of course, involves the right of one cotenant to have refunded to him by the other his proportion of any expenditures made for the benefit of the common property. The right to this accounting as to rents and profits inures to either cotenant as soon as the other has collected them, and the right to demand a proportionate share and maintain an action therefor on refusal to pay it then arises. So, also, as to the right of contribution. The right of the cotenant making the payment in excess of his proportion to recover payment from the other cotenant his share thereof arises at the date when any such expenditure is made.

Here the plaintiff had repudiated the existence of any cotenancy before any expenditures for which he claims contribution had been made, and was still repudiating it when all of them were made. This ouster of the defendant as a cotenant set the statute of limitations in motion for all purposes, not only as to the title and right of possession of the common property, but equally as to the right to demand an accounting for rents and profits, or contribution, as incidents to its existence. If the defendant, after notice of such repudiation, and more than two years after the receipt of rents and profits of the cotenancy property by plaintiff, if such had been received, or more than two years after defendant himself had made expenditures for the common benefit, had brought an action against plaintiff for an accounting or contribution, there can be no question but what plaintiff could have successfully pleaded the statute of limitations. It had been set in motion by him through his repudiation of any cotenancy between them, and effectually barred any right which might have accrued to defendant more than two years before an action brought by him. Now, as the defendant would be barred from asserting any rights against the plaintiff growing out of the cotenancy by the running of the statute as to all claims accruing more than two years before action brought by him, the benefit of the statute must be equally available to the defendant as to claims asserted against him by plaintiff accruing more than two years prior to the commencement of this action. The statute of limitations, having commenced to run by the repudiation of the existence of the cotenancy by plaintiff, affected the right of either party to the action equally. Under this view the trial court in this action should have found that the right of plaintiff to recover contribution from defendant for his proportion of items of expenditures stated in the account, and which were made more than two years prior to the bringing of this action, was barred by the statute of limitations invoked by defendant. As it is unquestioned that the amount of expenditures made by plaintiff during this period and allowed against defendant amounted to $371, the court should have disallowed them, and erred in not doing so.

[2, 3] The rest of the payments made by plaintiff and allowed by the court were made within two years of the bringing of this action by plaintiff and are not affected by the statute. As to these, however, defendant contends that plaintiff should not be allowed them, because they were made by him in his own behalf while repudiating any interest of defendant as a cotenant in the property and asserting exclusive title in himself. While undoubtedly this was the attitude of plaintiff towards defendant, we do not think that this affords sufficient cause for denying him contribution. The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as a matter of right to have his cotenant, who has received the benefit of it, refund to him his proportionate share of the amount paid. As a matter of fact this property was joint property when these taxes and other charges against it were paid by plaintiff. In proportion to their interests all tenants in common are in duty bound to pay taxes, which in this state are a lien upon real property and their nonpayment subjects the land to sale in satisfaction of them. Either of the cotenants may pay the taxes assessed against the whole estate, and such payment discharges the lien imposed upon the common interest, and no matter whether one tenant paying it intended the payment to be for his own benefit or not, such payment in fact and in law essentially inures to the benefit of the other cotenants. It discharges the lien against the common estate for the common benefit, independent of any intention of the cotenant paying it, and as all other cotenants are entitled to the benefit of such payment, it is only right that they should refund to the one making it their proportion of the amount he has paid. Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149. This rule equally applies to expenditures other than taxes made for the common benefit.

[4] The court allowed the plaintiff interest on all the expenditures from the date of payment of each by plaintiff. As we hold that part of these expenditures are barred by the statute of limitations, the question of interest only applies to those which we conclude were properly allowed. But as to those we are satisfied no interest should have been allowed. As a general rule in cotenancy accounting, a tenant making payments is only entitled to interest after a demand on his cotenant for contribution. Here, of course, if the defendant had offered payment, plaintiff would have refused it, because the acceptance would have been in derogation of his claim of nonexistence of the cotenancy. On the other hand, he could not consistently have made demand while repudiating the cotenancy, and in fact he made no demand until this action was brought. Under these circumstances plaintiff was not entitled to interest prior to the entry of judgment determining the liability of defendant for contribution.

[5] On the claim that the court should not have charged the portion of the property assigned to defendant on partition with the lien for the payment of the amount found to be due plaintiff from defendant: There is no merit in this claim. It was an appropriate judgment to enter under the pleadings. In fact, it is always appropriate to do so in partition as the only effectual way to secure a cotenant making advances and obtaining judgment therefor.

The judgment and order appealed from are reversed.

We concur: **HENSHAW, J.; MELVIN, J.**

168 Cal. 390

In re SIMMONS' ESTATE. (S. F. 6629.)

(Supreme Court of California. Oct. 1, 1914. Rehearing Denied Oct. 31, 1914.)

1. Wills (§ 400*)—Contest—Judgment of Dismissal — Interlocutory Orders — Review.

An order denying contestant's motion to be relieved of her default in failing to issue citation within a year after probate of the will and codicil sought to be attacked was necessarily involved in a subsequent order dismissing the contest, and was therefore reviewable on appeal from the order of dismissal.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869–873; Dec. Dig. § 400.*]

2. Wills (§ 400*)—Contest—Review—Jurisdiction—Discretion.

Where the trial court dismissed a will contest because it believed it had no jurisdiction on any showing to relieve contestant from failure to have citation issued within a year after probate of the will and codicil, contestant's application for such relief must be regarded on appeal as having been denied solely because of lack of jurisdiction to relieve her default, and not as a matter of discretion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869–873; Dec. Dig. § 400.*]

3. Wills (§ 400*)—Contest—Review—Prejudice.

Where a will contest was dismissed on the sole ground that the trial court erroneously believed it had no jurisdiction to relieve contestant from a default in failing to issue citation within the time prescribed, it could not be affirmed on appeal because contestant's particular motion for relief could not properly have been granted, because there was no showing of excusable neglect or sufficient affidavit of merits.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 869–873; Dec. Dig. § 400.*]

4. Wills (§ 355*)—Contest—Default — Relief—Affidavit of Merits.

Where an affidavit of merits, in support of a motion to relieve contestant from her default in failing to issue citation in a will contest within the time prescribed, alleged that contestant had stated all the facts in connection with the contest to her attorney, and had been advised by him, and believed that she had a good and meritorious case, it was sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 811–819; Dec. Dig. § 355.*]

5. Wills (§ 355*)—"Contest."

The word "contest," as used in an affidavit of merits that the affiant had stated all the facts in connection with the said contest to her attorney, meant not merely the ground of attack presented by contestant, but the entire dispute involved in the attack on testator's will, and the defense thereto.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 811–819; Dec. Dig. § 355.*

For other definitions, see Words and Phrases, First and Second Series, Contest.]

6. Wills (§ 355*)—Contest—Citation—Issuance—Default—Relief.

Since Code Civ. Proc. §§ 1327, 1328, providing procedure for will contests, require that citation shall be issued within a year, but contain no prohibition against further prosecution of the proceeding, and do not require dismissal for failure to comply with such requirement, the court in which such contest is pending may relieve contestant of his default in failing to issue citation within the time prescribed, under section 473, authorizing such relief where a default is due to excusable neglect, etc.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 811–819; Dec. Dig. § 355.*]

7. Wills (§ 401*)—Contest—Appeal — Reversal — Subsequent Proceedings in Trial Court.

Where a will contest was dismissed solely on the erroneous ground that the trial court had no jurisdiction to relieve contestant of her default in failing to issue citation within a year, and the order was reversed on appeal, the court on remand was at liberty to pass on the motion for such relief as if presented for the first time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 874; Dec. Dig. § 401.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Judicial settlement of the estate of Phillip Simmons, deceased. Permelia L. West having filed a contest of the will and codicil, the same was dismissed because of failure to serve citation within a year after probate of the will and codicil, and her motion to be relieved of her default was denied, from which she appeals. Reversed.

H. P. Andrews, of Red Bluff, and Pemberton & Pemberton, of San Francisco, for appellant. Joseph C. Meyerstein and Asher, Meyerstein & McNutt, all of San Francisco, for respondent.

SLOSS, J. On the 5th day of February, 1912, two papers were admitted to probate as the last will of Phillip Simmons, deceased, and a codicil thereto. On the 3d day of October, 1912, Nellie L. Wertner, claiming to be an heir at law of the decedent, filed a contest and petition for revocation of probate. No application for the issuance of a citation was made, and no citation was ever issued.

On February 18, 1913, Permelia L. West, one of the residuary legatees named in the will, served upon the contestant a notice that she would move for a dismissal of the contest and petition for revocation on the ground that no citation had been issued within one year after the probate of the will and codicil. The contestant served notice of a counter motion for an order relieving her from her neglect and default in failing to have citation issued within one year, and directing citation to be issued. The ground of the motion was, as stated in the notice, the excusable neglect of the contestant and her attorney. The notice was accompanied by affidavits.

The motion to dismiss and the motion for relief and the issuance of a citation came on for hearing together, and the court made its written order, in which, after reciting the hearing and consideration of the motions, it "finds that the failure of said Nellie Wertner to have citation issued in due time arose from the entirely excusable neglect of her attorney as set out in his affidavit; that it was such neglect as would entitle said Nellie Wertner to relief from the consequences thereof, if this court had power and jurisdiction to grant such relief, but this court is of opinion, and therefore so decides and adjudges, that it has no jurisdiction or power to grant such relief." Following this statement is an order granting the motion of Permelia L. West, denying those of Nellie Wertner, and dismissing the contest. From the order or orders so made, the contestant appeals.

[1] It is suggested by respondent that the part of the order denying relief is not appealable. But we think the denial of relief was necessarily involved in the dismissal of the contest, and may therefore be reviewed on the appeal from the order dismissing. That the last-mentioned order is a proper subject of appeal is not questioned.

If the order which was made could be construed as an exercise of the court's discretion to refuse relief under section 473 of the Code of Civil Procedure, there would be little or nothing to discuss here. Such determination could be assailed on appeal only where the court had abused its discretion in denying the relief. But the court below did not decide that the applicant's default was not due to excusable neglect. It refused to give the relief asked, solely because it believed it had no power, on any showing, to relieve a contestant from the failure to have citation issued within the time limited by the Code.

[2] The order denying the contestant's motion for relief must therefore be regarded as "a dismissal of the motion for lack of jurisdiction." Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467. So regarding it, the appeal presents for decision the one question whether the court below was right in its view on this matter of jurisdiction. It is contended by the respondent that this question is immaterial in the case before us, and that the error committed, if error there was, could not have been prejudicial.

[3] The argument is that, whatever may be our view of the right, in a proper case, to be relieved from the default here involved, this particular motion could not properly have been granted, because (1) there was no showing to justify a finding of excusable neglect, and (2) there was no sufficient affidavit of merits. If these matters are to be considered on an appeal from an order refusing to entertain a motion for want of jurisdiction, we cannot agree with the contentions thus made. The showing of excusable neglect was not, to be sure, a strong one. If the court below had denied relief on the merits, we should hardly have felt justified in interfering with the order made. On the other hand, it cannot be said that the showing was so devoid of merit that an appellate court would have been bound to overturn a conclusion that a case of excusable neglect had been made out. It is only in extreme cases that the action of the trial court, in granting or denying relief, can be reversed on appeal. The case before us is not one of those in which an abuse of discretion would be manifested by the granting of the relief.

[4] Nor can we assent to the contention that there was a total want of the affidavit of merits which is requisite to the granting of relief for excusable neglect under section 473 of the Code of Civil Procedure. The affidavit of the contestant declared that she had "stated all the facts in connection with the said contest" to her attorney, and upon said statement had been advised by him, and believed that she had a good and meritorious case. This is sufficient. The averment is not that she had stated only one side of the case to her attorney, as did the affidavits under consideration in People v. Larue, 66 Cal. 235, 5 Pac. 157, and similar decisions.

[5] She deposed that she had stated all the facts in connection with the "contest." The word "contest," in this connection, is fairly to be understood as meaning, not merely the ground of attack presented by the contestant, but the entire dispute involved in such attack and the defense thereto.

The procedure for contesting a will after probate is defined, so far as the main question here involved is concerned, by sections 1327 and 1328 of the Code of Civil Procedure. Section 1327 authorizes a contest by any person interested, within one year after probate. "For that purpose," it is provided, the contestant "must file * * * a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked." Section 1328 provides that:

> "Upon filing the petition, and within one year after such probate, a citation must be issued to the executor * * * and to all the legatees and devisees mentioned in the will, and heirs residing in the state, * * * requiring them to appear before the court on some day therein specified, to show cause why the probate of the will should not be revoked."

[6] It seems entirely clear that, under this statutory scheme, jurisdiction of the subject-matter of the contest is vested in the court by the filing of the petition. Mr. Justice Temple, in his concurring opinion in S. F. Prot. O. A. v. Superior Court, 116 Cal. 443, 48 Pac. 379, expresses the view that the proceeding is one in rem, and that service of a citation might have been omitted from the statutory procedure because not essential to jurisdiction of the res. But, if it be thought that service of the citation has any bearing on the jurisdiction, its office can be only that of a summons in a civil action, viz., to give jurisdiction of the persons of those whose rights would be affected by revocation of the probate. A voluntary appearance would dispense with the necessity

of service. Abila v. Padilla, 14 Cal. 106; Estate of Ricks, 160 Cal. 467, 117 Pac. 539. While the issuance of citation within the year is requisite to the maintenance of the contest, and a failure to have it thus issued would, in the absence of an appearance by adverse parties, justify the dismissal of the contest (Estate of Hite, 155 Cal. 390, 101 Pac. 8; Estate of Ricks, supra), the proceeding is none the less commenced by the filing of the petition, and the court's jurisdiction of the contest attaches upon such filing. Bacigalupo v. Sup. Ct., 108 Cal. 92, 40 Pac. 1055, relied on by respondent, merely holds that, where the petition for revocation had been dismissed, the court was without jurisdiction, after the expiration of a year from probate, to revive the lapsed petition and order a citation issued.

While section 1328 requires that the citation shall be issued within the year, there is no provision as there now is in the case of a summons (Code Civ. Proc. § 581a), prohibiting further prosecution of the proceeding, and requiring a dismissal for failure to comply with the requirement.

In view of these considerations, we think it must be held that the court has power, under section 473, to relieve a contestant, whose petition for revocation, duly filed, has not been dismissed, from the failure to have citation issued and served within the year. The proceeding (i. e., the contest) has been instituted, and jurisdiction over it has attached. The "default" sought to be excused is a failure to take, within time, one of the requisite steps in the prosecution of the proceeding thus pending. The analogies to be drawn from the decided cases point to the conclusion that, in such a case, the granting of relief is permissible under section 473. As we have heretofore had occasion to point out, this court has given a very liberal interpretation to the provisions of this section. "Thus, for example," it was said in Union C. Co. v. Oliver, 162 Cal. 755, 124 Pac. 435, "it has been held that the trial court may relieve a party from the consequences of his failure to serve in time a proposed bill of exceptions (Stonesifer v. Kilburn, 94 Cal. 33, [29 Pac. 332]; Pollitz v. Wickersham, 150 Cal. 238 [88 Pac. 911]), or statement on motion for a new trial (Vinson v. Los Angeles P. Ry. Co., 147 Cal. 479 [82 Pac. 53]), or from a failure to present to the judge for settlement, within the time allowed, a statement on motion for a new trial with the amendments thereto (Banta v. Siller, 121 Cal. 416 [53 Pac. 935])." The illustrations given are all of cases in which a step in a pending action or proceeding was required by the Code to be taken within a specified time, and the holding, in each instance, was that the objection to the belated taking of such step was a "proceeding taken against" the delaying party, and that relief might be given him under section 473. The case before us presents a similar situation. There is a clear distinction between it and Union C. Co. v. Oliver, supra, where it was held that a party could not be relieved from his failure to serve and file a timely notice of intention to move for a new trial. The motion for new trial is "in the nature of a new and independent proceeding collateral to the judgment in the action." Where a party desires to institute a new proceeding, such as a motion for a new trial, or an appeal transferring the cause to the jurisdiction of another court, or the commencement and prosecution of an action, his right depends upon his taking the initial step within the time limited by law. But where the proceeding itself is pending, and the delay relates to a step in the course of that proceeding, the court may, upon a proper showing, relieve from the effect of delay, unless the statute expressly provides that the delay shall terminate the right to proceed further.

It follows that the order must be reversed, and that the court below should proceed to pass upon the merits of the appellant's application for relief, and dispose of the other motions according to the decision upon such application. We do not reach this conclusion without some reluctance. The desirability of a prompt determination of questions affecting the settlement of estates is apparent. The opportunities afforded by the Code for contesting wills are ample and on liberal terms, and it would seem to be the better policy to hold parties desiring to attack wills after probate to a rigid compliance with the requirement of issuing citation within the time allowed. But this is a consideration which must be addressed to the Legislature, rather than the court. Under the existing statutes, as they have been applied by former decisions, we see no sufficient reason for holding that the court is without power to grant the relief here sought. We are not, of course, to be understood as intimating that the court below should, when it comes to exercise its discretion upon the showing here made, exercise that discretion in favor of the appellant. The so-called finding, in the order, that there had been excusable neglect was a mere preliminary to a refusal, for want of jurisdiction, to decide the question presented.

[7] The court below will be at liberty to pass upon the motion as if it were presented for the first time.

The order is reversed.

We concur: SULLIVAN, C. J.; HENSHAW, J.; MELVIN, J.; SHAW, J.; LORIGAN, J.

168 Cal. 420

PACIFIC GAS & ELECTRIC CO. v. ROBERTS, State Treasurer, et al. (S. F. 6867.)

(Supreme Court of California. Oct. 1, 1914.)

LICENSES (§ 19*)—GROSS EARNINGS TAX—MOTOR VEHICLE TAX.

Const. art. 13, § 14, imposes a gross earnings tax on gas and electric light companies, and declares that such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, on the property enumerated of such companies, except as otherwise provided in such section. *Held*, that such exemption should not be limited to ad valorem taxes imposed on the property of such corporations, but should be construed in accordance with its language, and exempted such corporations from liability for license fees imposed by Motor Vehicle Act (St. 1913, p. 641) §§ 4, 5, in so far as it attempted to impose such fee on vehicles used by such corporations exclusively in their business, as a condition to the requisite registration under the act.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 48–54; Dec. Dig. § 19.*]

In Bank. Mandamus by the Pacific Gas & Electric Company against E. D. Roberts, as Treasurer, and W. F. McClure, as Engineer of the State of California. Writ granted.

Garret W. McEnerney, of San Francisco (Wm. B. Bosley, of San Francisco, of counsel), for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin and John T. Nourse, both of San Francisco, for respondents.

HENSHAW, J. This is an original petition in mandate to compel the respondent E. D. Roberts, as treasurer of the state of California, to accept the applications for registration of certain motor vehicles, the property of the petitioner, and to signify in proper form to the department of engineering of the state of California that no fees are chargeable to the petitioner in the matter of its applications, and further to compel the respondent W. F. McClure, as state engineer of the state of California, to file these applications when so presented and alphabetically and numerically register the motor vehicles described in the applications, and do all other acts and things in this regard required of him by law and in particular by sections 4 and 5 of the Motor Vehicle Act (St. 1913, p. 641).

The petitioner is a public service corporation, organized under the laws of the state of California, and engaged in the business of transmitting and selling gas and electricity in the state of California. It owns a number of motor vehicles, automobiles, and motorcycles, which are used exclusively in the operation of its public service business in the state of California. The Motor Vehicle Act requires that motor vehicles shall be registered, and in registering shall pay a license fee or tax fixed under the terms of the act, and graduated in proportion to the horse power of such vehicles. Respondents contend that it is not their duty to register these vehicles, excepting upon payment by petitioner of the license fees contemplated by the Motor Vehicle Act. Petitioner contends that it is entitled to have its vehicles registered without the payment of any fee, by force of section 14, article 13, of the Constitution of this state, which section has relation to the taxation of public service corporations. In support of this position petitioner argues either that the Motor Vehicle Act must be construed as excluding from its contemplation in the matter of the payment of the license fee vehicles so owned and exclusively used, as operating property of such public corporations, or, if the conclusion is necessary that such vehicles are included within the purview of the Motor Vehicle Act, it then follows that, at least to this extent, the Motor Vehicle Act is void as being in conflict with and in contravention of section 14, article 13, of our Constitution.

The question is presented on demurrer to the petition, so that over the facts there is no controversy. The proposition is one strictly of law. Article 13, § 14, of the Constitution, declares as follows:

> "Taxes levied, assessed and collected as hereinafter provided upon * * * telegraph companies; telephone companies; companies engaged in the transmission or sale of gas or electricity * * *; and taxes upon all franchises of every kind and nature, shall be entirely and exclusively for state purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section shall include persons, partnerships, joint-stock associations, companies, and corporations.
>
> "(a) * * * All telegraph and telephone companies; and all companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, roadways, roadbeds, rails, rolling stock, poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state, computed as follows: Said tax shall be equal to the percentages hereinafter fixed upon the gross receipts from operation of such companies and each thereof within this state. * * *
>
> "The percentages above mentioned shall be as follows: * * * On all telegraph and telephone companies, three and one-half per cent.; on all companies engaged in the transmission or sale of gas or electricity, four per cent. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies except as otherwise in this section provided; provided, that nothing herein shall be construed to release any such company from the payment of any amount agreed, to be paid or required by law to be paid for any special privilege or franchise granted by any of the municipal authorities of this state."

The vital point in controversy centers upon the construction of the sentence:

> "Such taxes shall be in lieu of all other taxes and licenses, state, county, and municipal, upon the property above enumerated."

But before entering into a discussion of the meaning of this language, which meaning must, of course, be determined from its reading in connection with the whole constitutional provision of which it is a part, a few words may be said as to the history of the change in our fiscal system touching the taxation of public utilities. Under the system formerly in vogue an attempt was made to place an ad valorem tax upon the properties of these utilities, including therein their franchises. In addition to this privilege taxes of various kinds and amounts were imposed by the different authorities. As a necessary result many of these utilities, such as the petitioner herein, owning property in many counties of the state and supplying its utility to many municipalities, were subjected, first, to assessments by county assessors; second, to assessments by municipal assessors; and, third, to privilege taxes by such municipalities as saw fit to impose them. The method was crude and cumbersome, and it came to be believed that it was unequal and unjust. It was recognized that a small amount in value of real and personal property could, by use in business, bring in returns by way of revenue greatly in excess of the separate values of the properties employed. This earning capacity it was felt had a value which should be taxed, and no better method of taxing it was apparent than that which levied a percentage upon the gross revenue returns. This we find set forth in the Report of the Commission on Revenue and Taxation of the State of California (1906) pp. 193 and 194, in the following language:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The inadequacy of the property taxed when applied to express companies has been strikingly pointed out by the Supreme Court of the United States. In the so-called Ohio Express Company Cases (see Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683) the court said that it was 'unity of use' which enabled $23,400 worth of horses, wagons, safes, and so on, in the state to produce $275,446 in a single year."

The next difficulties which presented themselves were those which had to do with the legal requirements that taxes should be equal and uniform and should be levied upon "property." The Supreme Court of the United States hesitated to declare that a percentage tax upon the gross earnings of a corporation was in any true sense identical with an ad valorem tax upon the properties of the corporation. Thus in Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 227, 28 Sup. Ct. 640 [52 L. Ed. 1031] we find the court saying:

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the state, which, under their construction of the tax, included the earnings here in question. That court held that the statute was a part of a system long in force in Minnesota, passed under the authority of the state Constitution, and was intended to afford a means of valuing the property of express companies within the state. While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law. In this connection the language of Mr. Justice Peckham in McHenry v. Alford, 168 U. S. 651, 671 [18 Sup. Ct. 242, 42 L. Ed. 614], while it was not necessary to the decision of the case is nevertheless apposite:

> "When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

Without pausing here to review the decisions of the Supreme Court bearing upon the question, but contenting ourselves with a subsequent reference to some of them, it may be said that the conclusions of the Supreme Court were that property used in the public service frequently acquired a value in the use, which value was something greater than the value of the property not engaged in such use; that by the systemization and unification of such properties in use they in the aggregate acquired a special value by virtue of this unity of use; that this special value was in the nature of property; that a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied. Maine v. Grand Trunk Ry., 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; Cleveland & St. Louis Ry. Co. v. Backus, 154 U. S. 439, 14 Sup. Ct. 1122, 38 L. Ed. 1041; Erie Ry. v. Pennsylvania, 158 U. S. 440, 15 Sup. Ct. 900, 39 L. Ed. 1046; Adams Express Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; U. S. Express Co. v. Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459.

So much for the justness and reasonableness and legality of the new method. Further, it was believed that the income of the state could be largely drawn from these sources with great advantage both to the state and to the public service utilities, in that the method would be simple, direct, and inexpensive as compared with the existing method, necessitating the action of many assessors and numerous appeals to boards of equalization, and also that the new method would remove all temptation to such utilities to engage in political activity. Having subjected public utilities to this revised form of taxation, it was for the people under their Constitution to say whether these new taxes should be all of the taxes and charges imposed upon such corporations, and, if not all, then for what purposes could they or their properties be further taxed? For manifestly it was competent for the Constitution to declare that this commutated tax should be in lieu of all taxes, should be in lieu only of ad valorem taxes, or that it should not forbid the right to levy privilege taxes. What the Constitution did say in this regard is found in the sentence expressly quoted and adverted to, and it is to the construction of this sentence we are thus brought.

The interpretation put on it by petitioner has been outlined. It contends that the license fee sought to be exacted from it is a charge expressly prohibited in the very language of the Constitution; that this license fee is a privilege tax sought to be imposed upon the personal property of the corporation, which personal property is exclusively used in its business and necessary to the unified use of its operative property; or, in other words, that the demand of respondents is that petitioner shall pay this excise tax or privilege tax as a condition of its right to devote its operative properties to the remunerative use in the conduct of its business, for which remunerative use it pays a tax upon its gross revenues, which the Constitution itself declares shall be exclusive of all other taxes or license fees upon its property.

Respondents answer that the Constitution means that the commutated tax upon gross revenue is a substitution only for previous existing ad valorem taxes upon physical properties and franchises; that the Constitution does not include in its inhibition the right to levy a privilege or excise tax; but that, if it does include this inhibition, then this is not a privilege tax, but is in the nature of a rental charge or a toll exaction; or, finally, if no one of these positions is sustainable, it is a measure attributable to the legitimate exercise of the state's police power.

Certain of these arguments of respondents are disposed of by the case of In re Schuler, 139 Pac. 685, where the constitutionality of this Motor Vehicle Act came under review. It is there pointed out that an enormous revenue will be and is obtained under the act, and that this revenue, over and above the small expense of collecting it, is to be devoted to the maintenance, repair, and construction of highways. It is declared that the act is not referable to the police power, this court saying:

> "The repair of public roads is not a police measure, yet it is evident that the bill was passed for the principal purpose of raising revenue for use in the upkeep of such highways."

The true character of the license fees and charges is summed up in the following sentence:

> "The contention is made (and correctly made) that it imposes an excise tax or privilege for the purpose of providing a fund for roads under the dominion of the state authorities."

This explicit declaration as to the purpose and character of the Motor Vehicle Act is sufficient itself to negative the contention of respondents that the act may be construed as imposing a rental charge or toll charge for the use of the highways. But as those propositions were not specifically considered in the Schuler Case, and are here insistently urged, they demand brief consideration.

The contention that the Motor Vehicle Act should be construed as imposing a rental charge for the use of highways owned or controlled by the state is based solely upon the decision of the Supreme Court in St. Louis v. Western Union Telegraph Co., 148 U. S. 93, 13 Sup. Ct. 485, 37 L. Ed. 380, and considered at length by this court in Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 116 Pac. 557. In the federal case the telegraph company had made a permanent and exclusive appropriation of a part of the public streets of St. Louis by telegraph poles. The holding of the Supreme Court was that this permanent occupation of a portion of the public highway to the absolute exclusion of the public from the enjoyment of that part of the highway was something entirely different from the common right to the use of the highways for purposes of transitory locomotion, and that the charge which St. Louis exacted of five dollars per pole for poles so occupying portions of the highway was—

> "more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. * * * The city has attempted to make the telegraph company pay for an appropriation to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent."

It is not easy to adjust the law of that case to the facts of this case, where the use which petitioner's vehicles propose to make of the highways is identically that which of common right all persons and vehicles may make. If it is a rental charge at all, then a like rental charge may be imposed upon every pedestrian, as well as upon every vehicle traveling upon our highways. The common use of the highways is open to all. For the permanent and exclusive use of a portion of the highway a charge may be made. Such is the whole of the law upon this proposition.

As little force can be given to the next contention, that the Motor Vehicle Act should be regarded as an act imposing a toll for the use of the highways. Support for this proposition is sought to be derived from the two cases of Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, and Sands v. Manistee River Imp. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149. Mr. Justice Field wrote the decision in both cases. They grew out of a similar state of facts. Certain of the states had by expensive works improved the navigation of their rivers. For the use of these improvements tolls were charged. Here was a portion of a natural highway artificially improved at a large expense. But the federal Constitution guaranteed the free right of navigation. It was held by the Supreme Court of the United States that a toll for the use of a portion of such a particular highway artifically created or improved was not a violation of the federal Constitution. But the effort here made is not to charge a toll for the use of a toll road. It is exacting a fee from every automobile, the amount of which is based upon the horse power of the automobile for its entry upon or use of any highway in the state, improved or unimproved, within a municipality or without. A similar effort was made by the city of Chicago, which improved by dredging and otherwise the Chicago river, and then imposed a license fee upon certain crafts using the Chicago river. An effort was made to justify this charge as being a toll under the authority of Huse v. Glover and Sands v. Manistee River Co. Justice Field again wrote the opinion of the Supreme Court (Harmon v. City of Chicago, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216), and, scouting the argument that the license fee should be "treated as in the nature of a toll or compensation for the expenses of deepening the river," declared:

> "But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll or compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted for the keeping, use, or letting to hire of any steam tug, or barge or tow boat, for towing vessels or craft into the Chicago river, its branches, or slips connected therewith."

So here the charge is a fee exacted of motor vehicles for the right to use any public highway. It is not a toll. It is a revenue measure pure and simple.

It being thus clear both upon principle and upon the adjudication of the Schuler Case that this license charge is a privilege tax, established for purposes of revenue and forbidding petitioner's automobiles to use the public highways until payment thereof, we come to the principal contention of respondents: That, conceding it to be such a tax, still it is not a tax the levying of which is forbidden by the Constitution, and therefore it may justly be laid. Respondents' argument is the following: The new method of taxation was adopted solely as a substitute for the ad valorem taxes theretofore levied upon franchises and physical properties; it was not designed by the framers of this constitutional amendment to forbid the levying of any other kind of a tax, either upon the corporations or upon their physical properties; and as the taxing power is of so vital importance that it is of the essence of the existence of a government, no intendment should be indulged in any case that the state has relinquished any part of this all important power. The principle of construction here declared is unimpeachable. In cases of doubt upon such questions the doubt will always be resolved in favor of the sovereignty. Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939. But it is to be noted here that the principle is wholly inapplicable, in that the state, so far from surrendering its taxing powers, has simply declared a method by which it will tax such corporations, coupled with the declaration that though the percentage upon incomes is fixed, the percentage may be increased by the Legislature from time to time, as in fact the Legislature has done.

So far as goes the argument that the people meant in this constitutional provision only to declare that the franchises and physical properties should no longer be subject to an ad valorem tax, the determination of this will depend solely and exclusively upon the meaning of the language which the people have employed. Some light has already been shed upon this meaning by two decisions of this court, that of City & County of San Francisco v. Pac. T. & T. Co., 166 Cal. 244, 135 Pac. 971, and Hartford Fire Ins. Co. v. Roberts et al., 142 Pac. 839. In the first of these cases the city of San Francisco imposed that form of a privilege tax known as an occupation tax upon the right of the defendant, a public service corporation, to conduct its business, requiring it to pay a license fee based upon its gross receipts. It was held that under the inhibition of the constitutional provision which we are here considering such a privilege tax was void. In the second case the state itself, under its State Corporation License Tax Act, demanded of a foreign corporation doing business in this state the license fee as a condition of its right to continue in its business. Insurance companies paying the proper proportion of their gross revenues are included in the constitutional provision under consideration. It was held that this constitutional provision forbade the exaction of this privilege occupation tax upon the right of the insurance company to conduct its business. Here are two declarations that privilege taxes, in their nature occupation taxes, may not be imposed, because the Constitution has said that the tax imposed by the state "shall be in lieu of all other taxes and licenses, state, county and municipal upon the property above enumerated of such companies."

The essential difference between an ad valorem tax and any form of privilege tax is that the ad valorem tax is based upon the value of the property, tangible or intangible. The privilege tax need not be based upon such value at all. Privilege taxes themselves fall into two general classes: The first, a tax upon that intangible thing known as the right to conduct business; and the second, a tax upon specific personal property as a condition of the right to use it generally or for some specific purpose. Instances of the two forms of privilege tax will readily occur. Thus such a tax may be imposed upon the right to conduct the business of a taxicab company, and again a tax may be imposed upon each taxicab, to be paid before that particular piece of personal property may be employed in the business. Of course, as in the case of every tax, and upon whatsoever form or kind of property it may be laid, in its essence, it is a tax upon the owner of the property.

With these distinctions in view, it is easy to be seen that the decisions above adverted to clearly declare that the privilege occupation tax is forbidden by the Constitution. And yet certainly there is not so clear an inhibition against this tax as there is against the privilege tax upon the *property* exclusively used in the operation of the business. For in precise terms it is declared that the state tax shall be in lieu of all "other taxes and licenses * * * *upon the property* * * * of such companies." Respondents argue that this court in the Telephone Case, supra, has placed a limitation and definition upon this constitutional provision which support their contention that at the utmost only that form of privilege tax known as occupation tax is prohibited, and that therefore this particular form of privilege tax, not laid directly upon the business but only upon certain operative properties of the business, is valid. The language relied on is the following:

> "Every word in the clause under discussion can be given a reasonable and legitimate effect by reading the term 'licenses' as including revenue charges of any character upon the exercise of the franchises which are declared to be taxable for state purposes only. In this way the phrase 'upon the property above enumerated' is made fully effective, as qualifying both 'taxes' and 'licenses' preceding it, while no word is either ignored or distorted from its fair meaning."

But respondents entirely mistake its meaning and import. The argument which this court was there called upon to meet was the direct opposite of the one here presented. The city and county of San Francisco was there advancing a contention utterly destructive of respondents' position here. It was contending that the language of the Constitution in terms forbade the imposition of a tax upon the operative properties such as this, but did not in terms deny, and therefore should not by inference be held to deny, the right of the municipality to impose an occupation tax. A few extracts from the brief of the appellant city and county of San Francisco will establish this beyond question. We quote:

> "A tax, such as the tax provided for by this ordinance, is not a property tax at all. It is not a tax imposed upon any of the property of the person taxed. It is an occupation or business tax. The intention of the Legislature was clearly to prevent the levy of taxes of any sort (whether levied openly as property taxes or disguised as licenses) upon certain specified property of certain corporations. In an endeavor to carry out the legislative intent, and in order to cover all taxes upon said property, the word 'licenses' was used. In conclusion of this part of our argument we submit that the Legislature did not use the words 'upon the property' without intent. The intent clearly was to relieve the property assessed from all taxes other than state taxes levied upon it under the constitutional amendment."

It was in answer to this argument that this court used the language relied on by respondents. It is too plain for discussion, therefore, that this court did not hold that taxes could be levied upon operative property but that it did hold that the language of the Constitution forbidding taxes upon operative property "included revenue charges of any character upon the exercise of the franchise." Wherefore it must be concluded that this decision, if not directly against the respondents' contention here made, at least lends no aid or support to that contention.

But it is only in deference to the arguments of the fiscal and legal officers of the state that so much has been said upon a proposition which, to the mind of the layman as well as of the lawyer, is not debatable, under the plain and unambiguous language of the Constitution itself. We repeat:

> "Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated."

Where is there room for the play of construction upon language so plain as this, addressed to the facts of this case? With the argument of respondents, that the framers of this article were intelligent men and must be presumed to know what they meant to say, we are in perfect accord. What they said is so plain, so clear, so free from ambiguity and the possibility of construction, as to forbid debate. They declared that the state tax should be in lieu of *all* other taxes and licenses. If they meant that it should be in lieu of but some of those taxes, they would have said so. If they meant that it should be in lieu only of ad valorem taxes, they could easily and would undoubtedly have said so. What they did say was that this state tax, with the state's ability to increase it at will, should be in lieu of *all* other taxes and licenses. If argument is required upon the meaning of plain words so clearly expressing an obvious idea, it can only be because of an utter breakdown in our written language in its ability to convey thought. Additionally, it may be said that the purpose of the Constitution to exclude all other taxes and licenses is emphasized and accentuated by the one exception which that instrument itself declares when it provides that this inhibition against the levying of any or all taxes and licenses shall not be construed to release these companies from pre-existing agreements to pay specified sums of money.

And as a last word upon the subject it may be pointed out that, if confirmation can be required upon so plain a proposition, it is found in Railroad v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921. It was there held that railroad companies, by virtue of the language providing for a commutated tax were not relieved from privilege taxes, the court in addressing itself to the particular language of the law, saying:

> "Exemption from ad valorem taxation no more includes exemption from privilege taxation than the imposition of an ad valorem tax includes the imposition of a privilege tax. If one imposition does not embrace both, one exemption does not embrace both."

The court then proceeds:

> "It is not to be implied from what has been said that no exemption from privilege taxation could have been granted without naming the subject of such taxation and exempting it in so many words. That result could have been accomplished by a statement that the company was to have exemption from all taxation, or by any other form of expression that would, beyond doubt, disclose such an intention."

In our Constitution we have this exemption most completely, comprehensively, and explicitly expressed.

Let the mandate issue as prayed for.

We concur: LORIGAN, J.; MELVIN, J.; SHAW, J.

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168 Cal. 436

JOSSELYN v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 6074.)

(Supreme Court of California. Oct. 2, 1914. Rehearing Denied Oct. 31, 1914.)

1. Municipal Corporations (§ 956*)—Taxes—Limitation of Amount.

Whether there is any necessity for levying a special and additional tax under San Francisco Charter, art. 3, c. 1, § 13, in excess of the limit of $1 on each $100 assessed valuation prescribed by section 11 is a question of fact, as to which the determination of the board of supervisors is not final.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. § 956.*]

2. Appeal and Error (§ 907*)—Record—Matters Presented for Review.

In the absence of a bill of exceptions, it will be assumed that a finding of the superior court that there was no emergency justifying the suspension of the provisions of San Francisco Charter, art. 3, c. 1, § 11, limiting the tax levy to $1 on each $100, was supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

3. Municipal Corporations (§ 968*)—Taxes—Levying—Conditions Precedent.

San Francisco Charter, art. 12, § 1, provides that the board of supervisors, after determining that public interest or necessity demands the acquisition of a public utility, must procure from the board of works plans and estimates of the cost thereof. Section 5 prescribes the procedure to be followed, which includes the passage of an ordinance declaring the board's finding as to the public interest or necessity, a direction to the board of public works to procure and file plans and estimates, the publication of the ordinance, negotiations and contracts for the work if the cost can be paid out of the city's annual revenues, and, if a bonded indebtedness is necessary, the calling of a special election. *Held*, that where in 1903 at such a special election the proposal to issue bonds for a municipal street railway was defeated, the board of supervisors could not, in 1907, levy a tax for the construction of such railway without again following the procedure prescribed in the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2070–2074; Dec. Dig. § 968.*]

4. Municipal Corporations (§ 968*)—Taxes—Limitation of Amount.

The board of supervisors of the city and county of San Francisco included in the annual budget appropriations of $720,000, for the repair, sprinkling, and sweeping of streets, and $100,000 for an increase in salaries of schoolteachers, to be paid out of a special tax levy in excess of the levy of $1 on each $100, the limit prescribed by the charter except in case of emergency or great necessity, and also passed an ordinance declaring that the repair, sprinkling, and sweeping of the streets and the proposition to increase such salaries constituted and was a great necessity and emergency. It was found by the superior court, however, that no such necessity and emergency existed. The budget also included an item of $720,000 for the construction of a municipal street railway to be paid from the general levy. This appropriation was void because the board had not followed the procedure prescribed by the charter for the acquisition, construction, or completion of a public utility. *Held*, that though the elimination of this item reduced the general tax levy below the charter limit, the item of an equal amount for the repair, sprinkling, and sweeping of streets could not be substituted therefor and raised as a part of the general levy, the board having shown an intention that the money therefor should be raised by a special tax, and there being no reason for substituting this item in the general levy rather than the item for the increase in salaries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2070–2074; Dec. Dig. § 968.*]

5. Municipal Corporations (§ 956*)—Taxes—Limitation of Amount.

Article 3, c. 1, § 11, of the charter of the city and county of San Francisco, providing that the tax levy, exclusive of the state tax, the tax to pay the interest and maintain the sinking funds of the bonded indebtedness of the city and county, and of the tax to pay for the maintenance and improvements of parks, etc., shall not exceed $1 on each $100, does not justify the levying of taxes for purely county purposes, as distinguished from city purposes, in excess of the limitation prescribed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010–2013; Dec. Dig. § 956.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles Josselyn against the City and County of San Francisco. From a judgment in part for plaintiff, both parties appeal. Reversed, with instructions.

Percy V. Long, City Atty., and Jesse Steinhart, both of San Francisco, for appellant. Drown, Leicester & Drown, of San Francisco, for respondent.

MELVIN, J. Plaintiff brought this action to recover certain taxes paid by him under protest in the city and county of San Francisco. The case comes here on complaint, answer, findings of fact, and judgment. Three separate items of taxation were involved. The court found in plaintiff's favor on two of these, and against him on the third. Each party to the litigation appeals, plaintiff from that portion of the judgment which is adverse to him, and defendant from the whole of it. The facts as determined from the findings are, in brief, as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Between the first Monday in May and the first Monday in June, 1907, the board of supervisors of the city and county of San Francisco met to prepare a budget for the fiscal year 1907–08. One of the items of this budget was an additional and special tax levy of 20 cents on each $100 assessed valuation to raise $720,000 for the construction of a municipal railroad on Geary street. On June 3, 1907, the budget came up for final passage, but in the meantime it had been amended so that the tax for the construction of the Geary street road was not named as a "special and additional" tax, but as a part of the general levy and an item for the repair, sprinkling, and sweeping of streets was added. This was "to be paid for out of an additional and special tax levy of 20 cents on each $100 assessed valuation," the amount being $720,000. Prior to May 27, 1907, before the budget passed to print, a time was fixed by the supervisors for hearing taxpayers and citizens in regard to it, and the board attended at the time so set. After the adoption of the amendments no time was fixed for the hearing of taxpayers with reference to the budget or the amendments, but on June 10, 1907, at a meeting of the board, the privilege of the floor was granted and accepted by certain citizens and taxpayers who discussed the budget. At that date the three items involved in this case were set forth in the budget as follows:

"Geary Street Railroad—For the construction of a municipal street railway from Market street, along Geary street to Point Lobos avenue, along Point Lobos avenue to Tenth avenue; thence along Tenth avenue to Fulton street	$720,000."
"For the repair, sprinkling and sweeping of streets, to be performed by the board of works, under the direction of the board of supervisors, to be paid for out of an additional and special emergency tax levy of 20 cents on each $100 assessed valuation	$720,000."
"For increase in salaries of teachers in primary and grammar schools, to be paid out of the additional and special tax levy of 20 cents on each $100 assessed valuation	$100,000."

Exclusive of the last two items and of the amounts not contemplated in that part of the charter which imposes the restriction commonly designated the "dollar limit," the budget required a levy of $1 on each $100 of assessed valuation for city and county purposes.

On June 21, 1907, Eugene E. Schmitz, who on June 10th had received, as mayor of the city and county, the budget as passed, returned it with his veto on the items for the Geary street road and the sprinkling, repair, etc., of the streets. On June 17th the board of supervisors, acting under the proper charter provision, and declaring that because of his incarceration the mayor was unable to perform his official duties, chose one James L. Gallagher as president pro tempore. On June 24th the board, by a vote of 17 supervisors, being all of those present (Supervisor Rea being absent) formally overruled the veto. On July 1, 1907, the supervisors again adopted the budget over this veto, 17 members of the board voting in the affirmative and Supervisor Furey being absent. On July 2, 1907, the budget was signed by the acting mayor and the clerk of the board of supervisors.

On June 24, 1907, the board had passed an ordinance, No. 233 (N. S.), superseding the "dollar limit" provided in section 11, c. 1, art. 3, of the charter. The first section of the said ordinance was in part as follows:

> "It is hereby recited, determined and declared that the repair, sprinkling and sweeping of streets, to be performed by the board of public works under the direction of the board of supervisors, and the proposition to increase the salaries of teachers in the primary and grammar schools of the city and county, as specified in the budget of the fiscal year 1907–08, constitutes and is a great necessity and emergency of the kind and character contemplated by the provisions of section 13, c. 1, art. 3, of the charter."

In the second section of the ordinance the board determined and declared that the cost of the aforesaid propositions could not be paid out of the city's ordinary annual income. The superior court found in accordance with admitted facts that the Geary street road was a public utility; that in 1903 the supervisors voted that such an utility was a matter of public necessity, and, following the charter provisions (chapter 12, § 4), they determined that the cost of the utility so far exceeded the annual revenues of the city and county in addition to the other necessary expenses thereof as to render it necessary to incur a municipal bonded indebtedness therefor; that a special election was held and the proposal to issue bonds was defeated; and that no further steps toward the construction of the Geary street road were taken up to the time of the passage of the budget and the levy of the tax which we are here considering.

The court below determined that the suspension of the "dollar limit" was improper because neither in substance nor by proper allegation were the items described as necessities and emergencies really such. It was also adjudged that the appropriation for the Geary street road was without authorization of law. But as the amounts sought to be improperly collected for the Geary street road and the increase of teachers' salaries, when eliminated from the tax levy would have brought the tax to the "dollar limit," the plaintiff was allowed no relief from the tax for repairing, sweeping, and sprinkling streets. The exact language of the trial court's conclusion on this point is as follows:

> "That the said levy of taxes so made by said board of supervisors for said fiscal year for the purpose of repairing, sprinkling, and sweeping streets, as hereinbefore found, purports on its face to have been made in excess of the said limitation prescribed by section 11 of chapter 1 of article 3 of the said charter, and in and by the terms of said levy purports to be a levy authorized by the aforesaid invalid ordinance No. 233 (New Series), but that by reason of the invalidity of the said appropriation and levy for the construction of the said Geary Street Railroad, the said tax for the repair, sprinkling, and sweeping of streets does not exceed the said last-mentioned limitation, and that therefore the plaintiff is not entitled to recover any of the said taxes levied for said fiscal year upon his said properties for the repair, sprinkling, and sweeping of streets."

Plaintiff's first attack is directed at the entire levy, his contentions being that the taxes were all illegal because: (1) At the time they were levied no appropriations or budget had been made; (2) neither the budget nor the levy was made within the time prescribed by the charter; (3) the appropriation for the so-called emergency matters preceded the declaration that a necessity for them existed. We need not consider these interesting questions, however, as we agree with plaintiff's contention that the court erred in refusing to decree the refunding of that proportion of the tax levied illegally for payment of the expenses of repairing, sprinkling, and sweeping streets, while we are in accord with the conclusion that the purported levies for the construction of the Geary street road and the increase in the salaries of teachers were void.

[1, 2] In the very recent case of San Christina Investment Co. v. City & County of San Francisco, 141 Pac. 384, we held that the question of the necessity for the suspension of the "dollar limit" is one of fact, and that the determination by the supervisors of the existence of such necessity is not final. Here the court found that no such great emergency as that contemplated by the charter justified the suspension of the "dollar limit." We must assume that such finding is amply supported by evidence, as there is no bill of exceptions. It follows that under the authority of the case cited above, we must sustain the conclusion of law that ordinance No. 233 (N. S.), declaring the existence of such great emergency was void.

[3] Before discussing further the court's conclusion that the elimination of the item for the Geary street road made it possible for the city to collect that tax for the sweeping, sprinkling, and care of the streets levied avowedly as an emergency tax, we will briefly examine the reasons which must have governed the court in holding the former levy void. The powers of the board of supervisors relating to public utilities are conferred by and subject to the provisions of article 12 of the charter. By section 1 of that article the board, after determining that public interest or necessity demands the acquisition of a public utility, "*must* procure from the board of works" plans and estimates of the cost, etc., of such public utility. By section 5 the procedure of the board is prescribed. This includes the passage of an ordinance specifically declaring the board's finding that public interest or necessity demands the acquisition, construction, or completion of the utility; a direction in the same ordinance to the board of public works to procure and file plans and estimates of the cost; the publication of this ordinance for at least two weeks; negotiations and contracts for the work if the cost can be paid out of the city's annual revenues; and if the cost so far exceeds the annual revenues of the city in addition to the other proper expenses thereof as to render necessary a bonded indebtedness, then the calling of a special election. None of these things had been done. We cannot say that the proceedings taken in 1903 could be utilized by a board acting in 1907, because the determination by the board at the earlier date that public necessity demanded the acquisition and construction of the Geary street road had been reversed by the people themselves. Those proceedings terminated with the election, and the whole matter thereupon became functus officio. In order that money might thereafter be raised either by taxation or bond issue it was necessary that the supervisors should proceed anew under the provisions of article 12 of the charter. These provisions are mandatory, and the failure to comply with them made void the attempted levy of the tax for the Geary street road.

[4] Reverting to the conclusion of law that the striking from the levy of the item of $720,000 for the public utility restored the item for construction, repair, and upkeep of the streets, we are confronted with the fact that the same ordinance deals with the levies for the streets and for the increase of teachers' salaries. In the ordinance they are coordinately mentioned and collectively referred to as "*a* great necessity *and* emergency." While it may be very convenient bookkeeping to substitute for the sum specified in the Geary street railroad item the exactly similar amount involved in the item for expenditures on the streets, we can see no logic in preferring one part of the void ordinance to the other. When the items of $720,000 for the repair, sprinkling, and sweeping of the streets and of $100,000 for the increase in salaries of teachers were inserted in the budget and were by the very terms thereof made payable out of the proceeds of a tax to be levied in excess of the limitation prescribed by section 11, chapter 1, article 3, of the charter, the supervisors showed their intention that the money should be raised by a *special* tax. The ordinance by which this result was sought to be attained was invalid, and we may not

validate one of its parts merely because by so doing we would authorize the taxation of property to the full extent permitted by the charter. Proceedings for taxation are in invitum, and where, as here, the only levy sought to be made for these two specified purposes was the "additional tax levy authorized by ordinance No. 233," the court may not properly add the amount of the special levy to the general levy. Ordinance No. 233 being void, the levy founded thereon falls with it. The levy being void there was no valid tax.

[5] Counsel for defendant say that the levying of a large part of the taxes here involved was for purely *county* purposes as distinguished from city purposes, and that the limitation prescribed by section 11 of chapter 1 of article 3 of the charter does not apply to taxes imposed for county purposes. The very language of the limitation contradicts this theory. It is as follows:

> "But such levy, exclusive of the state tax and the tax to pay the interest and maintain the sinking funds of the bonded indebtedness of the city and county, and exclusive of the tax to pay for the maintenance and improvement of the parks, squares and public grounds of the city and county, shall not exceed the rate of one dollar on each one hundred dollars' valuation."

Taxes for county purposes are not excepted by the language quoted above, while the state tax and certain others are excepted. If it had been the intention of the framers of the charter that the limitation should not apply to taxes for *county* purposes, that intention would have been expressed and the exception would have been inserted with the others which do appear.

That part of the judgment from which plaintiff appeals is reversed, with instructions to the trial court to amend its conclusions of law in accordance with the views here expressed and to enter judgment for the amount prayed for in the complaint.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 485

MORRIS v. SOUTHERN PAC. CO. et al.

(Sac. 2094.)

(Supreme Court of California. Oct. 3, 1914. Rehearing Denied Nov. 2, 1914.)

1. CARRIERS (§ 322*)—INJURIES TO PASSENGER—VERDICT—CONCLUSIVENESS.

In a passenger's action for personal injuries, in which the conductor and engineer of the train were joined as defendants, a verdict exonerating them was conclusive that there was no negligence in the operation of the train, causing its derailment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 859; Dec. Dig. § 322.*]

2. CARRIERS (§ 285*)—PERSONAL INJURIES—DERAILMENT—CARE REQUIRED.

Under Civ. Code, § 2100, requiring a carrier of passengers to use the utmost care for their safety, and to that end to exercise a reasonable degree of skill, defendant railroad, which exercised the required degree of care against danger from flood waters of unprecedented height, was not liable for injury to a passenger from a derailment at a place believed by its engineer, etc., to be safe, but where the water undermined the track without affecting the surface, and leaving nothing to show that it was not in a safe and sound condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1136–1139; Dec. Dig. § 285.*]

Department 2. Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by Charles C. Morris against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. L. Cory, of Fresno, for appellants. F. G. Ostrander, of Merced, and J. B. Jennings, of Modesto, for respondent.

HENSHAW, J. Plaintiff brought this action to recover for injuries which he suffered while a passenger upon defendant's train. The cause was tried before a jury, which returned a verdict in the sum of $6,814.50 against the defendant Southern Pacific Company. From that judgment, and from an order denying its motion for a new trial, the railroad company appeals.

The injuries resulted from the derailment of the train, occasioned by storm waters which undermined the track. The accident occurred about 11 p. m. of the 20th day of January, 1911, in Merced county. There had been rains of unprecedented heaviness in that part of the country, and the storm and flood waters were being carried down new and old river channels to defendant's tracks. The company had been warned of the possibility of danger to its tracks from these flood waters at a point a mile and a half north of its station at Minturn, where there was an old slough of the Chowchilla river. This slough had been known in the past to carry part of the storm waters of the river. The foreman of a large vineyard near Minturn had notified his superintendent that a very heavy freshet of storm waters was approaching the railroad tracks. The superintendent in turn notified the defendant's agent at Minturn. This agent promptly carried the information to the proper officials, and immediate steps were taken to watch and protect the tracks at the old slough a mile and a half north of Minturn, where alone any danger was expected. We may pause here to give the substance of the testimony of the witnesses called on behalf of the plaintiff.

W. A. Nourse was the foreman of the Sierra vineyard, and conveyed the information of the threatened danger to D. V. Harris, the superintendent of the vineyard. Nourse testified that about 3 o'clock in the afternoon of the night of the accident he telephoned to Harris—

"that the Chowchilla was very high, and the water was coming down toward the Southern

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pacific tracks and might cause some damage or washout. When I gave the notice and said, 'Look out for the track,' I meant the track where the old slough came through. I did not give any notice that the water was coming up one mile northwest of that point. I have been foreman of this company for about eight years, and during all that time I have never known the water to be up to this particular point where the accident occurred. Sometimes I have seen heavy freshets when the water came down the old slough and when it overflowed, but the water never got up to this particular point where the wreck occurred during any of those times. The notice I gave the agent referred to the track at this old channel. Where the railroad crossed the old slough, there was a trestle; never very much water came down the old slough, not since I have been there. It was down that far in 1906. That is the only time that I have ever known it to approach the embankment at the old slough. Didn't then cause a washout. During all the time I have been there, there was water enough in this one time to run back towards the Chowchilla. I have never known it to go up as far as the point where the accident occurred."

Mr. Harris testified:

"In extremely high water the Chowchilla does overflow. On the day of the accident I sent a warning to the agent of the railroad with reference to high water. I asked my foreman to telephone the agent at Minturn that there was very high water. There is an old river channel paralleling the present channel, and in very high water the water overflows into that. This was nearly one mile south of the point of derailment. I received a telephone message from the Sharon estate that the river was very high. They said it was a cloudburst. All the time that I have been there I have never seen such a flood. This old channel is about one-eighth of a mile from the river, nearer San Francisco. The wreck occurred nearly a mile further west from the old channel. I was afraid the freshet would come down the old channel, and it was there I feared the damage would occur. I did not anticipate or expect that the water would go one mile up the track and make a washout. I had never seen water there before. There were no embankments there to control the water up to this point where the accident occurred. Notwithstanding this tremendous freshet coming down, I did not believe it possible for any water to get as far north as where the accident occurred. I have seen water in the old channel, but I do not believe it ever reached the railroad bridge. It is very sandy, and the water sinks very fast. I never saw the water reach the railroad bridge before in the old channel. I have been there when there had been other freshets. In the heavy freshets before, there never was enough water come down to imperil the railroad track at that point. There have been pretty high freshets before, so the water came down the old channel, but I never, up to this time, saw enough water come down to reach the railroad embankment. At this time, I understand, it not only reached the railroad embankment, but went one mile up the railroad track and caused this washout."

The foregoing testimony was all the testimony offered by plaintiff. The defendant's testimony corroborated this and stands uncontradicted. Thus Patrick Ferguson testified that he had been in the employ of the defendant company for 37 years; that he had been roadmaster of the particular district where the accident occurred for the last eight years. His evidence is as follows:

"I have never known of any freshet water having been at the point of the accident before. The embankment at that place was about 4 or 5 feet high. Before the accident the track was in first-class condition. Late in the afternoon of that day, I received a telegram from the superintendent's office. I wired instructions to the section foreman. The telegram is as follows: 'Water reported running towards track about mile and half west toward Minturn. Go there, examine and protect as soon as possible.' (In railroad parlance towards San Francisco is west and away from San Francisco is east.) The accident did not occur at that point, but a mile and a half west of that point, nearer Merced. The bridge over the Chowchilla river and the dry gulley is about a mile and a quarter from Minturn. During all the time I have been there I have never seen water in the Chowchilla river which would cause any uneasiness or any trouble. It is very seldom that the water ever covered the territory between the piers. All waterway was confined to a small portion of the channel. There were no fears from the Chowchilla river as far as I know."

Witnesses W. G. Hayes and C. C. Kloson testified that they had known the place where the washout and accident occured since the year 1880; that they had never known of any flood or storm waters being there; and that never before had there been any freshet or flood or any other water saving that from the ordinary rainfall upon the land.

The conductor and the engineer of the train which suffered derailment were made parties defendant. Their testimony is that they received orders that flood waters were to be apprehended about a mile and a half north of Minturn; that they were to proceed slowly and cautiously and not attempt to make up any time which was lost. They did so proceed. The headlight was an acetylene light, which made the track clearly visible for a hundred yards. The accident occurred, not at the channel of the old slough a mile and a half north of Minturn, but quite unexpectedly at a point about three miles north of Minturn.

The engineer testifies:

"Before we got there, I looked along the line, and everything looked physically intact. There was nothing in the track just at the point of the accident, as I approached it, that would warn me at all. The track looked fine. It never looked better at any time. The gravel was intact, and it looked all right until the engine trucks hit it. The little wheels ahead of the drivers, they must have crushed it in, and when the drivers came down they went right in the hole. The engine truck had scraped the gravel down in. It threw me forward, and she plowed right through, and by that time the engine became uncoupled from the train. The engine tender still stayed on the track. I have never known any water at the particular point where the accident occurred. The point I was cautioned about was a mile and a half west of Minturn, which is a mile and a half south of the point of the accident, which was three miles from Minturn."

The conductor declares:

"I looked to see what was the cause of the derailment. It was the water. The engine stayed on the track. It was across the washout from the train. The engine could not have stayed on the track if the washout had been there when the engine went over it."

[1] The jury by its verdict exonerated the conductor and engineer, which is conclusive upon the proposition that there was no negligence in the operation of the train. Therefore the sole negligence in the case is that charged against the corporation in not maintaining its roadbed in a safe condition.

[2] The facts in this case, as has been said, are not in conflict. They not only fail to show the slightest negligence upon behalf of the appellant, but they demonstrate that appellant exercised to the utmost the high degree of care demanded of it by law. Civ. Code, § 2100. Never in the history of the road had there been danger from flood waters at the place of the accident. This particular flood was of unprecedented severity. At a place upon the roadbed believed by everybody to be safe, the waters undermined the track without in the least affecting the surface conditions, so that the track seemed to be in sound condition. It was a trap, the existence of which was only known as the engine passed over it. Says the Supreme Court of Missouri (Holt v. S. W. Missouri E. Ry. Co., 84 Mo. App. 443):

> "A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before, and which may not be reasonably anticipated. That which never happened before, and which, in its character, is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good grounds for a charge of negligence in not foreseeing its happening and guarding against that remote contingency."

This language has been explicitly approved by this court in Cary v. Los Angeles Ry. Co., 157 Cal. 599, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329, and again in Teale v. Southern Pacific Co., 20 Cal App. 570, 129 Pac. 949, and it is in accord with the rule of decision in all jurisdictions. In the following cases the accidents were occasioned, as here, by storm waters: Libby v. Me. Cent. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Railroad Co. v. Halloren, 53 Tex. 46, 37 Am. Rep. 744; Central Tr. Co. v. Wabash Ry. (C. C.) 57 Fed. 441; Ellet v. St. Louis, etc., Ry. Co., 76 Mo. 518; Norfolk, etc., Co., v. Marshall, 90 Va. 836, 20 S. E. 823; Baltimore & Ohio R. Co. v. Sulphur Spring Ind. School Dist., 96 Pa. 65, 42 Am. Rep. 529; Gulf, C. & S. F. R. Co. v. Pomeroy, 67 Tex. 713, 498, 3 S. W. 722; McPherson v. St. Louis, etc., Co., 97 Mo. 253, 10 S. W. 846.

The trial court fairly instructed the jury upon this proposition. Under the instructions given, and under the evidence set forth, the jury could with propriety have rendered but one verdict, and that of exoneration.

The judgment is therefore reversed, and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

168 Cal. 468

HIGGINS v. KAY et al. (L. A. 3684.)

(Supreme Court of California. Oct. 2, 1914.)

1. PARTIES (§ 61*)—DEVOLUTION OF INTEREST — SUBSTITUTION PENDENTE LITE — NOTICE.

Code Civ. Proc. § 385, provides that in case of the death or disability of a party, the court on motion may allow the proceedings to be continued by or against his representative or successor in interest, and in case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. *Held*, that since one whose rights may be affected by action against him is entitled to notice and an opportunity to be heard, and a failure to accord such notice amounts to lack of due process of law, an order substituting a transferee of the subject-matter of litigation as party plaintiff, on application of the defendant without notice to such substituted party, was invalid.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 97; Dec. Dig. § 61.*]

2. APPEAL AND ERROR (§ 424*)—NOTICE OF APPEAL—SERVICE—IMPROPER PARTY.

Where a transferee of the subject-matter of litigation pendente lite was substituted as plaintiff without notice, on the application of the defendants, such substitution being invalid, service of notice of appeal on such substituted party was insufficient to sustain the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2152–2154; Dec. Dig. § 424.*]

In Bank. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Dell M. Higgins, substituted for A. E. Higgins, against W. O. Kay and others. From a judgment for plaintiff, defendant Kay appeals. On motion to dismiss. Granted.

L. L. Boone, of San Diego, for appellant. Dell M. Higgins, Hunsaker & Britt, and John A. Powell, all of Los Angeles, for respondent.

LORIGAN, J. Dell M. Higgins was substituted as plaintiff in the above entitled action by order of the superior court and notice of appeal served on her by the appellant, W. O. Kay. She moves to dismiss the appeal as to herself.

A. E. Higgins, the original plaintiff, brought an action against Kay and others to quiet his title to an undivided one-fourth interest in a certain lot in the city of San Diego. Kay answered, asserting an interest in the land under an executory contract between himself and plaintiff, and also filed a cross-complaint under which he sought specific performance of this executory contract. A general demurrer to the cross-complaint was sustained. On the trial judgment was entered in favor of plaintiff. This was on April 26, 1913. Kay took no steps to appeal under the new or alternative method of appeal, nor any steps to appeal until October 21st following, when a few days before his right to appeal under the old method would have expired he made an ex parte motion or application to the trial court for an order substituting Dell M. Higgins, the moving party herein, as plaintiff in the action in the place of the original plaintiff, A. E. Higgins, and this application the court forthwith granted. This was done without any notice to said Dell M. Higgins of the application for said order. The grounds upon which the motion for such substitution was made and ordered were that the original plaintiff, A. E. Higgins, had died on August 31, 1913; that prior thereto he had conveyed by deed, which was of record, all the property involved in the action to said Dell M. Higgins; that the estate of A. E. Higgins had no further interest in the property; and that said Dell M. Higgins was the only person interested therein as far as the interest of the original plaintiff was concerned.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

After this order of substitution was made, and on the same day it was made, notice of the making thereof was served on said Dell M. Higgins, as also a notice of appeal in this action. She now moves to dismiss the appeal on the ground that the order of substitution was void because made without any notice to her of the application therefor; that such notice was a jurisdictional prerequisite to the making of a valid order of substitution. The position of respondent in resisting her motion is that the superior court had authority to make the order without notice to her, or if notice should have been given it was not a jurisdictional essential, and failure to do so only rendered the order voidable; that this being true, the remedy of Dell M. Higgins was by motion in the trial court to have the order of substitution set aside or to proceed by direct appeal to have it vacated in this court, and that, having failed to seek relief by either of these methods, she should not be granted the relief of a dismissal of the appeal which she seeks under the present motion.

It is provided by section 385 of the Code of Civil Procedure as follows:

> "An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

It was under this section of the Code that the application for substitution was made, and it will be observed that any right of the defendant Kay to apply and have it done under the asserted fact that the original plaintiff had transferred his interest in the subject-matter of the litigation is given in the last sentence of the section, which provides that it may be ordered "in case of any other transfer" than the devolution of interest by death. While the application for an order of substitution here is based, in a measure, upon the death of the original plaintiff, that fact is really a false quantity in the case. The right of the defendant to have the substitution as made could not be based upon that fact, but only upon the alleged fact of the transfer prior thereto, and as far as either the death of or transfer by the original plaintiff is concerned, it could not affect the rights of the defendant, which would be fully secured if after the one the action continued to be prosecuted in the name of his personal representatives, or after the other it was still prosecuted in the name of the original plaintiff. This is clear from the terms of the section itself, and is supported by the authorities. Walker v. Felt, 54 Cal. 386; Malone v. Big Flat Gravel M. Co., 93 Cal. 384, 28 Pac. 1063. On the death of the original plaintiff Kay had the right to have his personal representatives substituted in his place and nothing more. This also is equally clear from the language of the section. But a substitution of this nature was not what was sought by the defendant or obtained. He based his right to it upon the fact that Dell M. Higgins had acquired by transfer from the original plaintiff all his interest in the subject-matter of the litigation, and on this showing, but without any notice to her, obtained the order of substitution.

[1] It is insisted by her counsel that this failure to give her notice of the application rendered the order void. This precise question has never been heretofore presented to this court for consideration. The cases in this court, and generally where the validity of orders of substitution have been presented for review show, however, that they have been heard and made only after notice to the party sought to be substituted, except where the application has been made by the party himself seeking to be substituted, and we are satisfied on principle that notice was essential to the validity of the order here made. The rule is that in any proceeding of a judicial character, one whose rights or interests may be affected by action against him therein is entitled to notice and an opportunity to be heard, and that a failure to accord him that right amounts to lack of due process of law. He is entitled to an opportunity to question the right of the party applying therefor to have an order for it at all, or whether the discretion of the court should be exercised in his favor, because the granting of such an order rests in the sound discretion of the court (Emerson v. McWhirter, 128 Cal. 268, 60 Pac. 774), and likewise is entitled to an opportunity to contest the facts upon which the motion or application for substitution are based. His substantial rights or interests may be vitally affected if substitution is made, or responsibilities and duties entailed upon him, and it is violative of fundamental principle that this may be

done without any notice or opportunity given him to be heard in protection of his rights and interests.

The case of Campbell v. West, 93 Cal. 653, 29 Pac. 219, 645, relied on by respondent in support of the order, is clearly distinguishable from the matter at bar. In that case while the question on appeal was as to the correct method of pleading the death of the plaintiff pending the action and the appointment of his executor, the court did say, as to motions to have an action continued against the representatives or successors in interest of a deceased, "that the practice in this state is well settled in such cases for courts to allow the substitution to be made upon suggestion of the death of a party and on an ex parte motion showing the appointment and qualification of the executor or administrator of the estate of the deceased party." But this language had reference to motions for the substitution of the executor or administrator of a deceased party made by such executor or administrator himself, which was the situation in the Campbell Case. Of course, a motion for substitution so made is not in any sense an adversary proceeding and it was to such a motion that the court in the Campbell Case was referring. But here the proceeding was of an adversary nature. It was sought to make Dell M. Higgins, who was not a party to the action without her consent, a litigant therein, and before this might be done she was entitled to her day in court—to notice and an opportunity to be heard in the matter. Undoubtedly the court may make a substitution such as was sought here upon a proper showing. But this may be done only after notice of an application therefor. Failure, however, to give her any notice here constituted lack of due process of law rendering the making of the order void.

[2] It follows that as there was no valid substitution of Dell M. Higgins as plaintiff in the action, the service of notice of appeal upon her was of no legal efficacy, and the motion to dismiss this appeal as to her is granted.

We concur: HENSHAW, J.; MELVIN, J.; SLOSS, J.; SHAW, J.

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168 Cal. 444

NICCOLLS et al. v. NICCOLLS et al.
(L. A. 3276.)

(Supreme Court of California. Oct. 2, 1914.)

1. WILLS (§ 91*)—TESTAMENTARY CHARACTER OF INSTRUMENT—CREATION OF TRUSTS.

A deed by a husband and wife, reciting that it was to take effect upon the death of the husband, and purporting to sell, assign, etc., all property, real and personal, that they might own at the husband's death, to trustees, in trust for purposes therein expressed, and reserving the right to revoke or modify it at any time during the husband's life, was testamentary in character and of no effect for the erection of a trust, since it only purported to take effect on the husband's death, and passed no interest till that time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 220; Dec. Dig. § 91.*]

2. TRUSTS (§ 53*)—CREATION OF TRUSTS—ESTOPPEL TO DENY TRUST.

Where a deed by a husband and wife conveying in trust the property which they might own at the death of the husband was ineffective, the fact that one of the trustees accepted the trust in writing and took charge of the husband's property after his death, and proceeded to carry out its terms, and the concurrence of the wife in such acts, gave the beneficiary no rights, by way of estoppel, in the property of the husband.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 73; Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Melinda Clemens Niccolls and others against Frances Niccolls and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Mills & O'Farrell, W. J. Mossholder, and Marks P. Mossholder, all of San Diego (Edward O'Bryan, of San Diego, of counsel), for appellants. Luce & Luce and Wadham & Cosgrove, all of San Diego, for respondents.

MELVIN, J. The plaintiffs filed their complaint, wherein they asked that the defendants be compelled to recognize the validity of a certain trust deed and to be governed by its provisions. A general demurrer to the complaint was sustained without leave to amend, and, from the judgment entered for defendants, plaintiffs appeal.

It is alleged that Rogers was the administrator of the estate of Eben Smith Niccolls, deceased; that plaintiff Melinda Clemens Niccolls is the widow of said Eben Smith Niccolls; that the other plaintiffs are surviving children of said decedent and are his heirs at law; that Rogers resigned as administrator of the Eben S. Niccolls estate, and Layne was appointed his successor; that on April 13, 1907, and from thence to the date of his death, November 4, 1909, one Robert Niccolls, an uncle of Eben S. Niccolls, was seised in fee simple of certain tracts of real estate, descriptions of which are fully set forth in the complaint; that during said period Robert Niccolls was possessed also of a large amount of personal property, which is also described; that Frances Niccolls is the widow of Robert, and was his wife at the time of the execution of a certain purported deed of trust, which is set forth in full in the complaint. The said deed by its terms seeks to create a trust to take effect upon the death of Robert Niccolls in favor of Frances Niccolls, his widow, and it also provides that upon her death the property shall be distributed to certain beneficiaries; Eben S. Niccolls being named as one of them. It is principally upon the terms of this deed of trust, so called, that plaintiffs base their supposed cause of action. The complaint contains averments that Robert and Frances Niccolls duly acknowledged the trust deed of April 13, 1907; that the executed instrument was afterwards delivered to Eben Smith Niccolls by the trustors in escrow, to be delivered according to its terms to the trustees, Thorp, Weldon, and Rogers; that, after the death of Robert Niccolls in 1909, Eben Smith Niccolls delivered the deed to Rogers, who in writing accepted the trust declared therein; that Thorp had predeceased the trustor Robert Niccolls, and Weldon refused to act; that Rogers took charge of all of Robert's property, recorded the deed, and proceeded to carry out its terms, but that subsequently, in collusion with Frances Niccolls, the surviving trustor, he caused himself, on her petition and his own, to be appointed administrator of the estate of Robert Niccolls, deceased, since which time they have refused to perform their duties under the trust deed or to recognize its validity. It is further set forth that Robert Niccolls left no children and no father nor mother surviving him.

[1] By the first paragraph of the trust deed the trustors, Robert and Frances Niccolls, reserve the right to revoke or modify the said deed at any time during Robert's life. The second paragraph is as follows:

> "That the said trustors by these presents, to take effect only upon the death of said Robert Niccolls, one of said trustors, sell, assign, transfer and confirm unto the said trustees, in joint tenancy, and to the survivor of them and their successors and assigns, all our property of every kind and nature, both real and personal, *that we may have and own at the time of the death of the said Robert Niccolls*, one of said trustors, to *have and to hold* the same unto the said trustees as joint tenants and not as tenants in common, with the right of survivorship, and to their successors and assigns, in *trust* and *confidence*, nevertheless for the purposes hereinafter expressed."

Clearly this did not convey any present interest in the property of the trustors. It only related to the property which they should possess at the time of the death of Robert. It purported to convey no interest in any property owned by them at the date of its execution, and the mere fact that they possessed the same property then which was theirs when Robert Niccolls died is a coincidence which in no manner alters the purport or effect of the instrument. While it is competent to create a trust which shall take effect after the death of a grantor, nevertheless there must be some interest or estate which passes at the time of the execution of the deed. In the recent case of Tennant v. John Tennant Memorial Home, 167 Cal. 577, 140 Pac. 246, this court had occasion to reaffirm the rule for determining whether or not a given instrument is testamentary in character, and in that behalf the following language was quoted from Nichols v. Emery, 109 Cal. 329, 41 Pac. 1089, 50 Am. St. Rep. 43:

> "The essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory; it acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. On the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. By such a trust, therefore, something of the settlor's interest has passed from him and into the trustee for the benefit of the cestui, and this transfer of interest is a present one and in no wise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate."

Measuring the trust deed by this rule, we cannot escape the conclusion that it sought to postpone not merely the date of the taking effect of the trust but also the passing of the interest of the so-called trustors to a time subsequent to the death of one of them. There was no attempt by words of description or otherwise to make the trust apply to the property owned by Robert and Frances Niccolls when the deed was executed. The words "that we may have and own at the time of the death of the said Robert Niccolls" are not ambiguous. They seek to specify a future event, namely, the death of the said Robert Niccolls, as the time for the creation of the trust estate. Such an instrument is clearly testamentary in its character and is of no effect for the erection of a trust.

[2] Appellants seek to make the further point that, under the allegations of their pleading, defendant Rogers is estopped by his conduct, and Frances Niccolls is estopped by her concurrence therein, from denying the efficacy of the trust deed; but no conduct could give vitality to a void instrument. The only interest in the property asserted by plaintiffs is one alleged to have been created in favor of Eben S. Niccolls by the deed of trust. That instrument being void, no trust in the property of the deceased Robert Niccolls may arise by the conduct of his supposed trustee nor of his alleged cotrustor.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 500

CRABBE v. MAMMOTH CHANNEL GOLD MINING CO. (Sac. 2111.)

(Supreme Court of California. Oct. 3, 1914.)

1. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DUTY OF SERVANT TO INSPECT.

A miner is not bound to inspect his place of work, though he must exercise that amount of care which the law presumes every person will employ for his own preservation, and hence he does not assume the risk of injury from the fall of rocks in a finished chamber in the mine because he did not inspect it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 241*)—INJURIES TO SERVANT—CARE.

A miner engaged in new operations such as driving a new shaft is bound to exercise much greater care than when at work in a finished chamber in the mine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 757; Dec. Dig. § 241.*]

3. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Employers' Liability Act (St. 1911, p. 796) § 1, subd. 1, having abolished the defense of assumption of risk, recovery for the death of a miner killed by a fall of rock, cannot be defeated on the ground that he assumed the risk because he did not inspect his place of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. § 204.*]

4. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—CHANGE IN CONDITIONS OF PLACE OF WORK.

The owner of a mine cannot defeat recovery for the death of a miner, killed by the fall of rock in a finished chamber, on the ground that it was a place where the conditions were continuously changing, where timbers for the chamber were outside the shaft, and could have been put up at any time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

5. MASTER AND SERVANT (§ 262*)—INJURIES TO SERVANTS—ACTIONS—DEFENSES.

The defense that a mineowner was not liable for the death of a servant because he was killed in a place where changes were continuous must be specially pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855–859; Dec. Dig. § 262.*]

6. TRIAL (§ 250*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE.

Instructions must be applicable to the pleadings and the proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584–586; Dec. Dig. § 250.*]

7. MASTER AND SERVANT (§ 262*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—NECESSITY OF PLEADING.

The defense of contributory negligence in an action for the death of a servant is an affirmative one, which must be pleaded before it can be relied on.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855–859; Dec. Dig. § 262.*]

8. MASTER AND SERVANT (§ 262*)—INJURY TO SERVANT—PLEADING CONTRIBUTORY NEGLIGENCE—SUFFICIENCY.

In an action for the wrongful death of a servant, an answer, consisting of a general denial and general allegations that the accident was caused by the servant's own gross negligence and failure to use ordinary care for his own protection, is not a sufficient pleading of the defense of contributory negligence, which is one in confession and avoidance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855–859; Dec. Dig. § 262.*]

9. DEATH (§ 58*)—TRIAL (§ 252*)—PRESUMPTIONS—NATURE OF PRESUMPTIONS—INSTRUCTIONS.

In an action for the wrongful death of a miner, where there were no eyewitnesses of the accident, the presumption that he exercised due care in his own behalf, announced by Code Civ. Proc. § 1963, subd. 4, while rebuttable, is conclusive under section 1961, not being controverted; hence instructions on contributory negligence were properly refused.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75–78; Dec. Dig. § 58;* Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

10. DEATH (§ 99*)—DAMAGES—MEASURE.

An award of $20,000 damages in favor of the widow and four minor children of the deceased was not excessive where he had an expectancy of over 33 years, and had earned $6 a day, though at the time of the accident he was earning only $3.50 a day.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

11. DEATH (§ 88*) — DAMAGES — ELEMENTS — LOSS OF SOCIETY.

In an action for the wrongful death of a father, the jury may consider the loss of society, comfort and care suffered by his surviving children.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 116; Dec. Dig. § 88.*]

Department 2. Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by Lavinia Crabbe, as administratrix of the estate of William R. Crabbe, against the Mammoth Channel Gold Mining Company. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant. Lon Bond, of Chico, and John H. Crabbe, of San Francisco, for respondent.

HENSHAW, J. William R. Crabbe, a skilled and experienced miner, aged 33 years, was killed by a falling stone while at work under ground in the mine of appellant. His administratrix brought this action for damages. It was tried before a jury; verdict passed for plaintiff in the sum of $20,000, and judgment followed the verdict. Defendant moved for a new trial, and from the order denying its motion prosecutes this appeal.

Defendant's mine comprised a tunnel leading from the surface into a mountain for a distance of 1,200 feet. There the tunnel connected with a shaft extending downward about 200 feet to what is known as a "station," which is an excavated underground room. The underground room in this case was 12 feet wide, 20 feet long, and 10 feet high. From the end of the station opposite the shaft another tunnel or "drift" was being driven in the hope of finding a pay gravel channel. Plaintiff's intestate, with a companion, was at work in excavating in this drift, which at the time of the accident extended from 25 to 30 feet from the station. He was "mucking" or carrying out the waste material to the end of the shaft in the station, whence it was conveyed out of the mine. While so engaged a stone in the roof of the station fell upon him and caused his death. The complaint charged negligence in failing properly to timber this station so as to prevent rock falling from the roof thereof. The answer made denial and affirmatively charged that the accident which resulted in Crabbe's death "was due to and caused by his own gross negligence and failure to exercise and use ordinary care for his own protection." The injury which resulted in Crabbe's death befell him on the 13th day of September, 1911, when the Employers' Liability Act was in force. This act was also in force at the time of the trial of the action. Stats. 1911, p. 796.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

At the time of the accident the station had been but partially and incompletely timbered. An additional set of timbers was placed near the mouth of the shaft ready for use, and was visible to the deceased as he went to and from his labors. No work had been done toward making the station safe and secure for two weeks before the accident, during which time the timbers remained at the mouth of the shaft.

[1] In argument appellant takes the position that the station was reasonably safe and had been made reasonably safe for the conduct of the mining operations which were under way; that the blasting in the drift had a tendency to jar and loosen the rock both in the drift and in the station; that it was the duty of the deceased as an experienced miner to observe the condition of the mine and station, and when that condition called for additional timbering in the station, to report this fact to the superintendent or foreman; that it was likewise Crabbe's duty, as a matter of common prudence for his own safety, to notice "if anything appeared out of the way, rendering it dangerous, and to report that condition promptly." The evidence of defendant's superintendent and foreman is to the effect that the station was in a reasonably safe condition. The opposing evidence is that it was unsafe, and the incontestable fact is that if the roof had been supported by the additional timbers the accident could not have happened. All of the evidence is to the effect that Crabbe was engaged in the performance of his regular duties as miner. There is not a scintilla of evidence that he was careless or negligent in the performance of those duties, unless this inference is to be drawn from the fact that while wheeling the loosened rock from the face of the tunnel through the station to the shaft a large stone from the unsupported roof of the station fell and killed him. If such a fact as this warrants even an inference of negligence upon the part of a miner, it must come from the position, which appellant asserts, that it is the duty of miners continually to observe the condition of the mine for their own safety. But even if this be conceded to be true, and only in a very limited sense can it be said to be true, no inference can be drawn that if he had inspected the roof he could have detected the hazard and the imminence of his danger. Indeed, it would be a much more natural inference that if he had paused to make such an examination he would have been killed while making the inspection, since the roof of the station was 10 feet high and, with the lights which miners carry, to inspect it necessitated standing under the point to be inspected and holding high the light. We say that the doctrine for which appellant contends is true only in the most limited extent—the duty namely of continued inspection of the condition of the mine. Such duty of inspection is the duty of the employer, and it should be performed with all proper care by the employer's agents. Dyas v. S. P. Co., 140 Cal. 308, 73 Pac. 972. In this case it is contended by appellant that it was so properly performed by the superintendent and foreman. To say that in a mine such as this it is the duty of each miner, holding high his light to inspect the roof of the station and the shaft and the condition of the tunnel is to say that the mineowner owes them no duty in this regard. Moreover, a miner who did, without special instruction from the owner, so employ his time in observation and inspection and not in his regular miner's work, would remain in the employ of the mineowner only until the fact was discovered. The truth of the matter is that a miner under such circumstances is charged with the duty of exercising only such an amount of care as the law presumes that every person will employ for their own interest and preservation. The quantum of that care will depend upon and vary with the degree of hazard of the particular occupation.

[2] Where miners are employed in drifting and are working into new formations, the degree of care which they will be called upon to exercise for their own protection to avoid injury from a cave or from falling rock will be very much greater than the degree of care imposed upon them in using the older workings which are or should be in a thoroughly protected condition, and which they have the right to assume are in such condition.

[3] But even if it be said that the station as used by Crabbe was in an unsafe condition, and that he knew it, this amounts to no more than a declaration that Crabbe assumed the risk of a known hazard. But this fact, by the very terms of the Employers' Liability Act, no longer affords the employer a de-

fense. Employers' Liability Act, § 1, subd. 1.

[4, 5] The argument of appellant that it was not bound to furnish a reasonably safe place for the work of deceased because of the changing conditions is open to the twofold answer: First, that there were no such changing conditions as to the station which made it impracticable to make that safe, since the extra timbering lying unused at the mouth of the shaft would unquestionably have done this thing; and, second, such a contention is in the nature of an affirmative defense which, to be availed of, should be pleaded. Bird v. Utica Gold Mining Co., 2 Cal. App. 677, 84 Pac. 256.

[6] Appellant's especial complaint, however, is directed to the refusal of the court to give certain instructions proposed by it. One of these instructions was to the effect that if the deceased knew or should have known the unsafe condition of the station in time to report it to the superintendent, and failed to do so, he was negligent. Again the court was asked to instruct the jury that if the negligence of the deceased was not slight, and that of the defendant was not gross the verdict should be for the defendant. Other instructions going to the asserted contributory negligence of the deceased and the degree of that negligence, whether slight or gross, as contemplated by section 1 of the Employers' Liability Act, were either refused or given in modified form. Over the action of the court in these respects appellant has no just cause for complaint, fundamentally because appellant's pleading did not justify the giving of these instructions, and, secondarily, because the evidence in the case did not call for them.

[7, 8] Appellant's answer, as above indicated, consisted of a denial that its negligence occasioned the death of Crabbe, and then it affirmatively declared, as above quoted, that his death was "caused by his own gross negligence and failure to exercise and use ordinary care for his own protection." Contributory negligence in this state is an affirmative defense which must be pleaded. While the pleader may charge the contributory negligence in general terms, yet he must plead the facts of such negligence, and the facts pleaded must show a causal connection with the injury. Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Stephenson v. S. P. Co., 102 Cal. 144, 34 Pac. 618, 36 Pac. 407. In this case the pleader does not plead contributory negligence as such at all, for contributory negligence is in its nature a plea of confession and avoidance. Contributory negligence in law is predicated upon the existence of negligence upon the part of the defendant, the responsibility for which he avoids by showing a concurrent and contributing negligence upon the part of the person injured. Cogdell v. Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618; Newport L. & A. T. Co. v. Pirmann, 82 S. W. 976; Watkinds v. S. P. R. Co. (D. C.) 38 Fed. 711, 4 L. R. A. 239. Appellant's plea is therefore not a plea of contributory negligence, but consists of a denial of negligence upon the part of the pleader and an assertion of gross negligence upon the part of the deceased. But this asserted gross negligence itself is not pleaded in form sufficient to tender an issue. The case then rests upon the asserted negligence of defendant averred in the complaint and the denial of that negligence sufficiently pleaded in the answer.

[9] But even if so great an extension of the rule of pleadings should be indulged in as to say that if the evidence (without a pleading of contributory negligence) showed such negligence upon the part of the injured person, the court should instruct accordingly, in this case such a showing is entirely lacking. The precise cause of Crabbe's death is well established. The precise amount of knowledge of conditions actually existing at the time of or just prior to his death is not known. It is, however, thoroughly well established that if the station had been properly timbered the stone which caused Crabbe's death would not have fallen. Even if it be said that as an experienced miner the deceased knew that the condition of the station was unsafe, in continuing to work in and through it, he but assumed the known hazard, which as a defense is no longer available to appellant. It was necessary for appellant to plead and to show that, even after the assumption of this known risk, he negligently conducted himself in regard to it. Where death is occasioned under circumstances such as this, without eyewitnesses, the law comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4; Cogdell v. Wilmington & W. R. Co., supra; Shannon v. Delwer, 68 Minn. 138, 71 N. W. 14. This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide. Code Civ. Proc., § 1961. There is no evidence in this case to rebut this presumption, and, standing uncontroverted, it is binding to the effect that the deceased was exercising the due amount of care in all matters connected with his progress through the station at the time when he met his death. There being no evidence, therefore, tending to show negligence upon the part of the deceased, all instructions touching that subject-matter were properly refused. Sill v. Ceschi, 140 Pac. 949.

[10, 11] Deceased left four minor children. He was at the time of his death earning $3.50 a day. He had earned $6 a day. His expectancy of life was over 33 years. The jury were entitled to take into consideration the loss of society, comfort, and care suffered by the surviving children on account of the death of their father. Dyas v. S. P.

Co., 140 Cal. 308, 73 Pac. 972. It may not be said that under the facts and circumstances of this case the award of the jury was excessive.

The order appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

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168 Cal. 448

ECONOMIC GAS CO. v. CITY OF LOS ANGELES et al. (L. A. 3369.)

(Supreme Court of California. Oct. 2, 1914. Rehearing Denied Oct. 31, 1914.)

1. GAS (§ 14*)—RATES—POWER OF MUNICIPAL CORPORATIONS.

The authority conferred by Const. art. 11, § 19, empowering municipal corporations to regulate charges for gas sold by any public service corporation, and St. 1911, p. 2063, authorizing a city to fix and determine rates to be collected for gas, is plenary, and is not limited to the fixing of maximum rates, but includes the power to prohibit the lowering of rates directly or indirectly by any device which a gas company may adopt, including the device of discount to consumers paying their bills at the office of the company on or before a designated day of the month next succeeding that during which the indebtedness for gas was incurred.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

2. MUNICIPAL CORPORATIONS (§ 111*)—ORDINANCES—PARTIAL INVALIDITY.

The validity of a city ordinance, fixing gas rates and making it unlawful to collect by rebate, drawback, or other device greater or less than or different from the rates fixed, is unaffected by the invalidity of the provision authorizing the board of public utilities to consent to a reduction in rates on application therefor on the theory that the board may fix rates more frequently than once a year, contrary to St. 1911, p. 2021.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245–256; Dec. Dig. § 111.*]

3. GAS (§ 14*)—RATES—ORDINANCES—CONSTRUCTION.

A city ordinance, fixing gas rates and prohibiting the collection, by rebate, drawback, or other device, of a greater or less or different sum than the rates fixed, prohibits a gas company from granting a discount to consumers paying their bills at its office on or before a designated day of the month next succeeding that during which the indebtedness was incurred.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Economic Gas Company against the City of Los Angeles. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

John W. Shenk, Charles D. Houghton, and Roy A. Linn, all of Los Angeles, for appellants. Trippet, Chapman & Biby, of Los Angeles, for respondent.

MELVIN, J. By ordinance No. 22947 (New Series) the city of Los Angeles established a rate of 80 cents per thousand cubic feet as the amount to be charged for gas furnished by the Economic Gas Company, a corporation, to its patrons within the corporate limits of that city. The gas company, for the purpose of facilitating its collections and to save the expense of hiring collectors, made a rule that a discount of 6¼ per cent. would be allowed to each consumer who would pay his bill at the office of the company on or before the 10th day of the month next succeeding that during which the indebtedness should be incurred. This action was one by which plaintiff sought to enjoin defendants from enforcing that part of the ordinance which prohibited the selling of gas at a rate less than that prescribed therein. Defendants demurred to the complaint; their demurrer was overruled; they declined to answer; and judgment was accordingly entered in compliance with plaintiff's prayer, enjoining defendants from any interference with the granting of the said rebates. They have appealed from the judgment.

By the first section of the ordinance in question the rates to be charged by the various gas companies in the city of Los Angeles, are fixed, that specified for plaintiff being, as stated above, 80 cents per thousand cubic feet. By section 2 it is made unlawful for any person, firm, or corporation furnishing gas in said city to charge, collect, or receive any compensation in excess of the rate fixed thereby for the year commencing July 1, 1911, and ending June 30, 1912. Section 3 is in part as follows:

> "It shall be unlawful for any person, firm or corporation, either as principal, agent, employé, or otherwise, to charge, demand, collect or receive any rate or compensation for gas supplied during the year commencing July 1, 1911, and ending June 30, 1912, to the city of Los Angeles, or to any inhabitant thereof, less than the rate fixed by this ordinance, unless an application for a reduction in such rate is made by the person, firm or corporation so supplying such gas, and the consent of the board of public utilities thereto is obtained in the manner hereinafter provided."

It is unnecessary, for the purposes of this opinion, to state in detail the procedure required to invoke the action of the board of public utilities. Suffice it to say that the board is authorized by the section to lower the rate on application and to raise it again on request of a gas producer, but not to a figure in excess of that established by the first section of the ordinance. It is alleged in the complaint that the gas company has not made application to the board of public utilities for permission to discount its bills, for the reason that said board has notified the officers of the company that such request would be denied.

Section 4 provides that it shall be unlawful to charge any person any rate greater or less than that demanded of another for the same service.

Section 5 prohibits the collection by rebate, drawback, or other device, of compensation for gas greater or less than or different from the rates fixed by the said ordinance.

[1] By section 19 of article 11 of the Constitution, any municipal corporation is given authority to "regulate the charges" for gas sold by any public service corporation or any individual engaged in similar business, and among the enumerated powers of the city in its charter (Stats. 1911, p. 2063) is that "to fix and determine rates of compensation to be collected * * * for gas." The authority conferred is plenary, and by the terms of the Constitution and the charter does not limit the city to the establishing of a maximum rate. Respondent insists, however, that the city's power is merely to declare a maximum rate, and that the corporation may do anything it desires in the way of a reduction of price to a general class of consumers. We cannot agree with this contention. One of the purposes of regulation is to exclude favoritism to an individual or a class. If the legislative body of a city might only fix a maximum rate, it might be possible for a corporation to reduce its charges, in some form or another, to a point which would drive a competitor out of business and, after accomplishing that result, to resume the maximum charge permitted by law.

It is contended that the city's police power extends only to the protection of the consumer. But "regulation" involves more than that. It includes the power to prevent ruinous competition among the producers as well as unjust charges to the consumers. Familiar examples of the right of a regulating body to fix rates which may not be exceeded nor rebated are furnished by the controversies which have arisen between the Interstate Commerce Commission and certain transportation companies. The Supreme Court of the United States has held that the tariff rates for shipments may not be evaded by any pretext or device. Armour Packing Co. v. United States, 209 U. S. 71, 28 Sup. Ct. 428, 52 L. Ed. 681; Louisville & Nashville R. R. Co., v. Mottley, 219 U. S. 476, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671. In the recent case of Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp., 141 Pac. 620, this department disposed of the whole subject of contracts with consumers made in violation of this ordinance. There, as here, one of the contentions was that the police power of the city permitted the establishment of a maximum rate only, but it was held that such a theory was in practical effect "a denial of the existence of the rate-fixing power itself."

[2, 3] Respondent argues that the power sought to be vested in the board of public utilities by section 3 of the ordinance may not be lawfully exercised because by its exercise rates might be fixed more frequently than once a year, contrary to the express prohibition of the law. Stats. 1911, p. 2021. It is unnecessary to discuss this interesting matter, for the reason that admittedly the board has not ever been requested to act upon the subject of respondent's proposed discounts. If we eliminate this part of the ordinance there still remains that portion of it by which the city council, in the exercise of its undoubted authority, fixed rates which it deemed reasonable. It forbade any departure from these rates except by permission of the board of utilities, and if the exception be void, the inhibition is clearly not so. We are not here concerned with the reasonableness of the rate of 80 cents per thousand cubic feet for gas. Indeed by seeking in some instances to charge a lower rate respondent concedes its reasonableness. We are merely concerned with the power of a municipality to prohibit the lowering of rates directly or indirectly by any sort of device which a gas company may adopt. Such power does exist and it has been exercised in the ordinance now before us.

The judgment is reversed and the cause remanded, with directions to the superior court to sustain the demurrer of defendants to the complaint and to dissolve the injunction.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 375

STEELE et ux. v. PACIFIC ELECTRIC RY. CO. (L. A. 3346.)

(Supreme Court of California. Oct. 1, 1914.)

CARRIERS (§ 316*)—PASSENGER'S ACTION FOR INJURIES—BURDEN OF PROOF—RES IPSA LOQUITUR.

While proof of a collision or derailment of a train or other accident, resulting in injury to a passenger through the operation of the instrumentalities employed by the carrier in the conduct of its business of transporting him, raises a presumption of negligence on the part of the carrier, and throws upon it the burden of showing that the accident was the result of causes beyond its control, and while such presumption arises from proof that the car was suddenly started while a passenger was alighting, no such presumption arises from the fact of an injury to a passenger without proof, if the fact be controverted, that the injury was caused by a collision, derailment, or sudden starting of the car while the passenger was alighting; and hence where the evidence was conflicting as to whether a passenger was injured by the car starting while she was alighting, or by reason of her attempt to alight while the car was in motion, it was error to charge that proof of the injury while on defendant's car cast upon defendant the burden of proving that the injury was occasioned by inevitable casualty, or some other cause that human care or foresight could not prevent, or by contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. § 316.*]

Department 2. Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Sarah I. Steele and husband against the Pacific Electric Railway Company. From a judgment on a verdict for plaintiffs, defendant appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

J. W. McKinley and R. C. Gortner, both of Los Angeles, for appellant. F. A. Knight, of Long Beach, for respondents.

LORIGAN, J. This action is brought to recover damages for personal injuries sustained by plaintiff Sarah I. Steele through the alleged negligence of the defendant, and, from a judgment entered on a verdict in favor of plaintiffs, defendant appeals.

The complaint alleges that, while plaintiff Mrs. Steele was a passenger on a street car of the defendant, she notified the employés of defendant operating it that she desired to get off at a certain point along its route which the car was approaching and where it regularly stopped; that the car was stopped when it reached said point, and she proceeded to leave it, but without allowing her sufficient time to safely do so, and, while she was still on the steps of the car, the employés of defendant carelessly and negligently and suddenly started said car, in consequence of which, and without any fault on her part, she was violently thrown to the street and grievously injured.

Defendant denied the charge of negligence, or that Mrs. Steele sustained the injuries claimed as a result thereof, and set up contributory negligence on her part in attempting to get off the car before it had stopped and while it was in motion.

There was no question but what Mrs. Steele was a passenger upon the car, and that she was injured while attempting to alight from it, but on the issue as to whether the car was stopped and was suddenly started while she was proceeding, as she claimed, to get off of it, or whether she attempted to alight therefrom while it was still in motion, and hence was guilty of contributory negligence as claimed by defendant, the evidence was sharply conflicting.

In this state of the pleadings, the issues made, and the condition of the evidence, the court gave the following instruction:

> "You are instructed that contributory negligence on the part of the plaintiff cannot be presumed from the mere fact of injury, but must be proved. *On the other hand, the proof of injury of plaintiff on a car of the defendant casts upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.*"

The correctness of this instruction, as far as the italicized portion of it is concerned, is attacked by appellant, and whether this attack is justified is the sole point presented for consideration on this appeal. It will be noted that under the instruction the jury is told that the proof of the mere happening of an injury to a passenger on the car of a carrier raises a presumption of negligence on the part of the carrier, which casts the burden on it of proving that such injury was occasioned by inevitable casualty, or by contributory negligence on the part of the passenger. Appellant insists that, under the issues and evidence in the case, such an instruction is erroneous, and we are satisfied that this claim must be sustained. We are not pointed by counsel for respondents to any case which declares that such a presumption of negligence on the part of the carrier arises from proof of the mere fact of injury itself to a passenger. The rule no doubt is that where a passenger is injured in a collision, or derailment of a train, or through the operation of the instrumentalities employed by the carrier in the conduct of its business of transporting him, proof of the collision, derailment, or accident due to such instrumentalities raises a presumption of negligence on the part of the carrier. It is not necessary for the passenger to prove the cause of the collision, derailment, or other accident. It is sufficient for him to prove that it occurred, and such proof makes a prima facie case of negligence on the part of the carrier, which throws upon it the duty of explaining how it occurred, and showing that it was the result of causes beyond its control, and so relieving it from responsibility. The wisdom of this rule is apparent. The train being under the control of the carrier, and the collision, derailment, or accident occurring while being operated by it, the causes therefor are peculiarly within the knowledge of the carrier. The passenger cannot ordinarily know how the accident occurred. Such accidents do not occur if ordinary care is used in the operation of trains, and it is only reasonable, when they do occur, to require an explanation of the causes thereof to be made by the one upon whom the duty is cast of avoiding them. MacDougall v. Central R. R. Co., 63 Cal. 431; McCurrie v. Southern Pac. Co., 122 Cal. 558, 55 Pac. 324; Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243; Kline v. Santa Barbara Ry. Co., 150 Cal. 741, 90 Pac. 125.

Within this rule it is no doubt equally true that where a passenger is attempting to alight from a car on reaching his destination, and the car suddenly starts, throwing him to the ground, on proof of the fact of such starting up while he is endeavoring to alight, a presumption of negligence on the part of the carrier in such starting is raised, because, in the exercise of due care, a car will not be started while the passenger is undertaking to get off. The passenger is therefore not required to prove why the car started, but simply the fact that it did start. Having done this, he makes a prima facie case of negligence against the carrier, and the burden of proof is then cast upon the latter to prove the cause of the starting, and that it occurred under such circumstances as relieved it from liability for any injury occasioned the passenger thereby. But, in any case, no presumption of negligence arises from the mere fact that the passenger was injured. There must be, in addition, proof, if the fact is controverted, that it proceeded from a collision or derailment of the train or the starting of the car while the passenger was endeavoring to alight, before the presumption of negligence can be invoked, because it is only on such proof and a finding by the jury that the injury proceeded from such cause that the presumption arises. The rule in this regard is clearly stated in Wyatt v. Pacific Electric Ry. Co., 156 Cal. 170, 103 Pac. 892, as follows:

> "It is not the law, as the argument of the plaintiffs implies, that the mere fact that a passenger is injured while aboard a car, or while alighting therefrom, creates a presumption that the injury was caused by want of care on the part of the defendant operating such car. It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant. When this is done, the law then presumes prima facie that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made. Such negligence is presumed because such accidents do not ordinarily happen if due care is used, and because the defendant is usually better able than the plaintiff to show the actual truth of the matter. In Griffen v. Manice, 166 N. Y. 193, 59 N. E. 925 [52 L. R. A. 922] 82 Am. St. Rep. 630, the court, referring to this maxim, says: 'It is not the injury, but the manner and circumstances of the injury, that justifies the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises.' So here the fact that the deceased was injured by falling to the ground creates no presumption of negligence. But, if it is also shown that the fall came about from the sudden starting of the car as she was stepping off the same, then it will be presumed that the sudden start was caused by the defendant's negligence. But the proof of the injury (that is, the bruise or hurt), or the proof that she fell to the ground, without proof as to why she fell, raises no presumption either that she was made to fall by the sudden starting of a car at rest, or by a careless attempt to get off while it was in motion and before it had stopped. Lincoln Tr. Co. v. Shepherd, 74 Neb. 372, 104 N. W. 882, 107 N. W. 764; Saunders v. Chicago, etc., Co., 6 S. D. 40, 60 N. W. 148."

It is this erroneous assumption discussed in the Wyatt Case which is embodied in the instruction at bar. The vice of that instruction arises from telling the jury that a presumption of negligence on the part of the carrier arises from the mere fact of injury to a passenger, when no such presumption arises from that fact alone. In the case at bar proof of injury alone had no tendency whatever to show how the accident to plaintiff occurred. It was simply the result of an effort to get off the car, and its happening no more tended of itself to prove that it occurred from a sudden starting of the car while plaintiff was attempting to alight therefrom than that it resulted from an attempt to do so while it was in motion. There was no question in the case but that plaintiff was injured while attempting to leave the car. The question was: How did it happen? Her injury alone could not raise the presumption of the negligence of defendant, because whether that injury was caused by the sudden starting of the car while plaintiff was in the act of alighting therefrom or not was the very question in the case. It was the crucial issue, and, before the jury would have been warranted in applying the presumption of negligence against defendant, it was necessary for it to determine that issue in favor of the plaintiff—to find that the car was in fact suddenly started by the employés of defendant while plaintiff was attempting to alight therefrom. Such a preliminary determination of the issue against defendant was the essential foundation upon which alone the presumption of negligence could arise, and the court should have so stated in its instruction to the jury. It should have instructed them that if upon this issue of fact between the parties, namely, whether the car did or did not start while plaintiff was attempting to alight therefrom, they found that it did so start, then that a presumption of negligence on the part of defendant arose, and the burden was cast upon it of showing that it arose from such cause which relieved it from responsibility for the injury to plaintiff. To instruct the jury that the mere fact of injury raised this presumption was to permit it to ignore the issue upon a finding of which, adversely to defendant, the presumption could alone be applied, and was for that reason error.

There were no other instructions given in the case under which it can be claimed that the error in giving this instruction was cured.

Counsel for respondents call our attention in their briefs to cases in which a similar instruction has been approved. MacDougall v. Central R. R. Co., 63 Cal. 431; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Boone v. Oakland Transit Co., 139 Cal. 490, 73 Pac. 243; Kline v. Santa Barbara Ry. Co., 150 Cal. 741, 90 Pac. 125; Housel v. Pacific Electric Ry. Co., 139 Pac. 73. But in each of these cases it will be found on examination that there was no question but that the injury to the plaintiff was caused by collision or derailment of the car in which he was a passenger or while he was alighting from it. There was no issue in any of these cases as to how the injury occurred. Under such circumstances, the giving of the instruction was proper. But this is not the situation here. Here the essential fact in issue was: How did the accident occur? Was it through the act of defendant in starting up the car while plaintiff was attempting to alight, or did it result from an attempt on her part to get off while it was still in motion? And the vice of the instruction was in ignoring any necessity on the part of the jury of finding adversely to the defendant on this issue as a prerequisite to applying the presumption against it, but, on the contrary, instructing them that such presumption arose and could be applied simply from proof of injury sustained by the plaintiff.

The judgment appealed from is reversed.

We concur: HENSHAW, J.; MELVIN, J.

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168 Cal. 463

HENRY DALTON & SONS CO. v. CITY OF OAKLAND. (S. F. 6343.)

(Supreme Court of California. Oct. 2, 1914.)

1. Navigable Waters (§ 39*)—Littoral or Riparian Owners—Tide Lands.

A littoral or riparian owner of land on navigable tide waters has no right of access to the deep waters over intervening tide lands, and the state may, as against him, authorize a city, as its agent, to improve the tide lands in aid of navigation and commerce.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239–244; Dec. Dig. § 39.*]

2. Navigable Waters (§§ 14, 37*)—Improvements—Authority of States.

In the absence of any legislation by Congress or acts by federal authorities, the states may improve their navigable waterways and harbors in subordination to the control of the general government over the subject; provided the improvement does not interfere with free navigation, or defeat any system for the improvement of navigation provided for by the federal government, and a state may grant tide and submerged lands to a city in trust to improve the harbor of the city in aid of navigation and commerce.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42, 201–226, 285; Dec. Dig. §§ 14, 37.*]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Henry Dalton & Sons Company against the City of Oakland. From a judgment for defendant, plaintiff appeals. Affirmed.

Z. N. Goldsby and H. D. Gill, both of Oakland, for appellant. Ben F. Wollner, of Oakland, for appellee.

LORIGAN, J. This action is brought by plaintiff as a private corporation and for its own benefit to enjoin the defendant from making certain proposed municipal improvements along its harbor in the bay of San Francisco. The complaint is in four counts, but a general statement of its allegations will present the grounds upon which plaintiff bases its right to relief.

It is alleged that plaintiff is the owner of a lot of land in the city of Oakland bordering on the line of ordinary high tide in the bay of San Francisco, in which the harbor of Oakland lies, as the line of said ordinary high tide existed in 1852; that upon this lot it has established and for many years past has conducted a large manufacturing plant and business; that extending seaward some 1,500 feet from said lot and in front of it is a strip of tideland alternately covered and uncovered by the daily and ordinary influx and reflux of the waters of the bay, over which for over 200 feet plaintiff has constructed and maintained a wharf and landing; that at high tides the waters covering said tidelands are not navigable for deep draft vessels, but at such tides light draft vessels may be navigated over them, and such are navigated and used by plaintiff in doing its shipping from said landing and wharf to and over the deep waters of the bay; that the defendant city of Oakland has exclusive jurisdiction, management, and control of the harbor of said city situated in said bay, and in contemplation of the development and improvement thereof has arranged for the establishment and construction of a system of municipal wharves and docks therein, together with the necessary adjuncts and appendages thereto to be constructed along its entire water front, and as an integral part thereof has arranged for and commenced the construction of a sea wall directly facing and fronting the land of the plaintiff and about 4,000 feet therefrom; that this sea wall, if constructed, will, in connection with other improvements already made in said harbor, present an impassable barrier and obstruction to the navigation from said waters of the bay shoreward from said sea wall, prevent access to and from the said land of the plaintiff by water, and deprive it of free passage to and egress from the navigable waters of said bay; that these acts done and threatened constitute a present and continuing nuisance specially injurious to plaintiff, and from which it has and will suffer great and irreparable injury, unless restrained by the court. The prayer was for an injunction restraining defendant from prosecuting such proposed improvement.

A demurrer to the complaint was sustained, without leave to amend, and from the judgment thereon entered in favor of the defendant the plaintiff appeals.

It will be observed that plaintiff does not claim any ownership in the tidelands in front of its property, nor that it possesses any franchise or permit granted it by the state or municipal authorities under which its wharf and landing over said tidelands were constructed. In fact, it is not questioned but that these intervening tidelands were granted by the state to the town of Oakland as part of its water front under the act of 1852 incorporating that town, subject only to the right of the public to use them for purposes of navigation and fishery, and charged with the public trust of improving said water front by the erection of wharves, docks, piers, and such other constructions in its harbor as are essential to facilitate and aid commerce and navigation therein. Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Cimpher v. City of Oakland, 162 Cal. 87, 121 Pac. 374; Oakland v. Oakland

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Water Front Co., 162 Cal. 675, 124 Pac. 251.

Further, by Act May 1, 1911 (St. 1911, p. 1258), the state in terms further granted to the city of Oakland the tide and submerged lands lying in front of the land of plaintiff and the deep waters of the bay in trust, and imposed on the city the duty of using said lands for the establishment, management, and conduct of a harbor and for the construction and maintenance thereon of wharves, docks, piers, slips, and other utilities and structures necessary or convenient for the promotion and accommodation of commerce and navigation. It is quite clear from the allegations of the complaint—in fact, is not questioned—that the improvements which the city of Oakland is making in its harbor are in discharge of the trust and duty imposed upon it under the acts of the Legislature and for the promotion of navigation and commerce therein.

[1] The theory under which appellant framed its complaint is that as a littoral or riparian owner of property fronting on the bay, and irrespective of who may be the owner of the tidelands lying between high-water mark and its deep waters, plaintiff by reason of such ownership of the upland possesses certain rights incident thereto, including the right to free and unobstructed access over such tidelands, to construct suitable landings thereon, and to enjoy exclusive occupancy thereof, subject only to the paramount public right of navigation; that the city has no right to erect structures, such as it contemplates, which will cut off access from the lands of plaintiff to the deep waters of the bay and destroy its right of navigation over them.

Counsel for appellant has discussed these propositions very thoroughly in his brief, citing cases which he contends sustain this position. Many of the cited authorities apparently do so, but they are cases which arose in other jurisdictions, where the laws relative to the rights of littoral or riparian owners on navigable waters are different from ours. Such rights depend upon the local laws of the different states, and if plaintiff possesses the littoral or riparian rights which it claims by virtue of the ownership of its upland lot, they must be found to be conferred under some law of this state. But under our laws plaintiff as littoral or riparian owner has no right of access as to the deep waters of the bay over intervening tidelands.

In People ex rel. v. Southern Pacific R. R. Co., 166 Cal. 627, 138 Pac. 103, decided since the appeal in this case was taken, this court had occasion to determine whether any such right existed in favor of a littoral or riparian owner, and it was decided that it did not. It was there said:

> "The defendants have a parcel of upland adjoining the tidelands in controversy, and they claim the right, as riparian proprietors, to wharf out and use the tideland in front of their upland for navigation in connection with the upland. It is settled by the decision of the Supreme Court of the United States in the case of United States v. Chandler-Dunbar W. P. Co. [229 U. S. 53], 33 Sup. Ct. 667 [57 L. Ed. 1063], decided May 26, 1913, that when the riparian proprietor holds title to the soil under the water in front of his upland, and holds it by virtue of his riparian ownership in fee, such title is subject to the public easements of navigation and fishery; that when the public authorities see fit to make improvements on the land below high-water mark for purposes of navigation, the riparian owner must yield thereto; and that his right is subordinate to the public rights. There are many other decisions of the Supreme Court of the United States substantially to the same effect. Under these authorities it is apparent that the littoral rights of the defendants cannot impinge upon the control by the state of tide lands for the public purposes of navigation and fishery, or affect the public easement for those purposes."

We are not concerned here with what may be the rights of an upland proprietor to restrain a stranger from erecting structures upon intervening tidelands which will prevent his free access to the navigable waters. S. F. Sav. Union v. R. G. D. Petroleum Co., 144 Cal. 137, 77 Pac. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Ann. Cas. 182. We are considering only the complaint of the plaintiff against the action of the state, through its agency, the city of Oakland, in the erection of improvements on the tidelands within its harbor which will deprive it of such access. This the state had a right to do, even though this result followed, as it had equally a right to authorize the city of Oakland as its agency to do it.

[2] While the paramount right exists in the United States government under the provisions of the federal Constitution to regulate and control the improvements of navigable waters, still in the absence of any legislation by Congress or acts thereunder by the federal authorities the states have the right to improve their navigable waterways and harbors. The only limitation on this power is that it must be exercised in subordination to the control of the general government over the subject, and such local system must not interfere with free navigation or defeat any system for the improvement of such navigation provided for by such general government. County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; People v. Cal. Fish. Co., 166 Cal. 600, 138 Pac. 79.

Under these authorities there can be no question but that the state had authority to make the grants which it did of these tide and submerged lands to the city of Oakland in trust for the purpose of improving its harbor in aid of navigation and commerce, as there can likewise be no question but that the improvements which the city was making and contemplated doing by the scheme it had devised were such as were imposed on it by the act of the Legislature referred to and were designed to effect that purpose.

It is not questioned but that the improvements contemplated by the city in the harbor are projected in good faith or that they will not accomplish the purpose designed. If such improvements have the effect of cutting off access over said tidelands from the upland lot of the plaintiff, it is no ground of complaint, because, as pointed out, it had no right as an upland owner to the free and obstructed access to navigable waters over said tidelands as against the right of the state to at any time devote them to the improvement of the harbor of Oakland in aid of the public easement of navigation and commerce, or transfer them, as it did, to the city of Oakland, charged with the duty and obligation of doing so.

The judgment is affirmed.

We concur: SULLIVAN, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.; MELVIN, J.

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168 Cal. 397

TITLE INS. & TRUST CO. v. CALIFORNIA DEVELOPMENT CO. et al.

(L. A. 3690–3691.)

(Supreme Court of California. Oct. 1, 1914.)

1. APPEAL AND ERROR (§ 412*)—NOTICE OF APPEAL—AUTHORITY OF ATTORNEY—RATIFICATION.

Where attorneys in good faith, but erroneously believing that they had authority to appeal from a judgment against a corporation, served notice of appeal, such notice was ineffective to perfect an appeal for the corporation, nor could it be ratified by the corporation's board of directors after the time to appeal had expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2135; Dec. Dig. § 412.*]

2. ATTORNEY AND CLIENT (§ 70*)—AUTHORITY—PRESUMPTIONS.

The fact that an attorney appears on behalf of a party raises a presumption of authority on his part to do so, but such presumption is disputable, and where it is fairly shown that the attorney was not authorized, the party for whom he assumed to act can found no rights on the attorney's unauthorized act.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. § 70.*]

3. PRINCIPAL AND AGENT (§ 175*)—ACTS OF AGENT—RATIFICATION.

While ratification of an agent's unauthorized acts is ordinarily equivalent to a precedent authorization, no unauthorized act of such agent can be made valid retroactively to the prejudice of third persons without their consent, as provided by Civ. Code, § 2313.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 662–668; Dec. Dig. § 175.*]

4. APPEAL AND ERROR (§ 373*)—PROCEEDINGS TO APPEAL—REQUISITES—BOND.

No undertaking is required to perfect an appeal under the "new and alternative method" of taking appeals prescribed by Code Civ. Proc. §§ 941a, 941b, 941c, and this though the appellant may have attempted to follow the old method, if his proceedings were sufficient to perfect an appeal under the new method.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001–2004; Dec. Dig. § 373.*]

5. APPEAL AND ERROR (§ 428*)—PROCEEDINGS TO PERFECT APPEAL—UNDERTAKING.

In order to escape the necessity of serving notice of appeal and giving an undertaking, appellant must file his notice of appeal within the 60 days specified by Code Civ. Proc. § 941b, but if he allows that time to pass, he may still perfect an appeal, under the old method as prescribed by section 939, by serving his notice and giving an undertaking.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2166, 2167; Dec. Dig. § 428.*]

6. APPEAL AND ERROR (§ 426*)—TIME TO APPEAL—NOTICE OF ENTRY OF JUDGMENT.

Code Civ. Proc. § 941b, authorizes the taking of an appeal within 60 days from and after notice of entry of the judgment appealed from has been served on the attorneys of record for the adverse party. *Held*, that the service of a notice of appeal was insufficient to show notice of the entry of judgment to the appellants so as to start the limitation so prescribed in motion, but that the service of written notice of the entry of the judgment appealed from must be actually made in order to have that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2151, 2162–2164; Dec. Dig. § 426.*]

7. APPEAL AND ERROR (§ 417*)—TIME TO APPEAL — NOTICE OF ENTRY OF JUDGMENT — SERVICE.

Code Civ. Proc. § 941b, provides that an appeal may be taken by the appealing party filing with the clerk a notice stating that the party appeals to the Supreme or District Court of Appeals, which notice may be filed at any time after the rendition of the judgment, but must be filed within 60 days after notice of entry of judgment has been served on the attorneys of record appearing for the appealing party, except that if no notice of entry of judgment be given, the notice of appeal must be filed not later than six months thereafter. *Held*, that where more than 60 days prior to the filing of a notice of appeal by defendants, there was served on their attorneys a notice of appeal by intervener from parts of the judgment in the action, addressed to the clerk of the court and to all the parties, and directing them to take notice that intervener appealed from a certain portion of the judgment rendered in the action on January 4, 1912, and thereafter entered, such notice was sufficient to shorten the time, within which defendants might appeal, to 60 days under such section, though it was not intended primarily for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*]

8. APPEAL AND ERROR (§ 348*)—NOTICE OF JUDGMENT—TIME TO APPEAL—PARTIES.

Code Civ. Proc. § 941b, declares that the time to appeal from a judgment may be shortened from six months to 60 days by the service on the appealing party of a notice of entry of judgment. *Held*, that where notice of entry of judgment was served on defendants by intervener, such notice was sufficient to shorten defendants' time to appeal in favor of all the other parties to the action, and that the benefit of the notice was not limited to the parties serving it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

9. APPEAL AND ERROR (§ 384*)—UNDERTAKING ON APPEAL—SUFFICIENCY.

Where four parties defendant appealed jointly from a judgment, an undertaking on the part of the "appellant" that "said appellant" will pay all damages and costs that may be awarded on the appeal was fatally defective, since it was sufficient only to support the appeal as to one of the parties who could not be identified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049–2056; Dec. Dig. § 384.*]

10. APPEAL AND ERROR (§ 384*) — APPEAL BOND—REQUISITES.

Where an appeal bond bound the surety to pay all damages that might be awarded against ———, it was fatally defective for uncertainty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049–2056; Dec. Dig. § 384.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter E. Bordwell, Judge.

Suit by the Title Insurance & Trust Company against the California Development Company and others. Judgment for plaintiff, and the development company and others appeal. On motion to dismiss appeals. Granted.

See, also, 164 Cal. 58, 127 Pac. 502.

Edwin E. Meserve, Shirley E. Meserve, Lewis R. Works, Works & Jordan, C. Hughes Jordan, and Eugene S. Ives, all of Los Angeles, for appellants. McCutchen, Olney & Willard and Page, McCutchen, Knight & Olney, all of San Francisco, and O'Melveny, Stevens & Millikin, of Los Angeles, for respondent.

SLOSS, J. Motions to dismiss appeals. The action is one to foreclose the lien of a mortgage or deed of trust made by the California Development Company to the Title Insurance & Trust Company, as trustee, to secure the payment of bonds issued by the development company. There was a judgment directing the sale of certain properties, and the payment, out of the proceeds of sale, of receiver's certificates, of the amount found due from the California Development Company to the plaintiff, and of certain judgments against said defendant and in favor of New Liverpool Salt Company and Southern Pacific Company, the balance, if any, to be paid to the California Development Company. The judgment further provides that all shares of stock of defendant Mexican Company held or claimed by defendants Heffernan, Flores, Rockwood, Perry, and others are held in trust for California Development Company, and directs the indorsement and delivery to the commissioner named in the judgment of the certificates representing said shares, upon payment of one dollar per share. The judgment was entered on January 9, 1913.

A notice of appeal from said judgment was filed in the name of California Development Company. Another appeal, specifying certain parts of the judgment, was taken, or attempted to be taken, by Heffernan, Flores, Rockwood, and Perry. The motions before us are directed to these appeals.

[1-3] The notice of appeal on behalf of the California Development Company was signed by Lewis R. Works and Works & Jordan, as attorneys for said defendant. One of the grounds of the motion to dismiss is that neither Mr. Works nor the firm of Works & Jordan ever had any authority from the California Development Company to represent it in said action or to give notice of appeal in its behalf. The evidence offered by the plaintiff in support of its motion to dismiss shows that the attorneys in question, while undoubtedly acting in good faith, were in fact without the authority which they believed they had, and which they assumed to exercise. This is not questioned by the attorney now representing the California Development Company. He attempts to meet the motion by showing that in October, 1913, some nine months after the entry of the judgment, and more than three months after the expiration of the right to appeal therefrom, the board of directors of the California Development Company adopted a resolution ratifying the act of Mr. Works and Messrs. Works & Jordan in filing the notice of appeal above referred to. The fact that an attorney appears on behalf of a party raises a presumption of "authority upon his part to do so." Garrison v. McGowan, 48 Cal. 592. But this presumption is disputable, and where it is clearly shown, as it is here, that the attorney was not authorized, the party whom he assumed to represent can found no rights upon the unauthorized act. The filing of the notice of appeal by the attorneys was not the act of the California Development Company, and that corporation, therefore, did not take an appeal within the time limited by law. The resolution of ratification cannot alter the situation. Ratification is ordinarily equivalent to precedent authorization, but "no unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent." Civ. Code, § 2313. Thus, where a plaintiff sued, claiming under an assignment made by one who had no authority from the owner of the cause of action, it was held that a subsequent ratification did not relate back so as to defeat the defendant's attack upon plaintiff's right to institute the action. Wittenbrock v. Bellmer, 57 Cal. 12; Dingley v. McDonald, 124 Cal. 682, 57 Pac. 574. The present case is even stronger. With the lapse of six months from the entry of the judgment, the judgment became final as against all parties who had not appealed. No appeal had then been taken by California Development Company. The right of the successful parties to maintain the judgment against it could not be taken away by a subsequent ratification. To hold the contrary would amount to allowing this defendant to take an appeal nine months after the entry of judgment, whereas the statute clearly limits the right to six months. This court has no jurisdiction of an appeal taken too late, and the jurisdiction, once gone, cannot be revived by any act done after the expiration of the time

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

limited. The purported appeal of the California Development Company cannot therefore stand.

[4] The motions to dismiss the appeals of Heffernan, Flores, Rockwood, and Perry present different considerations. In these motions, originally made by the plaintiff, the defendant New Liverpool Salt Company and the intervener Boaz Duncan join. The dismissal of these appeals is based on the ground, among others, that no sufficient undertaking on appeal was filed. Since an undertaking is not required under the "new and alternative method" of taking appeals (Code Civ. Proc. § 941a, 941b, and 941c; Est. of McPhee, 154 Cal. 385, 97 Pac. 878; Mitchell v. Cal. S. S. Co., 154 Cal. 731, 99 Pac. 202; Union Coll. Co. v. Oliver, 162 Cal. 755, 124 Pac. 435), the want of an undertaking will not justify a dismissal if the steps taken to perfect the appeal complied with all the requirements of the new method. This is true, even though the appellant may have attempted to follow the old method. Theisen v. Matthai, 165 Cal. 249, 131 Pac. 747.

[5] But, in order to escape the necessity of serving notice of appeal and giving an undertaking, the appellant must file his notice of appeal within the time limited by section 941b. If he allows that time to go by, but is still within the time allowed under the old method (section 939), he must serve his notice and give his undertaking, as he was required to do when that method was the only one in force. Theisen v. Matthai, supra. The questions to be decided are: (1) Whether the notice of appeal was filed after the time allowed by section 941b; and (2) whether the undertaking filed by appellants was insufficient. Section 941b provides that the notice of appeal must be filed "within sixty days after notice of entry of said judgment * * * has been served upon the attorneys of record appearing in said cause or proceeding"—and, in the absence of such notice of entry, within six months after the entry. The notice of appeal of Heffernan, Flores, Rockwood, and Perry was filed on July 7, 1913, or two days before the expiration of six months from the entry of the judgment. If notice of the entry had been served more than 60 days before July 7, 1913, the notice of appeal was filed too late to be effective under section 941b.

[6] The moving parties contend that the notice which started the running of the 60-day period was established in two ways. On April 5, 1913, the attorneys for Heffernan, Flores, Rockwood, and Perry served on the attorneys for the New Liverpool Salt Company, and on the attorneys for Boaz Duncan, intervener, a notice of appeal from the judgment. The notice was never, however, filed. We think this act cannot be treated as establishing the notice which, under section 941b, starts the 60-day period running. Undoubtedly, a party who serves a notice that he appeals from an entered judgment gives thereby convincing evidence that he has knowledge of the entry of such judgment. And knowledge, for some purposes, is synonymous with notice. But section 941b does not provide that an appeal must be taken within 60 days after notice of the entry of the judgment or order. If this were its language, any evidence that the party in fact knew of the entry would be sufficient. In section 953a, dealing with the preparation of a record on appeal, it is provided that the party desiring to appeal must file his request for a transcript "within ten days after notice of the entry of the judgment, order or decree." Under this provision, notice of the entry, on the part of an appellant, is sufficiently shown by his service of a notice of appeal. Est. of Keating, 158 Cal. 109, 110 Pac. 109. But the 60 days for taking an appeal, under section 941b, runs from and after "notice of entry * * * *has been served* upon the attorneys of record * * * ." This implies, as is intimated in Estate of Keating, supra, "that the notice * * * contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing." Parol evidence that a party knows a fact, or his written statement from which such knowledge may be inferred, is not equivalent to service upon him of written notice of the fact. The construction of the statute thus suggested in the Keating Case has been definitely adopted in a later decision. Huntington Park I. Co. v. Park L. Co., 165 Cal. 429, 132 Pac. 760.

[7] In addition, however, to what has just been set forth, the moving parties show that more than 60 days prior to the filing of notice of appeal by Heffernan, Flores, Rockwood, and Perry, there was served on the attorneys for said Heffernan and others a notice of appeal by Boaz Duncan, intervener, from parts of the judgment in the action. This paper was addressed to the clerk of the court and to all of the parties, and directed them to take notice that said Duncan appealed from a certain portion "of the judgment rendered in said action on the 4th day of January, 1912, and thereafter entered." Here was a written notice, duly served, advising the parties, through their attorneys of record, that judgment had been entered. The statute requires no more. It is immaterial that the notice was not intended, primarily, for the purpose of shortening the time within which the party served might appeal. The section (941b) gives him 60 days after he has been served with notice of the entry of the judgment. The purpose of the enactment evidently is that the full period of six months shall be allowed, unless knowledge of entry is brought home to the party by service of a notice in writing, stating the fact of such entry. If he is served with such notice, this purpose is fulfilled. He is bound by the law which limits his time of appeal to 60 days

from notice of the fact of entry, and is not entitled to ask that the other party, in addition to giving him written information of the fact, shall also advise him of the consequences flowing from the notice, or shall embody the notice in a paper which has no other purpose than that of starting the 60-day period.

[8] It is suggested that only the party giving notice (i. e., Boaz Duncan) is entitled to rely upon it, and that the appeals should be dismissed, if they are to be dismissed, only as to him. We do not agree with this position. The statute declares that the time of appeal shall be 60 days after the party desiring to appeal has been served with notice of the entry. It proceeds upon the theory that 60 days is long enough, provided there be evidence, of a given kind, that the party knows of the fact which starts this time running. If the required notice has been served on him by any one, he knows that a judgment, from which he may appeal within 60 days, has been entered. If he desires to take advantage of the new method, he should then file his notice of appeal within the 60 days. He would be in precisely the same situation if every party served him with notice. To require such service, in cases where there are many parties, would introduce unnecessary complication to no purpose. If the different parties served notices at different times, the party served would have as many varying periods of appeal as there were parties, and this, although he takes his appeal as against all adverse parties by simply filing a notice, without serving it on any one. There is nothing in the statute to indicate that such repeated services must be made. It is held, accordingly, that when a party has once been served with notice of entry of judgment, he must, in order to avail himself of the new method, file his notice of appeal within 60 days after such service.

[9] The only question remaining is whether the appeals of Heffernan and others were properly taken under the old method. An essential part of an appeal under that method is the filing of a sufficient undertaking. The undertaking here filed, after reciting the judgment, and the intended appeal therefrom of Heffernan, Flores, Rockwood, and Perry, goes on as follows:

> "Now, therefore, in consideration of the premises and of such appeal, the undersigned Pacific Coast Casualty Company, a corporation, * * * does hereby undertake and promise on the part of the appellant—that said appellant—will pay all damages and costs which may be awarded against ——— on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount it acknowledges itself bound."

This bond is not in compliance with the statute. The four parties having appealed jointly, the undertaking should have been "on the part" of the four, and each of them. It is, however, merely on the part of "the appellant," and promises that "said appellant" will pay all costs, etc. Such an undertaking can support only the appeal of a single appellant (Zane v. De Onatavia, 135 Cal. 440, 67 Pac. 685), and as there is no way of determining which one is meant, all of the attempted appeals must fall.

[10] Furthermore, the surety promises to pay all damages that may be awarded against ———. Here again, is a fatal uncertainty. The surety is entitled to stand on the letter of its bond, and where it has not undertaken to do the thing required by the statute, the undertaking cannot be held sufficient.

The motions are granted, and the appeal of California Development Company, as well as the appeals of Heffernan, Flores, Rockwood, and Perry dismissed.

We concur: SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

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168 Cal. 433

McDONALD v. McDONALD. (S. F. 6925.)

(Supreme Court of California. Oct. 1, 1914.)

1. APPEAL AND ERROR (§ 348*)—TIME TO APPEAL—ENTRY OF JUDGMENT—NOTICE.

Before respondent can invoke the limitation of 60 days to appeal prescribed by Code Civ Proc. § 941b, after service of notice of judgment, he must show that a formal notice of the entry of judgment has been actually served on appellant's attorney of record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

2. APPEAL AND ERROR (§ 339*)—TIME TO APPEAL—STATUTES.

Civ. Code, § 131, provides that an appeal may be taken from an interlocutory divorce decree within six months in the same manner and with like effect as if the judgment were final. Code Civ. Proc. § 941b, declares that a person may appeal by filing with the clerk of the court in which the judgment was rendered a notice of appeal, at any time after the rendition of the judgment, but must be filed within 60 days after notice of entry of judgment has been served on the attorneys of record appearing in the case, and if no notice of entry of judgment be given, the notice must nevertheless be filed not later than six months after the entry of judgment, order, or decree. Section 939, subd. 3, provides that an appeal may be taken from an interlocutory judgment within 60 days after the judgment is entered in the minutes of the court or filed with the clerk. *Held*, that such latter section applied only to appeals under the "old method," in which case the appeal must be taken in 60 days, while Civ. Code, § 131, should be construed as fixing the maximum time at six months under the "new method," subject to be cut down to 60 days by the service of the notice of entry of judgment prescribed by Code Civ. Proc. § 941b.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883–1887; Dec. Dig. § 339.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by George McDonald against Annie McDonald. On plaintiff's motion to dismiss defendant's appeal from the judgment, and from an intermediate order denying defendant's motion to set aside her default. Denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Arthur Crane, of San Francisco, for appellant. James M. Hanley, of San Francisco, for respondent.

MELVIN, J. George McDonald, plaintiff and respondent, moves to dismiss the appeal of defendant from the judgment against her, and "from that part of the judgment being the intermediate order denying defendant's motion to set aside default."

The facts as disclosed by the certificate of the clerk and by respondent's uncontradicted affidavit are as follows: The judgment granting an interlocutory decree of divorce to plaintiff from defendant upon the ground of extreme cruelty was rendered on the 27th day of October, 1913, and entered in the appropriate judgment book of the county clerk's office on the following day. The notice of appeal was filed February 13, 1914. It is accompanied by no evidence of service upon the adverse party. On October 7, 1913, the court had entered the default of the defendant, and on the 15th of the same month, after a full hearing upon defendant's motion to set aside the default, the said motion had been denied. Defendant appeared personally with her counsel at the trial, introduced evidence in opposition to the allegation of the complaint, and her counsel examined and cross-examined witnesses. The bill of exceptions, signed by the judge who tried the cause, was filed November 10, 1913.

[1] It is contended by respondent that by filing her bill of exceptions the appellant waived notice of decision, and that as no notice of appeal of any sort was filed until more than 60 days had elapsed after the entry of the decree and after the proposed bill of exception had been filed and signed by the judge, defendant lost her right to appeal.

Respondent's first and most important contention is contrary to established authority. The actual notice of the entry of the judgment, if any there were, implied by the filing of the bill of exceptions on behalf of defendant, was not sufficient to meet the requirements of section 941b of the Code of Civil Procedure. Before respondent may invoke the limitation of 60 days contemplated by that section as the time within which, after notice of the entry of judgment, an appeal may be taken, there must be a formal notice of such entry *actually served upon the attorney of record.* Huntington Park Imp. Co. v. Park Land Co., 165 Cal. 430, 132 Pac. 760; Title Ins. & Trust Co. v. California Development Co. (L. A. 3690, 3691), 143 Pac. 723.

[2] Respondent cites section 939, Code of Civil Procedure, as limiting the time for appeal from an interlocutory judgment in an action for divorce to 60 days after the making and filing thereof, without reference to the service of notice of judgment. That section in its present form was passed in 1907. Since that time section 131 of the Civil Code has been re-enacted. Stats. of 1909, p. 941. The latter section, after declaring that an interlocutory judgment must be entered in every case in which the court determines that the divorce ought to be granted, provides that "from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final." This is in accord with section 941b, Code of Civil Procedure, and if we should decide that section 939, Code of Civil Procedure, as amended in 1907, was intended as a statute of limitations applicable to the procedure permitted by section 941b, we would be compelled to hold that the later section of the Civil Code changed the period of limitation from 60 days to six months. If we regard subdivision 3 of section 939 as applicable only to appeals under the "old method," then all of the sections may be harmonized, for under such theory we have that section limiting the right to appeal from an interlocutory judgment under the "old method" to 60 days; and we also have section 131 of the Civil Code fixing the maximum time at six months under the so-called "new method" of appeal, subject to be cut down to 60 days, however, by the formal notice of entry of judgment permitted by section 941b of the Code of Civil Procedure. But in any view of the matter, the notice of appeal in this case, which was obviously intended to set in motion an appeal under the "new method," was not filed too long after the entry of judgment to give this court jurisdiction of the said appeal.

There is nothing in the opinion in Estate of Brewer, 156 Cal. 90, 103 Pac. 486, which at all conflicts with the conclusion reached in this case. The court was there considering an appeal in a special proceeding and it was held that the "new method" of appeal and the time within which an appeal might be taken as prescribed by sections 941a, 941b and 941c applied to probate matters only so far as the provisions of those new sections did not conflict with section 1715.

It follows that the motion must be denied; and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.; SLOSS, J.; SHAW, J.

168 Cal. 496

PEOPLE v. PACIFIC GAS & ELECTRIC CO. (Cr. 1845.)

(Supreme Court of California. Oct. 3, 1914.)

1. MUNICIPAL CORPORATIONS (§ 633*)—ORDINANCES—VIOLATIONS—PROSECUTION.

Action against a railroad company for violation of a city ordinance requiring the sprinkling of tracks, in which the railroad company was sentenced to pay a fine of $400, was criminal in character.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1390–1399; Dec. Dig. § 633.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. COURTS (§ 212*)—APPELLATE JURISDICTION — PROSECUTION FOR VIOLATION OF ORDINANCE.

Const. art. 6, § 4, provides that the Supreme Court shall have jurisdiction on appeal from the superior courts in all criminal cases where judgment of death has been rendered, and that the District Courts of Appeal shall have jurisdiction in criminal cases prosecuted by indictment and information in a court of record, except in criminal cases, where judgment of death has been rendered. *Held*, that where defendant electric company was prosecuted for violating a city ordinance requiring the sprinkling of tracks, and was fined $400, an appeal lay to the District Court of Appeal and not to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511, 513–515; Dec. Dig. § 212.*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by the People against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Dismissed.

W. B. Bosley, of San Francisco, L. T. Hatfield, of Sacramento, and Thos. J. Straub, of San Francisco, for appellant. F. F. Atkinson and V. A. McGeorge, both of Sacramento, U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

SHAW, J. In this case the respondent moves to dismiss the appeal, on the ground that the Supreme Court has no appellate jurisdiction of the case.

The defendant was convicted in the police court of the city of Sacramento, of the offense of violating an ordinance of that city, and was sentenced to pay a fine of $400. The ordinance required every person or corporation operating a street railroad in the city to sprinkle with water a sufficient portion of the street in and near its tracks to prevent the motion of the cars from raising dust, and declared that a violation thereof should be a misdemeanor, punishable by a fine or imprisonment. The defendant owned and operated a street railroad in Sacramento. On appeal to the superior court of Sacramento county the judgment of conviction in the police court was affirmed. From this judgment of affirmance in the superior court, the defendant has attempted to take an appeal to the Supreme Court.

The jurisdiction of the Supreme Court and the District Courts of Appeal is prescribed by section 4 of article 6 of the Constitution. The portions thereof material to the question here involved are as follows:

"The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars; also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered: * * *

"The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars; also, in all cases of forcible and unlawful entry and detainer (except such as arise in justices' courts), in proceedings in insolvency, and in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, and prohibition, usurpation of office, contesting elections and eminent domain, and in such other special proceedings as may be provided by law (excepting cases in which appellate jurisdiction is given to the Supreme Court); also, on questions of law alone, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered."

There is a corresponding provision relating to the original jurisdiction of the superior court, which is as follows:

"The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for."

The section proceeds to enumerate other cases in which the superior court has jurisdiction, which it is not necessary here to mention. Article 6, § 5.

[1] One of the points urged against the validity of the judgment of conviction is that the ordinance of the city of Sacramento is unconstitutional. The contention of the defendant is that this claim brings the case within the appellate jurisdiction of the Supreme Court because it brings directly in question the legality of a "municipal fine." It is argued that the term "municipal fine" as used in the constitutional provision above quoted includes fines imposed for a violation of a city ordinance. It has long been settled that actions of this character are criminal and not civil actions. Santa Barbara v. Sherman, 61 Cal. 57.

[2] Practically the same question that is involved here was before this court in 1866 in People v. Johnson, 30 Cal. 98, and was there decided adversely to appellant's contention. The defendant there was convicted in the court of a justice of the peace of the offense of unlawfully collecting toll without a license, which was declared by statute to be a misdemeanor. On appeal to the county court the conviction was affirmed. Thereupon the defendant undertook to appeal to the Supreme Court, claiming that the case involved the validity both of a toll and of a municipal fine within the meaning of the Constitution. The court held that it was not a municipal fine within the meaning of the Constitution. Taking up the question of jurisdiction upon the theory that it involved the legality of a "toll," the court, after quoting the constitutional provision then in force,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

which was in all substantial particulars identical with that now in force, said:

> "The power conferred in the foregoing language relates to four separate branches of the general subject, which are separately and specifically enumerated: (1) Cases in equity; (2) all cases at law of a certain character; (3) all cases arising in the probate courts; (4) all criminal cases of a certain grade. In view of this clear and precise division of the subject-matter, aside from the ordinary import of the words 'cases at law,' it is clear that those words refer only to civil as distinguished from criminal cases. Equity cases are first provided for, then civil cases at law, then probate cases, and lastly, criminal cases. That such is the true reading is made still more obvious by a reference to the sixth section of the same article, which defines the jurisdictions of the district courts, where the same language is used."

The sixth section referred to is substantially the same as the fifth section above quoted from our present Constitution.

We are entirely satisfied with the reasoning and decision in People v. Johnson. People v. Johnson was cited and approved in Wheeler v. Donnell, 110 Cal. 657, 43 Pac. 1. A similar question was decided in Matter of Curtis, 108 Cal. 661, 41 Pac. 793, declaring that the jurisdiction of the Supreme Court in criminal cases extends only to those which are prosecuted by information or indictment. The decision in People v. Johnson had established the meaning of this clause in the Constitution of 1849 as embracing civil cases only, and the people, in the Constitution of 1879, adopted the same language to define the jurisdiction of the Supreme Court. It must be presumed that this language was selected with knowledge of the construction which had been given to it, and with the intention that it should have the same meaning. Sharon v. Sharon, 67 Cal. 189, 7 Pac. 456, 635, 8 Pac. 709; People v. Edwards, 93 Cal. 153, 28 Pac. 831; People v. O'Brien, 96 Cal. 181, 31 Pac. 45; Morton v. Broderick, 118 Cal. 483, 60 Pac. 644; People v. Webb, 38 Cal. 477; People v. Coleman, 4 Cal. 50, 60 Am. Dec. 581. The question must be considered as settled.

The appeal is dismissed.

We concur: MELVIN, J.; LORIGAN, J.; HENSHAW, J.

SLOSS, J., being disqualified does not participate in the foregoing.

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168 Cal. 507

HINES v. BRODE. (L. A. 3252.)

(Supreme Court of California. Oct. 3, 1914.)

1. FRAUD (§ 59*)—JUDGMENTS—MEASURE.

In an action for fraud in the sale of land, the measure of damages is the difference between the actual value of the property and its value if as represented, together with any depreciation in the value of improvements placed thereon by the purchaser, resulting from the fact that the land was not as represented, notwithstanding such damages may be greater than the consideration paid for the property; but this extreme rule will only be applied in clear cases and on just terms.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. § 59.*]

2. FRAUD (§ 33*)—DAMAGES—MEASURE—EXECUTORY CONTRACT.

The right to recover damages for fraud in the sale of land is not defeated by the fact that the contract for the purchase is executory; since the action is not upon the contract, but is collateral thereto.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 33.*]

3. FRAUD (§ 31*)—NATURE OF ACTION.

Where a vendor has fraudulently misrepresented the land, the purchaser, on discovering the fraud, may either repudiate the contract and recover the consideration and other special damage sustained, or may affirm the contract whether it is executed or executory, and sue for the damages occasioned by the fraud; the affirmance of the contract not being an affirmance of the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. § 31.*]

4. FRAUD (§ 59*)—DAMAGES—MEASURE—EXECUTORY CONTRACT.

When a purchaser under an executory contract, who has paid only part of the purchase price, discovers that the land was misrepresented and elects to affirm the contract, he must, in an action for damages, show that he is ready and willing to complete the purchase, and the amount yet due under the contract should be deducted from the damages sustained.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. § 59.*]

5. PLEADING (§ 253*) — ADMISSIONS — COMPLAINT AMENDED AT TRIAL.

Where a complaint for fraud in the sale of land, which alleged that the defendant fraudulently misrepresented that there was a water right appurtenant to the land, was amended at the trial by inserting an allegation that there was no such water right, the failure to deny the new matter by filing an amended answer was not an admission of its truth; the allegation in the original complaint having been denied by the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 744–751; Dec. Dig. § 253.*]

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Action by Thomas C. Hines against A. W. Brode. Judgment for the plaintiff, and defendant appeals. Reversed.

George H. Moore and Charles M. Ackerman, both of Los Angeles, for appellant. Kendrick & Ardis, of Los Angeles, L. L. Dennett, of Modesto, and W. C. Le Hane, of Los Angeles, for respondent.

HENSHAW, J. By his action plaintiff sought damages for the deceit practiced upon him by defendant in the matter of an executory contract for the sale of land. The gravamen of plaintiff's complaint is as follows: He was induced to buy 40 acres of land in an arid district of Los Angeles county, upon representation by defendant vendor that there was appurtenant to this land water and a water right sufficient to raise by irrigation all ordinary crops. A written contract was entered into between the parties which fixed the purchase price of this 40 acres of land at $2,000; plaintiff agreeing to pay this amount in installments, with interest upon the deferred payments. He paid $250 upon the principal and $61.25 as interest. With the acquiescence of defendant, he entered upon the land and made improvements thereon before he discovered the falsity of defendant's representation in regard to the water right. The value of the land as represented by defendant, with the appurtenant water right, was $4,000. Without the water right it was $100. The value of the improvements placed by plaintiff upon the land, if it had possessed the water right, was $2,000. The value of the improvements, placed upon this arid land, was only $50. The written contract between the parties provided that plaintiff had the privilege to complete his payments and receive his deed and certificate of title at any time before maturity on paying the balance of the purchase price with interest. He alleges that upon September 28, 1911, he made an offer so to do in writing, but that defendant failed and neglected to comply with his offer. The complaint was verified upon the 29th day of September, the day after this offer was made, and was filed a few days later, upon October 2d. Another progress payment was due under the terms of the contract about a week after the date of the filing of the complaint. Plaintiff further alleged that he, "at the time of said offer to pay, ever since, and now, was and is ready, able, and willing to pay said purchase price upon the conditions in said contract until discovery of said fraud." As to the time of discovery plaintiff alleges that he learned of the falsity of the representations "within the last few days." As he verified this complaint upon the 29th of September and made his offer of performance on the 28th day of September, it is not to be questioned but that he knew of this asserted falsity at the time he made such offer of performance. He has remained, and still remains, in possession of the land under claim of right so to do, basing this claim of right upon the contention that, because of his offer of performance, he has fulfilled all the terms and conditions of his contract. He repudiates any suggestion that his action should be treated under these circumstances as an action for rescission, and with equal vehemence denies that, if his action be considered as in the nature of an affirmance of the contract, it is his duty to do any more than he has done. He laid his damages in the sum of $6,211.25, and by the verdict of the jury was awarded damages in the sum of $4,000. The somewhat surprising result of this litigation, therefore, is that plaintiff, having contracted to pay $2,000 for a piece of land, and having paid on account of the purchase price $311.25, gets the land, gets the improvements which he had placed upon the land, and gets $4,000 in money beside, or, reversing the statement, defendant, who sold the land for $2,000, gets $311.25, and is obliged to give up the land and $4,000 with it.

[1] If nothing else, the singularity of such a result challenges scrutiny. It should at once be stated, however, that the rule of damages in cases such as this, long announced in this state, and reaffirmed under review of the authorities in Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011, and in Betchel v. Chase, 156 Cal. 707, 106 Pac. 81, will in a proper case justify such an award as was here made. That rule declares that the measure of damages which a person is ordinarily entitled to recover in an action for deceit in the sale of property is the difference between the actual value of the property and its value had the property been as represented, and that the measure of recovery is not affected by the price paid. The price paid may be considered only as evidence of value. Therefore in a proper case a wronged plaintiff may assert, as here, and, if possible, show, that the actual value of the property was only $100, and that its value, if the property had been as represented, was $4,000. He may also show and recover for the depreciation in the value of the improvements which he may have placed upon the property —a depreciation resulting from the fact that the actual value was not the represented value; and he may also recover for any other legitimate expenditures he may have made. This is not only the rule in California, but it is declared to be the rule under the great weight of authority. The opposing rule is that which obtains in England and in the courts of the United States. That rule refuses to recognize as a legitimate element of damage the prospective profits which the vendee expected to make by his transaction. It points out that damages at law are compensatory merely (where not strictly exemplary), and make good to an injured party in terms of money the loss or injury which he has sustained, so that, if a vendee buys and pays $2,000 for a piece of land worth only $100, he may either by rescinding recover the $2,000 with interest for its detention, and thus be made whole, or he may retain the land worth $100 and recover back $1,900 of the purchase price, and thus be made whole. The authorities dealing with these two opposing views need not be cited. They will be found collated and discussed in George v. Hesse, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 Ann. Cas. 456; Tooker v. Alston, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 818; Stoke v. Converse, 153 Iowa, 274, 133 N. W. 709, 38 L. R. A. (N. S.) 465, Ann. Cas. 1913E, 270; 20 Cyc. 135; and in the notes to those citations. The conflict of authority upon the measure of damages in cases such as this is here adverted to for the purpose only of pointing out that the rule adopted in this state is the extreme rule, and it should therefore be applied only in clear cases and upon just terms.

[2] It has hereinbefore been said that such recovery may be had in proper cases upon proper showing. The cases generally, and, indeed, almost universally, are cases in which the defrauded party has executed the contract, has paid his price or consideration, and, electing to stand on his contract, and not to rescind, sues for damages for the deceit. The cases are such as this would have been had the plaintiff paid the $2,000 in full, and thereafter, upon discovery of the fraud, sought this recovery. The unusual feature of this case is that as to this plaintiff the contract is still in large part executory. He has paid but a trifling amount of the purchase price, and he is not aided by his pretended offer of complete performance. Pretended, we say, because the very pleading itself discloses and declares that plaintiff was not willing to perform after discovery of the fraud, and further that he made his discovery of the fraud before his offer. But, while the case in this respect is unusual, it is not exceptional. It is a principle of universal application that the right of action for damages for a fraud arises at once immediately upon the consummation of the fraud, and, of course, upon its discovery. The consummation of a fraud may arise in a contract executed or executory. But in either case the right of action immediately exists. This is so because even in the case of an executory contract the action for fraud is not upon the contract, but is collateral to the contract and is on the case. Whitney v. Allaire, 1 N. Y. 305; Allaire v. Whitney, 1 Hill (N. Y.) 484; Applebee v. Rumery, 28 Ill. 280; Eames et al. v. Morgan, 37 Ill. 261; West Florida Land Co. v. Studerbaker, 37 Fla. 28, 19 South. 176; Maxwell v. Sherman, 172 Ala. 626, 55 South. 520; 1 Page on Contracts, § 132; 20 Cyc. 92.

[3] But while such an action for deceit is not upon the contract, nevertheless it grows out of, and in that sense is founded on, the contractual relations between the parties. Therefore the nature and amount of a plaintiff's recovery must of necessity be controlled by the position which he takes in reference to that contract upon the discovery of the fraud. First, the vendee may rescind, and, in addition to the recovery of the consideration with which he has parted, obtain recoupment for any other special damage to which he has been subjected by the vendor's fraud. This he may do in every case where the contract is not wholly executed; and even where it has been executed by both parties, equity, if the facts will warrant, meaning hereby if no other innocent rights have intervened, may annul the contract for the fraud and restore the parties to their original position. In such a case, also, the vendee would have his action for damages for the deceit. The alternative to a vendee under such circumstances, and the only other course which he may follow, is that founded upon an affirmance of the contract. Here the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which, under the representations of the vendor, he was entitled to receive. This last presents the usual situation in actions of this nature under executed contracts. Nor is it true that by an affirmance of the contract the vendee affirms the fraud. Such a declaration it will be impossible to find in any well-considered case. The true principle is well stated in Whitney v. Allaire, supra, as follows:

> "It is true that, if a party affirms a contract with knowledge of the fraud, he affirms it wholly, and this whether it is executory, or partially executed. But in neither case does he affirm it as a contract made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement."

That but one of these two courses and none other is open to a vendee under an executory contract, whether the vendor's wrong rests in fraud or breach of warranty, is not debatable under the authorities elsewhere as well as in this state. Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Worley v. Nethercott, 91 Cal. 517, 27 Pac. 767, 25 Am. St. Rep. 209; Garvey v. Lashells, 151 Cal. 526, 91 Pac. 498.

[4] As it is humanly impossible for a man in the same breath to affirm and to repudiate an agreement, so is it legally impossible that he should have the same redress upon repudiation and rescission as upon acceptance and complete execution. It has already been pointed out that plaintiff's pleading in this regard is most anomalous. He begins his action for deceit upon an executory contract, as he has the unquestioned right to do. He does not repudiate and rescind, and protests against the contention that he is called upon to rescind. He does not affirm and express his willingness to complete his contract, but, to the contrary, expressly pleads that he was only willing to complete it up to the time of the discovery of the fraud. If he had executed his contract by the full payment of the $2,000, and then brought this action, the measure of damage and his consequent right of recovery would not for a moment be in question. It would be the measure of damage laid down by the trial court to the jury and hereinbefore declared. But what then would have been the precise situation? Plaintiff would have paid $2,000, and his recovery would have been the proved difference between the actual value of the land, pleaded as $100, and the value if the land had been as represented, pleaded as $4,000, with the additional loss which plaintiff had sustained in his proved expenditures by way of improvements, declared to be $1,950. But, under the case as presented by the pleadings and to the jury, plaintiff was entitled to this full recovery under an executory contract which he had not completed, which he refused to com-

plete, and upon which he had paid but a trifling part of the purchase price. It is intolerable to think for a moment that in such a case the right of recovery to a man who has not completed his contract and declares his unwillingness to complete it by the payment of the money called for under the contract should be larger than that to a man who has fairly accepted the contract, parted with the full consideration called for by it, and seeks legitimate recoupment for fraud under a rule and measure of damage thoroughly well settled.

Little or no light upon the true measure of damages in such a case is afforded by the authorities. But three that have come under our observation seem even to have had the question in mind. In Whitney v. Allaire, supra, where the false representation was as to the value of a leasehold, with a rent charge fixed thereon in accordance with the represented value, it is said:

> "It is conceded that if the contract had been partly executed, even in the most trifling particular, the defendant would have the right to rescind and bring his action for the deceit, or affirm the contract and have his remedy by way of recoupment when sued for the rent."

That this is a fair and reasonable admeasurement of damage no one may question. In Applebee v. Rumery, supra, the plaintiff had given two promissory notes for the purchase of a horse which was diseased. He brought his action for damages for the deceit. The purchase price was $200. The damages laid for the deceit are not indicated in the opinion of the court. But it is said:

> "The gravamen of the action was the deceit and warranty, and the amount to be recovered was not the money paid, but the depreciation in value of the horse, in consequence of the disease, and it was no matter whether the consideration was more or less than $200, or whether it was paid down or not. * * * The amount, mode, or time of payment is not material, so as the sale was upon a sufficient consideration to sustain it. The giving of the two promissory notes was a sufficient consideration; nor could the defendant defeat the right of the plaintiff to recover by showing that the notes were still in his hands unpaid, though it may be that he might, upon a proper notice, bring the notes into court and offer to surrender them in mitigation of the damages to that extent, but we will not now affirm that even this could be done."

Here a determination of the question of affirmance or disaffirmance and of the right to reduce the award of damages by the value of the promissory notes is clearly avoided. In Williams v. McFadden, 23 Fla. 143, 1 South. 618, 11 Am. St. Rep. 345, the action was for deceit in the sale of land; the contract having been fully executed. The court declared the rule of damages to be that which, as above shown, has been adopted in this state. In the later case of West Florida Land Co. v. Studerbaker, supra, plaintiff's action was for deceit in the sale of lands. Plaintiff had paid the purchase consideration partly in cash and partly by his promissory note, which was unpaid. He affirmed his contract and sued for damages. The Supreme Court declared that, though the contract was executory in the sense that the full purchase price had not been paid, this fact did not bar the right of recovery, but further declared that:

> "Owing to the imperfect manner in which the facts of this case have been presented, we do not feel called upon to express an opinion as to the rule for measure of damages where the purchase price of the land has been only partially paid, and whether or not it would be the same announced in Williams v. McFadden, supra."

The foregoing presents all the light which we have been able to obtain from the adjudications, and it must be apparent that they are not even persuasive, much less conclusive.

Nevertheless we think the rule not difficult of determination. Where, under an executory contract, a plaintiff seeks recoupment in damages for deceit while affirming the contract (and it must necessarily be an affirmance if the action be not after rescission) it must be conclusively taken as to such plaintiff that he stands ready and willing to pay the full consideration called for by the contract, and that the damages which he is entitled to recover are no other and no greater than those which would be awarded to a plaintiff who had fully executed his contract. Therefore, in case of an executory contract, from the award which the jury may make because of the fraud must be deducted the unpaid part of the purchase price or the value of any other consideration. And to this effect the jury should be instructed.

Reference has been made to the peculiar form of the complaint in this case. It neither pleads in rescission, nor yet does it plead for damages after affirmance. Under the reversal of this case, which must be had, leave should be given to plaintiff to amend his complaint so as to state in understandable terms the position upon this all-important question which he elects to take and which, as has been said, can be only one of two—damages after rescission or damages after affirmance, with alleged and proved willingness and ability to perform the terms of the contract.

[5] But one other matter, and that a minor one, merits consideration. The trial court instructed the jury that "it is admitted by the pleadings in this case that the land described in the complaint did not have appurtenant to it a water right sufficient for irrigation." In the original complaint plaintiff alleged that defendant fraudulently represented and stated to the plaintiff "that the land had appurtenant to it a water right sufficient for the irrigation of the land for the raising of ordinary crops." Defendant denied that he "had fraudulently or otherwise made such representation." Upon the trial plaintiff introduced evidence in an effort to show that such a water right was not in

fact appurtenant to the land sold. The court permitted an amendment of plaintiff's complaint to conform to the proof, which amendment was to the effect "that defendant has not now and never had any water right appurtenant to said land." This amendment so made was not in terms denied by any amendment to the answer, and respondent here urges that the instruction was justified because this failure so to deny by amendment to the answer was an admission of the truth. Such is not the rule of pleading in this state. Hedstrom v. Union Trust Co., 7 Cal. App. 278, 94 Pac. 386; Myers v. Holton, 9 Cal. App. 114, 98 Pac. 197; McDougald v. Argonaut, 117 Cal. 87, 48 Pac. 1021. The instruction should not have been given.

Wherefore the judgment and order appealed from are reversed.

We concur: LORIGAN, J.; SLOSS, J.; SHAW, J.; MELVIN, J.

168 Cal. 556

HOBBS v. DAVIS et al. (L. A. 3254.)

(Supreme Court of California. Oct. 5, 1914.)

1. MINES AND MINERALS (§ 104*)—INSPECTION BY STOCKHOLDERS.

A stockholder in a mining corporation has the right to examine the mining property of the company, including the right to be accompanied on such examination by an expert.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 228; Dec. Dig. § 104.*]

2. SPECIFIC PERFORMANCE (§ 114*)—COMPLAINT—SUFFICIENCY—EXCUSE FOR DEFAULT BY PLAINTIFF.

In an action to enforce specifically a contract for the sale of mining stock to plaintiff, the payments therefor to be made at stipulated intervals, and time to be of the essence of the contract, allegations that the seller of the stock knew that plaintiff did not have the money necessary to pay the entire contract price, and that he could not secure it from the party with whom he was negotiating, unless his engineer could examine the mine and would verify a report of new discoveries of great value, that the seller stated that he could not grant permission to make the examination, but that plaintiff as a stockholder had a legal right to make it, and that thereafter the seller conspired with the other directors of the company to prevent plaintiff from making such examination before the first installment under the contract became due, does not show that plaintiff's failure to pay the first installment was due to the conduct of the defendant, since it did not appear that he did not have enough money himself to make that payment, nor that the engineer would have made such a report as would have induced the others to furnish the money to plaintiff, and therefore plaintiff's default is not excused.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

3. SPECIFIC PERFORMANCE (§§ 49, 51*)—CONTRACTS ENFORCEABLE — CONSIDERATION — ADEQUACY.

A contract for the purchase of mining stock of the value of $624,000 for the sum of $255,000, only $1,000 of which amount had been paid, is not just and reasonable, or founded on an adequate consideration, and therefore cannot be specifically enforced under Civ. Code, § 3391.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151, 153, 154; Dec. Dig. §§ 49, 51.*]

4. ACTION (§ 50*)—PARTIES (§ 26*)—MISJOINDER—DAMAGES FOR BREACH OF CONTRACT.

A complaint against the seller of certain stock in a mining corporation, the corporation, and the directors thereof, to enforce specific performance of a contract for the sale of the stock, if treated as a complaint for damages for breach of contract by the seller, is demurrable for misjoinder of defendants, and for misjoinder of causes of action affecting some, but not all, of the defendants.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50;* Parties, Cent. Dig. §§ 32–34; Dec. Dig. § 26.*]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by John H. Hobbs against D. A. Davis and others. Judgment for defendants, and plaintiff appealed to the District Court of Appeal, which affirmed the judgment. On rehearing, in the Supreme Court, judgment of the superior court and of the Court of Appeals affirmed.

J. W. McKinley and H. L. McNair, both of Los Angeles, and Thomas, Bryant, Nye & Malburn, of Denver, Colo., for appellant. Hunsaker & Britt, of Los Angeles, C. J. Willett, of Pasadena, and N. P. Moerdyke, of Los Angeles, for respondents.

PER CURIAM. A rehearing of this case on appeal was ordered so that we might further examine the opinion of the District Court of Appeal. Some of the members of this court thought that the conduct of the vendor in preventing the vendee from examining the mine amounted to a violation of the agreement, upon the principle that written into every contract is the stipulation that the vendee may have all of his lawful rights and may exercise them in relation to the subject-matter of the agreement. A further study of the case and of the opinion of the learned District Court of Appeal of the Second District, written by Mr. Presiding Judge Conrey, convinces us that the above-stated principle was considered and observed by that court in its decision. But, even if we should eliminate from the case the discussion with reference to the allegations that plaintiff was excused from strict compliance with the contract in the matter of making payments on the purchase price of the stock at the dates specified in the writing, still we must hold that the demurrer was properly sustained because the pleading failed to allege facts showing that the contract was just and reasonable and founded upon an adequate consideration, and because, assuming that a cause of action for damages was stated, the complaint was demurrable for the reasons set forth in the last paragraph (3) of the opinion of the District

Court of Appeal. We adopt that opinion, which is as follows:

"Demurrers of the defendants to the second amended complaint in this action were sustained without leave to amend, and thereupon the action was dismissed. The plaintiff appeals from the judgment.

"Plaintiff seeks a decree for specific performance of a contract for the sale to him by the defendant Davis of certain shares of stock in the Tom Reed Gold Mines Company, a corporation, and judgment for damages, if for any cause such specific performance cannot be had according to law. The contract in question, as well as a prior option hereinafter mentioned, was made between defendant Davis and one H. E. Fluke; but it is alleged that in all of the proceedings Fluke was acting as agent of the plaintiff, and that Fluke has assigned to plaintiff his interest in said contracts. On July 29, 1910, on payment of $1,000, an option in writing was executed between Davis and Fluke giving Fluke the right during the period of 30 days to purchase said stock at a stipulated price, but did not bind Fluke or the plaintiff to complete the purchase. On August 25, 1910, a written contract was executed between the same parties for the sale of the same stock at the same price, and therein it was specified that Fluke agreed to buy the shares of stock and pay the purchase price in specified installments, payable successively as follows: $25,500 on or before September 2d, $102,000 on or before October 2d, and $127,500 on or before November 1, 1910; the vendor acknowledging receipt of $1,000 on the first installment. Time was specified to be of the essence of the contract, and all sums paid on the contract were to be forfeited in case of failure of the purchaser to perform his agreement. Nothing was paid on the contract except the first $1,000. No offer to perform by paying the contract price, or any further portion thereof, was made until at least as late as March, 1911. The contract price amounted to about $1.23 per share, and it is alleged that the reasonable value of said stock on September 2, 1910, was, and ever since has been, not less than $3 per share.

"It is manifest that upon these facts alone the complaint could not state a cause of action. Assuming everything else in favor of the plaintiff, it would still be necessary that the plaintiff furnish a valid excuse for his failure to make the payments at the times named in the agreement. This he has attempted to do as follows: It is alleged that on the day prior to the date of making said contract of August 25, 1910, the plaintiff informed the defendant Davis that he had procured persons who were ready, able, and willing to furnish the money necessary for the purchase of said shares of stock; that the plaintiff also would join with said persons and furnish a portion of the said purchase money; but that said persons were unwilling to proceed with the matter unless time should be allowed in order to permit an examination of the mine of the defendant corporation to be made by plaintiff's engineer, nor unless certain discoveries of ore alleged to have been made since a prior examination made by the plaintiff in April, 1910, should, upon such new examination, be verified by said engineer. 'And said defendant Davis, at said interview, said that he, as a single director of the defendant company, had no right to agree on behalf of the said company to an examination of said mining property by plaintiff's engineer, but that plaintiff, as a stockholder of the defendant company, undoubtedly had the right to examine said property, that such right had never been questioned, and had been repeatedly exercised, and that there should be no objection raised to the making of such examination; and plaintiff said to defendant Davis that his engineer was ready to proceed at once to said mine for the purpose of examining the same.' The plaintiff then was, and for some time past had been, a stockholder in said corporation. Neither plaintiff nor said Fluke at that time possessed sufficient ready cash to pay the entire purchase price of said stock at the times fixed by said contract, and depended wholly for procuring the greater part of said money upon the said arrangements made with other persons to furnish the money, all of which was well known to defendant Davis. It is then alleged that defendant Davis, contriving to fraudulently defeat said sale and purchase and to prevent the plaintiff from obtaining the money necessary for the consummation by plaintiff of said purchase, attended a meeting of the board of directors of the corporation, 'in the latter part of August, 1910,' and procured and voted for a resolution by the board of directors forbidding the examination of the underground workings of said mine by the engineer selected by plaintiff, 'and postponing such examination to an indefinite future time'; that four other of the defendants, who were then directors of the corporation, combined and conspired with Davis, by preventing the examination of said mine by plaintiff, and by said resolution, to defeat the consummation of plaintiff's said contract and to divert the purchase of said shares from plaintiff to themselves. On August 25, 1910, plaintiff was advised by letter from the secretary of the corporation to plaintiff's engineer, and received by him after the making of the contract, of the action taken by the board of directors and of the company's refusal to permit at that time an examination of said mine to be made. The plaintiff immediately protested and represented to defendants his readiness to make immediate examination of the mine and to complete the purchase and pay the purchase price and the impossibility of completing said purchase until such examination was permitted. Nevertheless the defendants then, and at all times down to the filing of said complaint, persisted in refusing to give plaintiff access to said mine. Defendant Davis has repeatedly informed the plaintiff that he 'will not perform said contract or recognize the validity of the same.'

"Plaintiff's counsel do not contend that the facts stated in the complaint carry with them any right to vary, supplement, or depart from the written contracts, nor that there was any additional agreement on the part of the defendant Davis, nor that there has been any breach of such additional agreement. His position is that, by reason of the described acts of Davis done as aforesaid, the plaintiff was intentionally prevented from making payments at the time that they were due, and that for that reason prompt performance of the contract was excused, and that therefore plaintiff's right to insist upon performance of the contract by Davis was still in existence at the commencement of this action.

[1] "Plaintiff was entitled to examine the mining property of the company. This presumably included the right to be 'accompanied by his expert.' Hobbs v. Tom Reed Gold Mines Co., 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112. But this was his right as a stockholder owning other stock, and is a matter wholly independent of the contract between him and defendant Davis.

[2] "1. The plaintiff did not agree to pay the purchase price upon condition that he could inspect the property and if he could borrow enough money. His promise, as stated in his contract, is unconditional. The default of plaintiff took place on September 2, 1910, by nonpayment of the unpaid portion of the installment of $25,500. The complaint alleges that the plaintiff's statement to Davis was that others were to advance money to be used in this transaction, and that the plaintiff would also join with said persons and furnish a portion of said purchase money. The only claim made by him of inability to pay is that he did not have sufficient ready cash to pay the entire purchase price at the times fixed by the con-

tract. The sale by Davis to other defendants herein of a portion of the stock is alleged to have occurred 'about the month of September, 1910.' There is nothing stated in the complaint from which it can be inferred that on September 2d the plaintiff was unable to pay the comparatively small amount of money that became due on that day. This being so, the defendants did not prevent the plaintiff from making that payment, and they did not cause him to be in default. It must be remembered that the contract is a contract of the plaintiff alone, and not of the persons who were to furnish him with funds; also that the excuse for nonperformance relied upon by plaintiff was solely based upon the proposition that the defendants, and in particular the defendant Davis, prevented plaintiff from performing his part of the contract. Even on his own theory of this case, it was his duty to meet the payment of September 2d, if he had ability so to do. He would not be excused merely because defendants' conduct with reference to his intended examination of the mine led him to believe that such conduct, if persisted in by them, would later prevent him from obtaining funds sufficient to complete his later payments. If he made the payment on September 2d and if defendant Davis, by conduct sufficient to furnish legal excuse to the plaintiff, should later prevent the plaintiff from paying the last two installments, plaintiff would in that event have ample protection at law with respect to his previous payments, as well as the right in equity or at law to enforce the entire contract.

"2. Provisions of a contract calling for payments strictly at a time specified 'cannot be applied where the efficient cause of the failure of the party seeking specific performance to comply strictly and literally with the contract was the conduct of the other party.' Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; Houghton v. Steele, 58 Cal. 421; Antonelle v. Lumber Co., 140 Cal. 315, 73 Pac. 966; Griffith v. Happersberger, 86 Cal. 606, 25 Pac. 137, 487. Yielding full assent to this principle on which the plaintiff's case depends, it is clear that the conduct of the defendants herein was not the efficient cause of plaintiff's default on September 2, 1910. The default occurring as above stated has never been remedied by agreement or by anything in the subsequent conduct of the parties. It may also be observed in this connection that the facts alleged with reference to the persons who were to furnish funds to the plaintiff are that they would not furnish the money, unless after examining the mine the engineer should verify certain currently reported 'new discoveries of ore of great value' therein. It is not alleged that the plaintiff's engineer would have reported favorably. Even if the new discoveries had been 'of great value,' the value might have been less than sufficient to satisfy the engineer. Moreover, it is not alleged that if he had reported favorably said persons would have furnished the necessary money to enable plaintiff to perform the contract. Unless these results were certain, it is difficult to see how it could be held that the defendants prevented the payments from being made.

[3] "3. It does not appear that the contract was just and reasonable, or founded upon an adequate consideration. For this reason specific performance could not be enforced. Civ. Code, § 3391; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 806. It is alleged that the stock of the corporation has no established market value. Therefore the allegations of value as made by plaintiff must relate to intrinsic value. One of these is that the reasonable value of the stock included in the contract was, on September 2, 1910, $3 per share, which amounts to $624,000; yet he was buying it for $255,000. The only other statement pertaining to value is that, in April, 1910, plaintiff's engineer had reported to him that the value of the property of the company was 'not sufficient to warrant the price fixed by said contract.' Plaintiff has paid nothing on this valuable and important contract, except the $1,000 paid out on the original option. It would seem that the price fixed by the contract of August 25, 1910, was grossly inadequate and, under the circumstances shown by plaintiff's complaint, he ought not to have affirmative relief in equity.

[4] "Being of opinion that the complaint does not state a cause of action, we omit any discussion of the grounds of special demurrer, further than to say that, if the stated case were to be treated as showing a cause of action for damages against defendant Davis, then the demurrers would have been properly sustained upon the ground of improper joinder of parties defendant, and upon the ground that the plaintiff improperly united alleged causes of action affecting some, but not all, of the defendants. But we agree with counsel for plaintiff in their statement that 'the whole frame of the bill of complaint is for specific performance.'

"The judgment is affirmed."

SULLIVAN, C. J., and ANGELLOTTI, J., do not participate in the foregoing.

SHAW, J. (dissenting). I cannot agree with the conclusion of the court in the foregoing opinion. The plaintiff and the defendant Davis were both stockholders in the Tom Reed Gold Mines Company. Under the law every stockholder has a right to inspect the mine. Both parties must be presumed to know this. The complaint shows that the defendant Davis knew that the plaintiff made the contract with the expectation of obtaining means of making payments by reselling the stock to other persons. By the contract $25,500 was due on the 2d of September, and a much larger sum—$102,000—on or before the 2d of October. Defendant knew that the plaintiff could not obtain the latter sum unless he was allowed to examine the mine to discover its condition before making a resale. The condition of the mine was such that if he examined the mine he would have been enabled to make a resale and could have completed the contract. All this was known to the defendant. With the fraudulent intention of preventing plaintiff from carrying out the contract, the defendant caused the company to immediately refuse to permit the plaintiff to enter the mine for examination. He did this to prevent plaintiff from carrying out the contract, and persisted in so doing until after the payment of September 2d became due, knowing and believing that by that means he would avoid performance of the contract. In my opinion, this was fraudulent, and constituted an estoppel against the defendant sufficient to to prevent him from now claiming that the plaintiff was in default for failing to pay the comparatively small amount due on September 2d. If the plaintiff had paid that amount, as it may be conceded he was able to do, he was confronted with the certainty that the refusal to permit him to examine the mine would prevent him from making the much larger payment due in October, and that he would thereby forfeit the money already paid. In my opinion, the defendant is in no position to claim the default which he himself has in this manner produced. I think the complaint states a cause of action.

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168 Cal. 452

GONYER v. WILLIAMS. (L. A. 3355.)

(Supreme Court of California. Oct. 2, 1914.)

1. BANKS AND BANKING (§ 126*)—INSOLVENCY—CLAIMS—DEPOSITS.

Where a bank received on deposit a check on another bank, and immediately placed the amount thereof to the credit of the depositor, although the check was not presented to, or paid by, the drawee bank until the next day, at which time the former bank was in the hands of the state banking department, the crediting of the amount of the check to the depositor's account made the bank a general debtor to the depositor for that amount, not a trustee to collect.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

2. BANKS AND BANKING (§ 166*)—INSOLVENCY—CLAIMS—COLLECTION.

Where a bank had collected a draft, and, in accordance with universal usage, had transmitted its draft upon a New York bank to the remitter of the collected draft, the agency of the bank for the collection was changed into the relation of general debtor, and the remitter of the draft cannot recover the amount from the state superintendent of banking as trustee, after the draft drawn by the collecting bank was returned unpaid because of the insolvency of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 574–578, 586; Dec. Dig. § 166.*]

3. CUSTOMS AND USAGES (§ 15*)—EXPLANATION OF CONTRACT—COLLECTIONS BY BANK.

The contract for the collection of a draft and the disposition of the proceeds thereof was one resting in general usage, and the usage was therefore admissible, under Code Civ. Proc. § 1870, subd. 12, providing that a usage is admissible to explain the true character of a contract which is not otherwise plain.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30–33; Dec. Dig. § 15.*]

Department 2. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by D. J. Gonyer against W. R. Williams, as Superintendent of the State Banking Department of California. Judgment for the plaintiff, and defendant appeals. Reversed.

Hiram W. Johnson, Jr., of San Francisco, and A. A. Deligne, of Sacramento, for appellant. T. N. Harvey and George E. Whitaker, both of Bakersfield, for respondent.

MELVIN, J. This was an action against the superintendent of banks to recover the value of two checks and a draft received by the Kern Valley Bank just before it was closed by his order. The amount of one of the checks, $200, was paid by the defendant before the trial of the action. The court held that $300, the money represented by the other check, and $140, the proceeds of a certain draft, were held by the defendant in trust for the plaintiff. From this judgment defendant appeals.

[1] Plaintiff was on May 11, 1911, and for a long time theretofore had been, a depositor with the Kern Valley Bank. On the afternoon of that day he deposited with said bank a check for $300, drawn in his favor, and bearing his indorsement in blank. Before the close of business on that day, the books of the bank were posted and balanced, and the amount of the check was placed to the credit of the plaintiff, D. J. Gonyer. On May 12th, before the opening of the bank at 10 o'clock a. m., one of defendant's deputies entered the premises. Under his instructions the doors were opened as usual for business, but all deposits made during that morning were segregated and kept separate from the other funds of the bank. Shortly before noon the bank closed its doors, and subsequently all deposits made on May 12th were returned to the depositors. Before the doors were closed on the morning of May 12, 1911, the Bank of Bakersfield, on which the check for $300 was drawn, balanced its accounts with the Kern Valley Bank, with the result that the sum of about $1,300 was found to be due by the latter to the former.

While it is alleged by plaintiff and admitted by defendant that the Kern Valley Bank was in fact insolvent when plaintiff's check was deposited, there is neither allegation nor finding that such insolvency was known at that time to the officers of the bank. There is therefore no question in this case with reference to the fraudulent receipt by an insolvent institution of an amount tendered for deposit. Respondent's theory, which was accepted by the trial court, was that the function of the depositary was to collect from the Bank of Bakersfield the amount of the check and place it to the account of the depositor, and that, until such a transaction was consummated by the balancing of the account of the two banks, Mr. Gonyer did not become a general creditor of the Kern Valley Bank; and that, as the Kern Valley Bank was under the supervision of the state's superintendent of banks when the balance between the two institutions was sought to be figured, it was incapable of transacting business, and therefore no general deposit of the $300 was completed. We cannot agree with this theory of the transaction. The deposit of the indorsed check by Mr. Gonyer with the Kern Valley Bank, in the ordinary course of business, transferred the title to the instrument from him to the bank. The transaction was not one which created the relation of principal and agent but rather that of creditor and debtor. The matter of depositing checks and the ensuing rights and obligations was considered by this department in the case of Plumas County Bank v. Rideout, Smith & Co., 165 Cal. 137, 131 Pac.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

360, 47 L. R. A. (N. S.) 552, a cause in which a hearing in bank was denied. On the authority of that case we must hold that the court erred in deciding that the sum of $300 was a trust fund held by the superintendent of banks for the benefit of the depositor. See, also, Newmark Grain Co. v. Merchants' National Bank, 166 Cal. 208, 135 Pac. 958.

[2] The plaintiff sued also on an assigned claim for $140. The history of the transaction out of which that claim arose is as follows: In the early part of May, 1911, the Kern Valley Bank received for collection from the Clauss-Shear Company of Fremont, Ohio, a draft on A. Weill for $140. This was presented and duly paid by the said A. Weill on May 11, 1911. The Kern Valley Bank, after deducting the usual charge for collection, prepared a draft upon its New York correspondent for the balance of the $140 and sent said draft to the Clauss-Shear Company. Before the last-named corporation could present the draft for collection, the Kern Valley Bank suspended business; the New York correspondent, therefore, refused to honor the draft, and it has never been paid. It was stipulated by the parties that the course pursued by the Kern Valley Bank was that usually followed by banking institutions in collecting drafts and remitting the proceeds.

The money was not a special trust fund, but the general assets of the bank were subject to the payment of the draft on the failure of its correspondent in New York to honor its paper. The owners of the money collected from Weill were therefore general creditors, and the court erred in finding that a part of the assets of the bank which passed into the hands of the superintendent of banks constituted a trust fund for the payment of the balance due from the bank as the proceeds of the collection. Nothing in Henderson v. O'Conor, 106 Cal. 385, 39 Pac. 786, is in conflict with the conclusion which we have reached here. In that case the draft was not collected until after the closing of the bank to which it had been entrusted for collection, and the money due that insolvent institution from its correspondent (including the sum received from the corporation against which the draft was made) was actually paid to the receiver after the insolvency. The money, therefore, had never come into the possession of the bank which, as the plaintiff's agent, had taken the draft for collection. Undoubtedly the Kern Valley Bank was the agent of the drawer for collecting the draft, but this relation was changed by the manner of remitting the proceeds of the collection to that of debtor. The rule is thus expressed in 5 Cyc. 516:

> "When paper is received for collection, a trust relation often exists in the beginning which is changed by agreement or custom into that of debtor and creditor after the collection of the proceeds. * * * The transformation does not affect the depositor unless it is known by him either by agreement or usage."

In the present case it was known by the plaintiff that it is the custom of banks to credit those sending drafts for collection with the proceeds of the paper after the money has been collected. Such, indeed, is the invariable custom, in the absence of a special agreement to the contrary (First National Bank of Circleville v. Bank of Monroe [C. C.] 33 Fed. 411), and the stipulation in the present case amounts to an agreement that the course followed by the Kern Valley Bank was the universal one in such cases.

[3] Respondent insists that the contract was complete without recourse to proof or stipulation as to custom (citing sudivision 12 of section 1870, Code Civ. Proc.). On the contrary, the contract was for the collection of the draft, and the manner of disposing of the assets was clearly one resting in general usage. Proof of such custom is admissible, and the general usage, when not in contravention of law, is of governing force. Davis v. First National Bank of Fresno, 118 Cal. 602, 50 Pac. 666.

> "When a draft is forwarded to a bank for collection and remittance, and collection is made, and the proceeds placed in the vaults of the bank, a draft for the amount, less charges for collecting, being forwarded for payment, such proceeds do not become a trust fund in the hands of the bank." Morse on Banks and Banking (4th Ed.) § 248, p. 482.

See, also, Bowman v. First National Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870, which is practically identical in its facts with the case at bar.

It follows that the judgment must be, and accordingly it is, reversed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 491

In re FABER'S ESTATE.

Appeal of SUFFAL.

(L. A. 3720.)

(Supreme Court of California. Oct. 3, 1914.)

1. Appeal and Error (§ 417*)—"Notice of Appeal"—Sufficiency.

A notice as follows: "Notice is hereby given pursuant to section 953a, Code Civ. Proc. to all persons concerned, that the undersigned * * * desires to appeal and does hereby appeal to the Supreme Court from the order," etc., is good as a notice of appeal within Code Civ. Proc. § 941b, where the notice describes the order with sufficient accuracy, and the fact that the notice is drawn so as to serve the office of notice of appeal and notice to the clerk does not destroy its effect as a notice of appeal, and the words "pursuant to section 953a" may be treated as applicable solely to the part constituting a notice to the clerk, or as mere surplusage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*

For other definitions, see Words and Phrases, Second Series, Notice of Appeal.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. HOMESTEAD (§ 58)—ASSIGNMENT TO WIDOW—PROPERTY SUBJECT TO.

A lot without improvements except two small buildings, neither fit for a dwelling place, may not be set apart as a homestead to the widow of the deceased owner under Code Civ. Proc. § 1465, providing for the setting apart of exempt property, though the deceased husband had, a few months before his death, removed from the lot a small dwelling house with the intention of building an apartment house thereon, and to live in one of the apartments, and was endeavoring at the time of his death to arrange for the construction of the building.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 86; Dec. Dig. § 58.*]

3. EVIDENCE (§ 541*)—FOREIGN LAW—COMPETENCY OF WITNESS.

Under Code Civ. Proc. § 1902, providing that the oral testimony of a witness skilled therein is admissible to prove the unwritten law of a foreign country, a witness, testifying that it was his duty as an officer to become familiar with the laws of a foreign country as to real and personal property rights, may testify whether he is familiar with such laws, though he has not engaged in the practice of the law in the foreign country or as professor of law therein, and if familiar with the laws, he may testify concerning them, and the fact that he has not been a practicing lawyer or a professor of law in the foreign country merely affects the weight of his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2354; Dec. Dig. § 541.*]

In Bank. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

In the matter of the Estate of Frank R. Faber, deceased. From an order setting apart to Mildred Faber, widow of the deceased, a parcel of land as homestead, Mary E. Suffal appeals. Reversed.

Edward T. Lannon and Mannix & Lannon, all of San Diego, for appellant. Gordon L. Gray, of San Diego, for respondent.

SHAW, J. This is an appeal from an order setting apart to Mildred Faber, the widow of decedent, a parcel of land belonging to the estate, as homestead.

[1] The respondent moves to dismiss the appeal on the ground that no sufficient notice of appeal has been filed. The opening part of the notice of appeal shows the defect relied on. It is as follows:

> "Notice is hereby given, pursuant to section 953a, Code of Civil Procedure, to all persons concerned that the undersigned Mary E. Suffal, desires to appeal and does hereby appeal to the Supreme Court from the order," etc.

We deem this a sufficient notice in substance, although it is not in good form. It differs from the notices of appeal held insufficient in Lent v. California, etc., Ass'n, 161 Cal. 719, 121 Pac. 1002, Boling v. Alton, 162 Cal. 299, 122 Pac. 461, and Marcucci v. Vowinckel, 164 Cal. 695, 130 Pac. 430, in this: That it expressly states that Mary E. Suffal "does hereby appeal" from the order, etc., describing it with sufficient accuracy. The notices in the cases cited did not contain any equivalent language, but were plainly phrased for notices to the clerk to prepare the transcript, as provided by section 953a. This notice expressly states that the petitioner does appeal, and it is therefore good as a notice of appeal under section 941b of the Code of Civil Procedure. The fact that it is drawn so as to serve the double office of a notice of appeal and a notice to the clerk, under section 953a, as appears from the subsequent parts of the notice (not above quoted), does not destroy its effect as a notice of appeal, nor is the statement that it is given "pursuant to section 953a" fatal to its sufficiency as a notice of appeal. That phrase may properly be deemed applicable solely to the subsequent part constituting a notice to the clerk, or as mere surplusage. It could not have misled the parties interested and, under the rule prevailing since the enactment of section 941b, such faults do not vitiate an appeal. S. R. Co. v. Superior Court, 167 Cal. 250, 139 Pac. 71. The motion to dismiss the appeal is denied.

[2] The main objection to the order appealed from is that the land set apart as a homestead had no building or structure upon it that could be used as a dwelling house, either at the time of decedent's death, or thereafter up to the time of making the order. We think this objection is well taken. The land consisted of a lot in the city of San Diego. It had no improvements upon it, except two small buildings, which the petitioner herself designated as "shacks." One of them was scarcely large enough to inclose an ordinary buggy, the other was used as a garage. The petitioner testified that neither of them was fit for a dwelling place.

The question of the power of a court to set apart such property as a probate homestead is settled by the decision in Estate of Gallagher, 134 Cal. 96, 66 Pac. 70. In that case the property involved was farming land upon which the decedent and his wife, the petitioner, had at one time resided in a house situated thereon. This house, some two or three years before his death, was destroyed by fire. From that time until his death there was no building upon the land that could be used as a dwelling, and the decedent and his wife resided elsewhere. She offered to prove that if the court should set off the land to her as a homestead she would erect thereon a dwelling house and reside in it. This court held that this testimony was properly rejected. Upon the merits, it was decided that the authorities in this state establish "the rule that a probate homestead cannot be carved out of a tract of naked agricultural land having upon it no dwelling house or qualities of a home," and that the court below was right in refusing to set apart the land as a homestead. This is in harmony with the declaration in Estate of Noah, 73 Cal. 593, 15 Pac. 292, 2 Am. St. Rep. 834, that the superior court "would be justified in refusing to set apart land as a homestead, unless it were made to appear that there was thereon an edifice that could be used as a dwelling." See, also, In re Sharp, 78 Cal. 485, 21 Pac. 182.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The same principle applies here. The lot in question was no more suitable for a home than was the farming land applied for in the Gallagher Case. The purpose of the widow, in that case, to build a dwelling on the land, if it had been awarded to her, was declared to be insufficient to authorize such award. There is no suggestion in the case at bar that the petitioner intends ever to build a dwelling house on the lot or to occupy it as a home. There is evidence tending to show that the decedent intended to build an apartment house on the lot and to live in one of the apartments after the house was erected, that preparatory to carrying out this intention, he had, some three or four months before his death, removed from the lot a small dwelling house thereon, and that, shortly prior to his death, he was endeavoring to arrange for the borrowing of sufficient money with which to build the house, and was having plans therefor drawn by an architect. But it also appeared that these plans were conditional upon the uncertain event of his ability to borrow the money necessary for that purpose. No definite arrangement had been made therefor. This may have been entirely immaterial in any event, but it is, at all events, not sufficient to show that the lot was in any legal sense the residence of the decedent, or capable of being used as a residence at the time of his death. It remained in the same condition up to the time of making the order. An unexecuted and conditional intent to fit a place for residence, such as here appears, is not sufficient to justify a court in setting it apart as a probate homestead under section 1465 of the Code of Civil Procedure. The case cannot be distinguished from the Gallagher Case above cited so far as that point is concerned. It follows that the court erred in setting apart the property to the petitioner as a homestead.

[3] Some question arose upon the trial concerning the character of the property, whether it was community property or separate property of the decedent. As there may be another trial below, we deem it advisable to notice a ruling upon the admission of evidence upon the subject. The claim of petitioner was that the money with which the decedent purchased the lot was earned by him while he was residing in the city of Constantinople in Turkey, after her marriage, and that therefore it was community property. The contestant, on the other hand, claimed that the funds which paid for the lot were obtained by him by descent from his brother and were his separate estate. The contestant endeavored to prove that, under the law of Turkey, there was no community property, and that all property accumulated in Turkey by the husband became his separate estate. She called a witness who testified that he had been a factor engaged in selling and buying property in Smyrna, which is in the empire of Turkey; that the law of Turkey required that he should be licensed to carry on that business; that he held such license; and that in order to hold the same it was necessary that he should be familiar with the laws of Turkey governing property rights, both real and personal. Thereupon he was asked whether or not he was familiar with the laws of the empire of Turkey regarding property rights. The court sustained an objection to this question, and refused to allow him to testify further on the subject, basing the ruling upon the proposition that the laws of a foreign country cannot be proven by the testimony of a witness who was not engaged in the practice of the law therein. In this we think the court erred. Section 1902 of the Code of Civil Procedure provides that:

> "The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country."

It does not declare that such witness must be engaged in the practice of the law in such country, or as a professor of law therein. It is sufficient if it appears that he was skilled therein. The witness in question testified that it was his duty as an officer to become familiar with the laws of Turkey regarding property rights, both real and personal. He was not allowed to proceed to testify whether he was familiar with such laws, or to testify concerning the law itself on the subject in question. We think this testimony was admissible. If it should appear that he was skilled therein, the objection that he was not a lawyer, or a professor of law, would go to the weight of his testimony, and not to its competency.

The order appealed from is reversed.

We concur: SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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168 Cal. 406

PEOPLE ex rel. HUBBARD v. LOS ANGELES RY. CORPORATION. (L. A. 3302.)

(Supreme Court of California. Oct. 1, 1914. Rehearing Denied Oct. 31, 1914.)

1. Street Railroads (§ 60*)—Franchise—Forfeiture for Noncompletion — Effect on Completed Portion.

A franchise ordinance for the construction of a street railroad line, which provided that if the road was not fully completed and in operation within 18 months after the passage of the ordinance the franchise should be forfeited as to the uncompleted portion thereof, and the acceptance of the franchise by the company and the payment of a valuable consideration therefor, constituted a contract that the grantee of the franchise might abandon the uncompleted portion, and that the abandonment would be accepted by the council under the provisions of Civ. Code, § 502, that a failure to complete within the time required works a forfeiture of the right of way and of the franchise unless the uncompleted portion is abandoned in writing by the grantee of the franchise with the consent of the authorities granting, and therefore the failure to complete the entire line does not affect the validity of the franchise for the portion completed within the time fixed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. § 60.*]

2. JUDGMENT (§ 735*) — CONCLUSIVENESS — MATTERS NOT IN ISSUE.

A judgment declaring the forfeiture of the franchise for the portion of the line not constructed within the time specified, where the pleadings raised no issue as to the validity of the franchise for the other portions of the line, is not conclusive as to such validity, although some of the language in the opinion on appeal was broad enough to include that portion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1263–1268; Dec. Dig. § 735.*]

3. STREET RAILROADS (§ 60*)—FRANCHISES—CONSTRUCTION — EXTENSION OF TIME FOR COMPLETION.

A subsequent ordinance extending the time for the "completion of the lines" did not destroy the privilege granted by the earlier ordinance to abandon the unused part of the route.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. § 60.*]

4. STREET RAILROADS (§ 61*)—FRANCHISES—CONSTRUCTION—ACTS OF PARTIES.

Nor did the attempt of the predecessor in interest of the present holder of the franchise to construct a railroad along the portion forfeited, though inconsistent with the claim that the original ordinance contracted to abandon the uncompleted portion of the railroad, divest the title of the street railroad company to the completed portion.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. § 61.*]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Quo warranto by the People of the State of California, by U. S. Webb, Attorney General, on the relation of A. A. Hubbard, against the Los Angeles Railway Corporation. Judgment for the plaintiff, and defendant appeals. Reversed, with instructions.

Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellant. Emmet H. Wilson, of Los Angeles, amicus curiæ, supporting appellant. George Cryer, Chas. S. Burnell, and John W. Shenk, City Atty., all of Los Angeles, for respondent.

MELVIN, J. This action in the nature of quo warranto was instituted for the purpose of having a judicial declaration that the defendant was usurping and unlawfully exercising the franchise of maintaining tracks for its street railway along portions of San Pedro street in the city of Los Angeles, and that the said defendant had forfeited its right to operate its road or to maintain tracks along any part of the route described in that certain ordinance of the city of Los Angeles known as "Ordinance No. 4240 (New Series)." Judgment was given in favor of the plaintiff, and defendant appeals from said judgment.

The essence of the judgment was that by its failure to complete the construction of its tracks over the entire route described in Ordinance No. 4240 within the time prescribed therein and in a later ordinance by which an extension of time was granted, defendant ipso facto forfeited its right to maintain tracks upon any portion of said route. The facts are stipulated, and so far as they are necessary to the decision of this case are as follows:

On May 11, 1897, Ordinance No. 4240 (New Series) was passed and it was approved on the same day. It granted to John C. Lynch, his successors and assigns, a franchise to build and operate a line of street railway along a route—

> "commencing at a point in the east line of Main street 30 feet north of the north line of the Pico House block, and running thence easterly along the Plaza to the center of Los Angeles street; thence southerly on Los Angeles street to First street; thence easterly on First street to San Pedro street; thence south along San Pedro street to its intersection with Stanley avenue; thence southerly along Stanley avenue to the southern city boundary."

Section 4 of the ordinance was as follows:

> "The above rights and privileges are granted upon the express condition that work on said road shall be commenced within six months, and the whole thereof completed within eighteen months, from the date of the passage of this ordinance. It being understood that, if said road is not fully completed and in operation within said time, then this franchise shall be forfeited as to the portion thereof uncompleted; and in case any portion of said road is unused and unoperated with reasonable service for one month, then that part of the road shall become forfeited and become the property of the city."

By section 6 it was provided that the grantee of the franchise on and after the completion of the road, "or any portion thereof, and the operation of the same," should issue and receive transfers to and from its other lines. The time for completing the work was extended by Ordinance No. 5381 (New Series) to expire May 12, 1899. No part of the road described in Ordinance No. 4240 was completed prior to the date last mentioned except that portion along San Pedro street between Fifth and Thirtieth streets, a distance of about one mile. This road was regularly operated by Lynch and his successors until May 1, 1903, when defendant's predecessor in interest, the Los Angeles Railway Company, commenced the extension of its road on San Pedro street and Park avenue (the new name for Stanley avenue) from Thirtieth street to the terminus described in Ordinance No. 4240. A portion of this extension was actually constructed when the city, acting through its agents, prevented further prosecution of the work. Thereupon the Los Angeles Railway Company commenced an action against the city of Los Angeles to restrain that municipality from interfering with its work of construction and operation of its road south of Thirtieth street and under protection of a restraining order completed its tracks to the terminus described in Ordinance No. 4240.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On the hearing in the superior court of the railroad company's action, the restraining order was dissolved and judgment was entered for the defendant. Plaintiff appealed, and, pending the determination of the cause on appeal, entered into a contract with the city whereby, on payment of a certain monthly sum, the railroad company was permitted to occupy and use that portion of the route south of Thirtieth street on San Pedro street and on South Park avenue north of Slauson avenue. On appeal the judgment of the superior court was affirmed. Los Angeles Railway Co. v. City of Los Angeles, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54.

It was also stipulated that the portion of the road first constructed under the authority of Ordinance No. 4240 had always been operated as a part of a general system, and that by transfers and without extra charge passengers living near parts of the proposed route upon which no tracks were constructed prior to May 12, 1899, were taken to points conveniently near to their places of residence. Neither the city nor its agents ever declared the franchise granted by Ordinance No. 4240 was forfeited until the city attorney in the answer filed by him in the suit by the railway company against the city asserted that such forfeiture had occurred. After the decision of the railway company's suit in the superior court, the city attorney suggested that an action be commenced by the city for the purpose of forfeiting the entire franchise sought to be granted by Ordinance No. 4240, and he drew a recommendation and resolution to that effect which he presented to the city council. This was referred to the appropriate committee, and that committee rendered the following report:

> "It appears to your committee that at the time this franchise was granted in 1897 there must have been grave doubts in the minds of the mayor and council, as well as Mr. John C. Lynch, as to the propriety of building this road to the extreme southerly limits within the limit specified as a business proposition, for they at that time, by mutual consent, inserted the provision in the franchise, that has never before nor since been incorporated in a railway franchise in this city, that if the whole line was not completed within the time limit, the franchise for only that portion uncompleted should be forfeited. Your committee believes that, regardless of any advantages that we might attempt to avail ourselves of through the courts in the way of technical law points in the state Code bearing on this case, there was a very clear and definite understanding between the city, through its officials, on one side, and the purchaser of this franchise, on the other, as to the conditions expressed therein, and one which it is the plain duty of this council as their successors to carry out. We therefore recommend that this council shall decline at this time to instruct the city attorney to take any legal action with a view to seeking a forfeiture of the franchise in question."

On November 6, 1905, the committee's report was adopted by the city council and spread upon the minutes of its meeting of that date.

Shortly after the decision of this court in Los Angeles Railway Co. v. City of Los Angeles, the said company made application in writing to the city council to advertise for sale a franchise for a street railway over the portion of the route of the former franchise which had been in controversy in the injunction suit. The city attorney reported against such a course, stating his opinion that the whole of the franchise sought to be granted by Ordinance No. 4240 had been forfeited. However, the city council proceeded to advertise and sell the franchise for a street railway commencing at Thirtieth and San Pedro streets, and running thence over the southerly portion of the route designated in said Ordinance 4240. This franchise was duly granted by Ordinance No. 16320, and was assigned to defendant herein, but upon a referendum to the electors of the city the ordinance was rejected.

The stipulation contains reference to great expenditures made by the defendant and its predecessor in the way of taxes, paving, reconstruction of tracks, etc., induced by a belief, fostered by the conduct of the city, that a franchise had been regularly and effectively granted by Ordinance No. 4240 (New Series) to the railway company to occupy that portion of San Pedro street between Fifth and Thirtieth streets.

Appellant's first contention is that its demurrer should have been sustained because of the provisions of subdivisions 1 and 2 of section 340 of the Code of Civil Procedure and of section 343 of the same Code; but we need not discuss this matter, because we are of the opinion that on the merits the judgment ought to be reversed.

[1] Appellant insists that the franchise ordinance, together with the written acceptance thereof, which was shown by the stipulation of facts, constituted an abandonment in writing by the grantee, and a consent to such abandonment in writing by the governing body of the city, within both the letter and intent of section 502 of the Civil Code. We fully agree with this contention. Section 502 of the Civil Code is in part as follows:

> "Work to construct the railroad must be commenced in good faith within not more than one year from the date of the taking effect of the ordinance granting the right of way, and said work must be completed within not more than three years after the taking effect of such ordinance: Provided, that the governing body of such municipal corporation at the time of granting said right of way shall have the power to fix the time for either the commencing or completion, or both, of said work; not, however, to a time less than six months for commencing, and not less than eighteen months for completing the same. A failure to comply with either of the foregoing provisions of this section, or with either of the provisions of the ordinance granting said right of way, works a forfeiture of the right of way, and also of the franchise, unless the uncompleted portion is abandoned by the person or corporation to whom said right of way is granted, with the consent of the authorities granting the right

of way, such abandonment and consent to be in writing."

Under the authority of this section the city council fixed a shorter time for the commencement and completion of the work than that named in the statute itself. This right to shorten the time is correlative with the power of the city council to waive forfeiture of a franchise. No time is fixed by the statute for the abandonment of the uncompleted part of the right of way and the acceptance by the city of the finished portion. We can easily imagine conditions in which such abandonment might be sought during the progress of the building of the railroad by a grantee of a franchise who would foresee the impossibility of finishing the work on time, and we can also see that in proper cases a city council would grant the requested relief. So, too, a grantee, having used his best efforts during all of the time allowed in the ordinance for the completion of the work, might with propriety, in some cases, ask and obtain permission to abandon the uncompleted portion of the right of way theretofore given him, and thereby retain the franchise for that part over which his tracks had been constructed. But why may not a city council, in advance of any construction of tracks at all, agree with the grantee that all parts of the right of way not used at the expiration of the time limit prescribed by the ordinance shall be abandoned, and that the franchise shall be in full effect as to the constructed portion? The franchise and the written acceptance thereof constituted a contract between the city and Mr. Lynch. He had paid $5,000 for the privilege granted. The city said, in effect:

> "If you will be satisfied with less territory for your tracks than we have allowed you, then we shall be satisfied with the more limited service, provided you will abandon the unused portion of your right of way."

And they contracted accordingly. The same result might have been obtained by the grant of a number of franchises for short spaces along the proposed route of the railway each with the same time limit. At the expiration of the prescribed period all of these spaces upon which tracks were built and in use would be protected by franchises, and the right of way over the unused spaces would have lapsed. The city council chose to adopt the more logical and direct method permitted by section 502 of the Civil Code.

[2] But respondent insists that the judgment in the case of Los Angeles Railway Company v. City of Los Angeles concludes and estops appellant in all matters urged as a basis of its present right to occupy any portion of the route described in the original ordinance. It is true that in the complaint in that action the railroad company averred its ownership of the entire franchise over the designated route, and defendant therein, the city of Los Angeles, denied the company's ownership of a franchise to operate its road over any part of the said right of way by reason of the failure of Lynch or his assigns to complete the work of constructing the road. But this pleading did not necessarily put in issue the ownership of the entire franchise. The decision by the superior court, which was affirmed by this court, referred only to the pretended right of the railway company to extend its tracks along San Pedro street south of Thirtieth street—territory upon which it had failed to build during the period delimited by the two ordinances. Whether or not the railway company possessed a vital franchise to operate its road between Fifth and Thirtieth streets on San Pedro street was a question not necessarily involved in that litigation. Certainly it was not a question which was there decided. We must hold, therefore, that the decision of this court in the 152d volume of the California Reports did not estop the railway company from asserting ownership of a franchise to operate its road between Fifth and Thirtieth streets on San Pedro street.

Respondent cites authorities to the effect that where the subject-matter of two litigations is the same the second is governed by the decision of the first. There can be no doubt of the existence of this rule, but we cannot concede that the forfeiture of the *entire* franchise was involved in the former action. Respondent quotes the following language from the decision in the former case (152 Cal. 244, 92 Pac. 491, 15 L. R. A. [N. S.] 1269, 125 Am. St. Rep. 54):

> "The question whether the superior court erred in dissolving the temporary injunction and denying a permanent injunction depends mainly upon the further question whether the franchise of plaintiff was forfeited ipso facto by its failure to complete the road within the time limited by the grant. The respondent claims that it was so forfeited under the provisions of section 502 of the Civil Code."

But we must remember that the court was considering, not the long-constructed, long-used, and long-taxed portion of the road, but that part which was built long after the expiration of the time granted by the city council. Counsel for respondent insist that the quoted language applies to the entire franchise, and must necessarily so apply because, as they assert, "the law makes no provision for a forfeiture of a part of a franchise"; but the law *does* make just such provision when the assent of the city council and the grantee concurs. In the case from which counsel quote there was no question of the interpretation of the *contract* between the city and Mr. Lynch, whereby it was agreed that both parties would assent to a franchise covering the part of the road which should be built during the time limit granted by the council. This court had its attention directed to that part of the franchise which, in any view of section 502 of the Civil Code, must be regarded as forfeited for nonuser. This is shown by the following language in the opinion:

"It follows from this conclusion that the plaintiff, having forfeited its right to use or occupy the street which it had left vacant for four years after the expiration of the time limited for the completion of its road, had no more right to lay its track there than one who had never been granted a right of way."

[3] But respondent makes the point that Ordinance No. 5381 (New Series) extended the time of the city's grantee only for the "completion of said railway lines," not for the completion of such part as the grantee might see fit to build. To hold that the quoted language destroyed the privilege granted by Ordinance No. 4240 (New Series) of abandoning the unused part of the route would be to give to it a narrow and technical meaning surely not contemplated by its authors. The purpose of the latter ordinance was merely to amend the earlier one in the matter of time and nothing else. Indeed, that was the only particular in which it could, under the statute, amend the earlier enactment. To be sure the ordinance specified the time for the "completion" of said lines, but their construction over a part of the contemplated route was clearly a "completion" in view of the terms of the original agreement.

[4] There can be no doubt that the attempt, on the part of appellant's predecessor, to build its road on San Pedro street south of Thirtieth street was inconsistent with the claim now made that the corporation had abandoned that portion of its franchise, but the fact that the predecessor of one of the parties now in interest committed an unlawful act would not justify a construction of the ordinance contrary to its plain terms. If a valid title to the franchise for the road constructed prior to May 11, 1899, vested at once in the grantee, that title could no more be divested by an unlawful attempt four years later to build on the abandoned right of way than it could be by an effort of that corporation to lay its tracks upon some totally different street upon which it never had any color of right to place its rails.

Our conclusion that by the very terms of Ordinance No. 4240 (New Series) and the written acceptance thereof the grantee obtained a franchise for the portion of the road constructed within the time limit makes it unnecessary to examine appellant's contention that the city by its conduct in taxing the railroad company, by requiring the corporation to construct a portion of the paving along the line of its tracks, by its own interpretation of the original ordinance (exhibited in the adoption by the city council of its committee's report), and by numerous other acts estopped itself from attacking the franchise of appellant. We may say, in passing, however, that these considerations appeal strongly to our sense of equity.

The judgment is reversed, with instructions to the superior court to enter a judgment confirming appellant's franchise in and to that part of its road on San Pedro street between Fifth and Thirtieth streets in conformity with the provisions of Ordinance No. 4240 (New Series) of the city of Los Angeles.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 473

RAYMOND et al. v. HILL. (L. A. 3335.)

(Supreme Court of California. Oct. 2, 1914.)

1. Trial (§ 203*)—Instructions—Evidence—Applicability.

The court, in giving its instructions, must state the law on any reasonable theory of the case, supported by evidence, and need not model its instructions solely on the evidence of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. § 203.*]

2. Highways (§ 184*)—Injuries to Pedestrian — Instructions — Evidence — Applicability.

Where, in an action for injuries to a pedestrian struck by an automobile, the evidence of plaintiff showed that she was unaware of the approach of the automobile until she was struck by it, and the evidence of defendant showed that she suddenly became aware of the proximity of the automobile and in her terror rushed from a place of safety into one of danger, an instruction that the act of a pedestrian in running in front of an automobile as the result of terror caused by the sudden discovery of the automobile near her does not necessarily show contributory negligence was authorized by the evidence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471–474; Dec. Dig. § 184.*]

3. Trial (§ 191*)—Instructions — Misleading Instructions.

An instruction, in an action for injuries to a pedestrian struck by an automobile, that pedestrians having in general, and under reasonable restrictions as to exercise of care by them, a right to travel anywhere on a public highway, and it is negligence for a driver on a public highway to recklessly run on a pedestrian who is standing or walking with his back toward him, is not objectionable as imputing reckless driving to defendant, and correctly states the law, holding one responsible for injuries which he may inflict by the reckless driving of a vehicle.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. § 191.*]

4. Highways (§ 173*)—Law of the Road—Statutory Provisions.

St. 1905, p. 816, requiring drivers of motor vehicles to pass to the right of an approaching person, and to give reasonable warning of the approach, and use every reasonable precaution, and requiring drivers approaching any person from the rear to pass to the left, is but declaratory of the common custom of the state, and requires vehicles generally to use the right-hand part of the highway, but does not prevent one using the left part of a highway where he cannot cross to the right-hand side, and negligence may not be predicated merely on such use, provided the roadway is of ample width to permit that use with safety to pedestrians, and a clear passage to approaching vehicles.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. § 173.*]

5. Highways (§ 168*)—Law of the Road—Right of Pedestrians.

Pedestrians may use and traverse a highway at all its points, being chargeable only for the exercise of due care, measured by the use which they actually make of the highway, and this rule applies to city streets without reference to the amount of travel thereon.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 456, 457; Dec. Dig. § 168.*]

6. HIGHWAYS (§ 176*)—CARE REQUIRED OF PEDESTRIANS.

A pedestrian is under no obligation to look back to see whether he is in danger of being struck by an automobile approaching from the rear.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. § 176.*]

7. HIGHWAYS (§ 176*)—CARE REQUIRED OF TRAVELERS.

While a pedestrian and a driver of an automobile thereon are charged only with the exercise of the same degree of care, the driver must, as required by St. 1905, p. 818, give reasonable warning of his approach and use every reasonable precaution to insure safety, and in the exercise of every reasonable precaution the driver approaching pedestrians, and particularly women, must have his car under such control that it may be promptly stopped, and the sounding of the horn and the noise of the muffler cutout are not sufficient.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. § 176.*]

8. HIGHWAYS (§ 184*)—INJURIES TO PEDESTRIANS—NEGLIGENCE.

Where, in an action for injuries to a pedestrian struck by an automobile, there was evidence that defendant approached from the rear with horn blowing and with muffler cut-out roaring, but that plaintiff and her companions were, through preoccupation, unaware of the presence of the automobile until it was just behind them, and that plaintiff was frightened and rushed in front of the automobile, the issue was whether the driver used every reasonable precaution to insure the safety of plaintiff up to the moment she was struck, and if he did, the accident was either inevitable or attributable to the negligence of plaintiff, defeating a recovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471–474; Dec. Dig. § 184.*]

9. HIGHWAYS (§ 176*)—INJURIES TO PEDESTRIANS—NEGLIGENCE.

A driver of an automobile overtaking pedestrians must, to escape liability for striking any of them, make certain that they are aware of his approach, and that he is at such a distance from them as to avoid running over them in a sudden panic from a surprised knowledge of his unexpected approach, and the automobile must be under such control that it may be stopped promptly, and a driver doing these things is relieved from liability, though injury to a pedestrian results, for the injury must result only from the pedestrian's own negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. § 176.*]

10. HIGHWAYS (§ 184*)—INJURIES TO PEDESTRIANS—EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries to a pedestrian struck by an automobile running on the left-hand side of the highway and approaching from the rear, there was evidence that the pedestrian was unaware of the approach of the automobile until she was struck by it, and also evidence that she suddenly became aware of the proximity of the automobile, and in her terror rushed from a place of safety into one of danger, and that the driver could not cross over to the other side, and the court merely gave general instructions to the effect that the operator of an automobile approaching a pedestrian must give reasonable warning and use every reasonable precaution to insure safety, refusal to charge that defendant was rightfully on the left-hand side of the roadway, and that if he used every reasonable precaution in his power, and the pedestrian notwithstanding ran into the automobile, there could be no recovery, was reversible error.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471–474; Dec. Dig. § 184.*]

Department 2. Appeal from Superior Court, Los Angeles County; M. P. Conrey, Judge.

Action by Lutie Raymond and another against Frank C. Hill. From a judgment for plaintiffs, defendant appeals. Reversed.

Geo. S. Hupp, of Los Angeles, for appellant. Newmire & Morris, of Los Angeles, for respondents.

HENSHAW, J. This action was brought by Lutie Raymond and her husband, Harry Raymond, to recover damages for injuries inflicted upon the former. The complaint charged that Lutie Raymond was injured by the negligent act of the defendant in carelessly and recklessly causing an automobile driven by himself to strike Lutie Raymond, inflicting upon her specified injuries for which compensation was sought. Trial was had before a jury, which brought in a verdict in favor of plaintiffs in the sum of $2,000. Judgment followed. Defendant moved for a new trial, and from the order denying his motion and from the judgment, he prosecutes this appeal.

The accident happened upon North Lake street, a public highway of the county of Los Angeles. North Lake street runs north and south. At its northern end Sans Souci avenue, running east and west, crosses it. The middle portion of North Lake street from Sans Souci avenue southward was occupied by an electric railway, and was impassable to vehicles because of construction work which the railway company had under way. Plaintiff and her husband, with two companions, Mr. and Mrs. McMillan, were walking in a southerly direction on the eastern portion of the roadway of North Lake street. The two women were walking together, as were also the two men. The women were six or eight feet ahead of the men. They all were walking upon the westerly or street railroad side of the easterly half of North Lake street, Mrs. McMillan being nearest to the railroad tracks, the plaintiff Lutie Raymond walking at her left side. Defendant, Hill, driving his automobile, and accompanied by his wife and Mr. and Mrs. Mathews, turned into North Lake street from Sans Souci avenue on the east, and, desiring to go south upon North Lake street, and being unable to cross North Lake street at Sans Souci avenue, turned southward upon the eastern half or division of that street. They thus traveled some 400 or 500 feet, passing several different parties who were walking upon the highway, until they approached the pedestrians composing plaintiffs' party. The accounts of the accident as given by plaintiffs' party and by the occupants of the automobile are in sharp conflict, indeed in amazing conflict. The plaintiff, Mrs. Raymond, testifies:

> "The first thing I knew I was struck in the back—it seemed to me I heard a horn blow just at the time it struck me, but I didn't hear anything until it struck me, and I didn't know anything more until they picked me up. I don't remember hitting the ground—all I know was when it struck me that I felt the lick and the horn at the same time; that is all I know."

Her husband's testimony is to the following effect:

> "The first intimation I had of the presence of the automobile was when it struck my wife. I saw no automobile or heard any sound until the automobile struck her."

Mrs. McMillan declares:

> "The automobile was almost on us before we heard the noise, and I heard it just a little bit and turned and looked, and it struck her just then and hit her and carried her in front of the automobile. We didn't hear the sound of any horn. The front of the automobile hit her in the back and hip. It was not the fender that hit her."

Mr. McMillan adds this:

> "I did not hear any automobile horn. The first thing I saw was Mrs. Raymond going round in the air on the side of the automobile."

The testimony of the automobile party is that they proceeded south on North Lake street slowly and with great caution, keeping to the extreme easterly side of the roadway, and repeatedly sounding the automobile horn and keeping open the muffler cutout, which produced a loud roaring sound of the engine. They discovered the Raymond party at least 100 feet before they reached them and kept the muffler cut-out open continuously, and sounded the horn at least three or four times as they slowly approached them from behind. The horn was last sounded as the automobile came opposite to the men, who, as has been said, were some 6 or 8 feet behind their wives. The immediate circumstances of the accident are thus told by defendant Hill. Having testified to the facts above narrated and to the further fact that the roadway was about 15 feet wide, that he was traveling as near as possible to the eastern gutter, and in the course he was pursuing would have passed the Raymond party with at least 6 feet of space between, he says:

> "I passed Mr. Raymond about 6 feet distant. Just as I got about opposite the men my horn was sounded again, and then Mrs. Raymond threw out her hands and ran to the east, directly in the path of my machine, or that would have been my path if I had continued on my course. She had given some indication of hearing my horn by turning to the left. She threw out her arms this way, and got her head down and ran across the road as hard as she could. Just as she started I put on my brake and steered to the left, and she ran into the side of the front fender a foot or 18 inches back of the front end of it. My machine had practically stopped running at the time she struck, but the back end skidded off into the gully, which was on an incline from the roadway. From the time I applied my brake to the time I stopped the machine did not travel over 6 feet. * * * Mrs. Raymond ran into the machine with her hands up and tried to push herself away from the machine; she then turned around and sat on the running board between the two fenders, and from there sat down upon the ground."

Mr. Mathews testifies:

> "But just as we got up to the party Mrs. Raymond looked around and saw the machine and ran into the side of the front fender. At the moment Mr. Hill saw her starting to run he put on the brake and the machine skidded to the east, and the rear wheels went into the gutter. As she hit the fender she turned around and sat down on the running board and then fell to the ground."

Mrs. Hill declares:

> "As we passed the men and repeated our warning Mrs. Raymond suddenly turned around and jumped and ran into the road to her left, and we veered off as far as we could to the left and she ran into the side of the front fender."

And Mrs. Mathews add this in corroboration:

> "When we got even with the men Mrs. Raymond turned around and then started to run right toward the left of the road, and Mr. Hill immediately put on the brake, veered to the left, and stopped the machine, and by that time Mrs. Raymond had gotten right up to the machine. She ran into the front fender, and the impact of touching the machine pushed her back and she kept going back to back fender and sat down on the running board, and as the rear wheel skidded into the ditch, Mrs. Raymond slid off and sat on the road."

[1, 2] Appellant's first complaint is that the court gave certain instructions touching the conduct of a person suddenly faced with an imminent danger. Thus the court declared:

> "You are further instructed that the act of a pedestrian on a public highway in running in front of an automobile, as the result of fright or terror, caused by the sudden discovery of the automobile near him, or by a noise caused by the automobile, does not necessarily constitute contributory negligence on his part, or, in other words, if the act of the defendant caused fear and loss of presence of mind on the part of the plaintiff, so as to impel her to rush into danger, as stated before, her mere error or mistake of judgment in so acting shall not be taken by you to be contributory negligence on her part."

It is not questioned but that this instruction is unimpeachable in point of law. Schneider v. Market St. R. R. Co., 134 Cal. 482, 66 Pac. 734. But it is insisted that the giving of the instruction was erroneous and injurious, since under the testimony of the plaintiffs themselves and all of their witnesses to the accident, there is not the slightest evidence to show knowledge upon the part of Mrs. Raymond of the presence of an imminent or of any danger, her testimony being, as above quoted, that the first thing she knew was that she was struck in the back. It is unquestionably true that the testimony of plaintiffs and of plaintiffs' witnesses, if that testimony controlled the discretion of the court in the matter of giving instructions, would render such an instruction as this entirely foreign to the case, and perhaps injuriously erroneous under the authority of such cases as Hanks v. Naglee, 54 Cal. 52, 35 Am. Rep. 67, and In re Calkins, 112 Cal. 305, 44 Pac. 577. But the court was not under duty to model its instructions solely upon the evidence given on behalf of plaintiff. Its duty was to give instructions expounding the law upon any reasonable theory of the case finding support in the evidence. When the testimony on behalf of defendant is considered, it will be noticed that Mrs. Raymond suddenly and seemingly in a panic rushed blindly to the left and into the automobile. The very circumstances of the accident as related by defendant's witnesses lend weight to the argument that she suddenly became aware of the proximity of an automobile, and in her terror, not pausing to determine its location and direction, endeavored to get off the street, and so rushed from a place of safety into one of danger. Under this view of the evidence, which was a permissible one for the jury to take, the instructions complained of were pertinent and apposite.

[3] The court further advised the jury in the following language:

"Pedestrians have in general, and under reasonable restrictions as to exercise of care by them, a right to travel anywhere upon a public highway, and it is negligence for a driver of a vehicle upon a public highway to recklessly run upon a pedestrian who is standing or walking with his back toward him."

Appellant complains that this instruction imputes reckless driving to the defendant. This in fairness cannot be said. The instruction states an unimpeachable proposition of law, holding responsible for the injuries which he may inflict the reckless driver of a vehicle. Nor, however foreign to the facts appellant may think this instruction to be, it is neverthless true that it was addressed to an allegation of the complaint and to the testimony touching reckless driving which plaintiffs and their witnesses offered.

With these exceptions, the instructions given by the court are unchallenged, and it may be added that they are fair and dispassionate instructions. One of the appellant's principal grievances, however, is over the court's refusal to give certain proposed instructions which he insists were pertinent and even necessary to a fair consideration of the case by the jury. One of these instructions was to the effect that if "defendant Hill gave sufficient warning of his approach, and that the said Lutie Raymond knew of the approach of defendant's automobile, and in spite of said knowledge attempted to run toward said machine, the said Lutie Raymond was guilty of such negligence as contributed to the injury, and you should find for the defendant." Another was in the following language:

"The court instructs the jury that if they believe from the evidence that at the time of the accident the defendant, Hill, was driving his automobile in a careful and prudent manner, and if the jury further believes from the evidence that defendant, Hill, saw the plaintiff in front of him, and that she was then walking close to the track, and not in a line directly in front of said automobile, the said Hill had the right to assume that the plaintiff would continue on in the same direction in which she was then going, and had the right to assume that she would not turn to the left so as to be in front of the automobile, and you are further instructed that if you believe from the evidence that the plaintiff Lutie Raymond did turn toward the left without stopping and looking around to see if vehicles were coming up behind her, then she was guilty of such contributory negligence as will defeat her right of action herein, and your verdict should be for the defendant."

Additionally, the appellant requested the court to give the two following instructions:

"The court instructs the jury that the plaintiff in this action cannot avail herself of the mere fact that the defendant was on the wrong side of the road, inasmuch as she herself was on the wrong side of the road, and she cannot be heard to complain of the defendant doing an act which she herself was doing, and the jury is instructed that under such circumstances no presumption is to be raised against this defendant in this action."

"You are instructed that both the plaintiff and defendant were traveling lawfully and rightfully upon the east side of North Lake street, and each had an equal right to be on the east side of the street."

As has been said, the instructions which the court gave were unimpeachable in point of law. They were, however, in their nature general instructions, to the effect that a person operating a motor vehicle and approaching another walking on a highway must give reasonable warning and use every reasonable precaution to insure the safety of such person. Further, that if the plaintiff—

"was guilty of any act of negligence which directly contributed to her injury, or was guilty of any lack of ordinary care on her part, whether the act be an active one or an omission to do what she ought to have done under the circumstances, and such lack of care, act, or omission contributed to the accident, and without which the accident would not have occurred, then you cannot go further and apportion the accident or injury, but the plaintiff's contributory negligence in such case defeats recovery, and your verdict must be for the defendant."

The gravamen of appellant's complaint is that no specific instructions, touching the right to use the highway as it was being used by the parties to the litigation, or governing the question of Lutie Raymond's negligence in doing what defendant's witnesses testified she did do, were given by the court. As to the last specification of error, it is pointed out that while the jury was told in effect that the conduct of Lutie Raymond, if occasioned by sudden fright or terror, "did not necessarily constitute negligence on her part," the court refused to tell the jury, as requested in the first of the rejected instructions above quoted, that if the defendant exercised due care in operating his machine, and that, notwithstanding this, Lutie Raymond placed herself in a position of peril and was injured therefor, she could not recover.

[4] To the proper consideration of appellant's grievance, a word must first be said touching the use of highways. So long continued and universal is the custom in California for approaching vehicles or pedestrians to pass to the right, and to pass to the

left where the approach is made from behind another vehicle or pedestrian, that it may be said to be a part of our common law. In this state the custom, in part, has been crystallized into statute law. Stats. of 1905, p. 816. This law declares it the duty of the drivers of all motor vehicles to pass to the right of an approaching person or vehicle and to "give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person or animal." Section 3, subd. 3. In the same way it is declared the duty of the driver of the motor vehicle to pass to the left on approaching any person or other vehicle from the rear. The effect of these laws, as well as the universal custom, is to prompt vehicles generally to use the right-hand portion of the highway. But this does not mean that where one seeks to enter upon a highway under the circumstances depicted in the evidence of defendant, they must abandon the highway because the vehicle cannot cross to the right-hand side. It was legally permissible for the defendant to use the easterly or left-hand side of the highway as he undertook to use it, and no negligence could be predicated merely upon such use, it appearing that the roadway was of ample width to permit that use with safety to pedestrians and a clear passage to approaching vehicles.

[5] As to foot passengers, the old common-law rule declaring the King's highway to be "fair and free" has not been modified in this state by any positive enactment. So that it still remains the law that foot passengers have the right to use and traverse the highway at all its points, being chargeable only for the exercise of a due amount of care, which due amount of care, in its quantum, is measured by the use which the pedestrian actually makes. Thus in this state, even in populous streets of cities, pedestrians are not restricted to the crossings in traversing a street, but may cross it at any point. And the same is true of their right to walk along the roadbed of a highway. Owing to the fact that the great congestion of certain parts of our modern cities and the immensely improved modes of rapid transportation over the highway and the desirability of seeing that all such traffic is moved as expeditiously as may be, some cities have compelled pedestrians to use the authorized crossings alone. But no such law is upon our books, and it follows therefore that all parts of the highway are as open to the use of foot passengers as to vehicles. 2 Elliott, Roads and Streets (2d Ed.) paragraphs 1086, 1087, 1088, and cases. It follows herefrom that plaintiff was in the exercise of her right in being upon the highway when and where she was.

[6, 7] But under the circumstances shown in this case, certain very important considerations differentiate the rights and duties of plaintiffs and defendant. Some of these will readily occur to mind. One is that the pedestrians were traveling on a part of the road and under circumstances where they could reasonably look for vehicles approaching them from the front, but would not naturally be expected to contemplate that an automobile would come up behind them, and they were under no legal obligation to look back to see whether they were in danger of being struck from behind. Elliott, Streets & Roads (3d Ed.) § 1088. Another is that to the driver of the automobile the pedestrians were plainly visible. The automobile was not visible to the pedestrians. Still a third is that it was within the power of the automobile to inflict injury or death. Such was not the power of the pedestrians. Upon the part of the driver of the automobile, therefore, we have a known approach to foot passengers, with the power to inflict grave injury. Upon the part of the foot passengers we have the unconsciousness of such approach, with absolute inability to inflict injury and a measurable inability to avoid the infliction of injury. While both parties are charged only with the exercise of the same degree of care, it is manifest that the amount of that care by law exacted of the driver of the motor vehicle is far greater than the amount exacted of the foot passengers. Of the driver of a vehicle under such circumstances, the law in terms requires that he shall not only give reasonable warning of his approach, but "use every reasonable precaution to insure safety." We are aware that from the point of view of the driver of an automobile foot passengers frequently seem to display a negligence amounting to an indifference to the law of self-preservation; while from the viewpoint of the pedestrian, the driver of the automobile evinces a recklessness and indifference to human life meriting punishment by death. But nevertheless no person who has ever ridden in or driven an automobile can be unaware of one fact, and that is that pedestrians, and women particularly, are liable to sudden panic upon the unexpected approach of this terrifying machine. In the exercise of "every reasonable precaution" which the law enjoins, it is well within the spirit of the law to say that the driver of an automobile approaching pedestrians, and particularly women, must have his car under such control as that it may be promptly stopped. The sounding of the horn and the noise of the muffler cut-out are each and both well enough in their way, but they do not embrace and conclude all of the duties of the driver of the automobile. Geiselman v. Schmidt, 106 Md. 580, 68 Atl. 202; Simeone v. Lindsay, 6 Pennewill (Del.) 224, 65 Atl. 778; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 228, 124 Am. St. Rep. 402.

[8] It would seem to be fairly inferable from the facts (though it should be remembered that this is stated solely for the pur-

pose of the legal discussion herein had and for the enlightenment of the trial court in the event of a new trial) that defendant did approach this party of pedestrians with horn blowing and with muffler cut-out roaring. It appears, further, that, through preoccupation, they were not aware of the presence of the automobile until it was just behind them. It further appears, as is not unusual, that Lutie Raymond was thrown into a blind panic upon the discovery, and that she rushed in front of or into the side of the automobile. Taking this statement as presenting a reasonable view of the evidence, then the questions for the jury are not complicated by the rightful or wrongful presence of either the automobile or the pedestrians upon the portion of the highway which they were occupying. Both were within their legal rights in being where they were. The vital question for solution by the jury was whether the driver of the automobile used every reasonable precaution to insure the safety of plaintiff up to the moment she was struck. If he did, then the accident belongs either in the category of inevitable casualty or is attributable to the negligence of plaintiff herself.

[9] But as a part of the reasonable precaution which the law enjoins upon the driver of an automobile to use is the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle, that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from a surprised knowledge of its unexpected approach, and finally, that the vehicle is under such control as that it may be stopped promptly, if appellant did all these things, then he is exonerated, notwithstanding the fact that injury to plaintiff resulted, for such injury could have resulted only from her own negligence under circumstances relieving defendant from blame.

[10] It must be concluded, therefore, that appellant's grievance is well founded. There may well have been a misapprehension in the minds of the jury concerning the right of vehicles to use the left-hand portion of a highway. Appellant was entitled to the instruction that he was lawfully and rightfully upon that portion of the highway. He was further entitled to the specific instruction that if he used reasonable care—that is "every reasonable precaution" in his approach—and Lutie Raymond, notwithstanding, ran into the machine, defendant was not liable.

It follows herefrom that the court's refusal to give the indicated instructions was error seriously prejudicial to appellant, and for this reason the judgment and order are reversed and the cause remanded.

We concur: LORIGAN, J.; MELVIN, J.

168 Cal. 521

PEOPLE v. MUELLER. (Crim. 1859.)

(Supreme Court of California. Oct. 5, 1914.)

1. Criminal Law (§ 304*)—Judicial Notice—Local Option Election—"Fact Established by Law."

The result of an election under the Wyllie act (St. 1911, p. 599), for or against the sale of intoxicating liquors within a city, town, or supervisorial district, is not a fact established by law, within Code Civ. Proc. § 1875, requiring courts to take judicial notice of such facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. § 304.*]

2. Criminal Law (§ 304*)—Judicial Notice—Local Option Election.

The result of an election under the Wyllie act (St. 1911, p. 599), for or against the sale of intoxicating liquors in a certain territory, is similar to the records and votes of city councils and county boards, and the courts cannot take judicial notice thereof, especially in view of section 10 of the act, which makes a certified copy of the record of the result of the vote prima facie evidence thereof, and of sections 6 and 11, which permit the result of the election to be changed by a subsequent vote or by a contest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. § 304.*]

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Joseph Mueller was convicted of the unlawful sale of alcoholic liquor in no-license territory, and he appeals. Reversed.

Jas. T. Matlock, Jr., of Red Bluff, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

SHAW, J. The defendant was convicted of an unlawful sale of alcoholic liquors in "no-license" territory under the provisions of the act generally known as the "Wyllie law" (Stats. 1911, p. 599). His appeal is from the judgment and from an order denying his motion for a new trial. It will be necessary to consider but one point arising in the case.

[1] The court below instructed the jury, as a matter of law, that the city of Red Bluff was "no-license territory" by reason of an election held under the Wyllie act. There was no evidence on the subject. The charge was that the liquor was sold within the city of Red Bluff, the same being "no-license" territory.

The act provides for the calling of an election in any city or town, or in that part of a supervisorial district not within a city or town, to vote for or against licensing the sale of alcoholic liquors within such territory, and declares that unless the poll at such election shows a majority vote in favor of license, sales of alcoholic liquors within the territory shall thereupon be forbidden and shall be punishable as a misdemeanor. There are certain exceptions not here involved, and which it is unnecessary to notice. It appears, then, that the question whether or not the city, town, or district is "no-license territory," as defined in the act, will depend on the result of such election. It is claimed that the court may take judicial notice of the vote so given, and of its effect, if not in favor of license, to make the territory "no-license territory" and to put the law in force therein.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon this question the courts of this state have not heretofore spoken. In other states having laws of this kind there is a sharp conflict in the decisions. The courts of Georgia, Idaho, Indiana, Maryland, and Virginia hold that judicial notice may be taken of the result of the election and its effect to put the law in operation in the territory. Combs v. State, 81 Ga. 783, 8 S. E. 318; Woodard v. State, 103 Ga. 496, 30 S. E. 522; Oglesby v. State, 121 Ga. 602, 49 S. E. 706; State v. Schmitz, 19 Idaho, 566, 114 Pac. 1; State v. Ade, 178 Ind. 588, 99 N. E. 983; Jay v. O'Donnell, 178 Ind. 282, 98 N. E. 355; Slymer v. State, 62 Md. 237; Jones v. State, 67 Md. 258, 259, 10 Atl. 216; Mitchell v. State, 115 Md. 360, 80 Atl. 1020; Savage v. Commonwealth, 84 Va. 582, 5 S. E. 563; Thomas v. Com., 90 Va. 95, 17 S. E. 788. In Alabama, Michigan, Mississippi, Missouri, Montana, Oregon, and Texas, the decisions are that although the court will take notice of the terms and effect of the law, as a general law, it cannot take notice of the result of the local election by which it is put in operation, or prevented from operation, in the local territory. Grider v. Tally, 77 Ala. 427, 54 Am. Rep. 65; Ex parte Reynolds, 87 Ala. 142, 6 South. 335; People v. Murphy, 93 Mich. 45, 52 N. W. 1042; People v. Edwards, 174 Mich. 450, 140 N. W. 473; Norton v. State, 65 Miss. 297, 3 South. 665; Bryant v. State, 65 Miss. 435, 4 South. 343; West v. State, 70 Miss. 598, 12 South. 903; State v. O'Brien, 35 Mont. 500, 90 Pac. 514, 10 Ann. Cas. 1006; Gue v. Eugene, 53 Or. 282, 100 Pac. 254; Gay v. Eugene, 53 Or. 289, 100 Pac. 306, 18 Ann. Cas. 188; State v. Wilson, 161 Mo. App. 301, 143 S. W. 534; State v. Hall, 130 Mo. App. 170, 108 S. W. 1077; Shively v. Lankford, 174 Mo. 546, 74 S. W. 835; Craddick v. State, 48 Tex. Cr. R. 385, 88 S. W. 347; Bills v. State, 55 Tex. Cr. R. 543, 117 S. W. 835; Kinnebrew v. State (Tex. Cr. App.) 150 S. W. 775; Dorman v. State, 64 Tex. Cr. R. 104, 141 S. W. 526.

We believe the decisions last mentioned are more in accord with general principles. In respect of this question, the Wyllie law is not essentially different from other laws operating upon specific classes of things. It is general, in that its force extends throughout the state. But it is in actual operation only, where the subjects, or the prescribed conditions, upon which alone it is to operate, exist. The people of a city, town, or district do not, by voting against license, enact the law in that territory. The law, in substance, declares that no liquor licenses shall be issued in any city, town, or district in which the sentiment is not in favor of it. The election is authorized solely to afford a means whereby this sentiment may be conclusively determined, and it merely establishes the local status or condition. This is the gist of the decision in Ex parte Beck, 162 Cal. 701, 124 Pac. 543, holding that the act is not invald as a delegation of legislative power to the voters of the territory. This local status or condition, therefore, is not established by the law; it remains to be determined from time to time, as the electors desire. It is not a fact "established by law," within the meaning of subdivision 2 of section 1875 of the Code of Civil Procedure, and is not a subject of judicial notice under that section. It depends on the result of a local election, manifested by the local record. The law establishes a method whereby the condition necessary to its local operation may be brought into existence, but the condition so produced is not "established by law"; it is a simple fact to be established by evidence. The fact that it is produced by proceedings authorized by the law does not, of itself, require the court to take judicial notice of it. The case is not different from any other where, the law operating only upon certain things, the existence of the thing must be made to appear.

[2] The courts take judicial notice of the existence and bounds of a city (Stats. 1889, p. 372; Pasadena v. Stimson, 91 Cal. 256, 27 Pac. 604; People v. Potter, 35 Cal. 112), but not of the boundaries of supervisorial districts. Such districts are laid out by the supervisors of the particular county, and the proceedings of such county boards are governed by the same rule as those of a city council in this respect; their orders and ordinances are not subjects of judicial notice. 1 Greenl. on Ev. (16th Ed.) § 44; 4 Wigmore on Ev., § 2572, p. 3608; 2 Dill. Mun. Corp. (5th Ed.) § 639; Lucas, Turner & Co. v. City of San Francisco, 7 Cal. 474; Carpenter v. Shinners, 108 Cal. 359, 41 Pac. 473. There is an exception, immaterial here, with regard to judicial notice of ordinances by local inferior courts established to enforce local ordinances. Ex parte Davis, 115 Cal. 445, 47 Pac. 258; Ex parte Hansen, 158 Cal. 497, 111 Pac. 528. But the precise fact of which it is here claimed that judicial notice must be taken is the result of the vote taken in the territory, pursuant to the act. This vote does not make the territory in which it is taken a political subdivision of the state constituted for the purpose of carrying on a part of the governmental functions of the state. It does not become a governmental agency similar to a municipal corporation, or a county, of which the courts, for that reason largely, are bound to take notice. The only effect of the election is to produce a status or condition upon which the law may operate. It does not give the territory any power, or erect it into a corporation or body politic. The holding of the election and the record of the result are matters in all essentials similar to the rec-

ords of the votes and resolutions of city councils and county boards by which ordinances are adopted and passed. These, as we have seen, are not matters of judicial knowledge, but must be proven as other facts.

The act, itself, contains a strong implication that the character of the territory is not to be judicially noticed, but must be shown by evidence. The last clause of section 10 provides that in any prosecution under the act the record of the governing body of the city, town, or district, showing the number of votes cast at the election, or a duly certified copy thereof, shall be prima facie evidence that the territory in which the election was held is "no-license" territory. If the courts must take judicial notice of the fact, this provision would be wholly useless. The necessary inference is that the Legislature believed that proof would be required, as of ordinary matters in pais, and that this provision was intended to facilitate such proof.

Furthermore, it is to be observed that the condition of "no-license" territory, produced by an election under the act, is not intended to be stable or fixed; it remains only until at a subsequent election under the act a different result is produced, and this may occur every two years (sections 6 and 11). The election itself may be contested by any voter of the territory, and in such case the force and effect of the election is not changed until the contest is finally decided (section 9). Thus the character of the territory is subject to change at any time, if there is a contest. It is obvious that the "no-license" territory, so created, is not intended to be a permanently established institution, as in the case of a municipal corporation, and there is not the same reason for making it the subject of judicial notice.

Upon all these grounds our conclusion is that the courts do not take judicial notice that a given city, town, or district is "no-license territory" under this law, that it must be proven by evidence as provided in the act itself, or by other sufficient evidence, and that the court below erred in giving the instruction complained of.

The judgment and order are reversed.

We concur: SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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168 Cal. 526

PEOPLE v. MUELLER. (Cr. 1858.)

(Supreme Court of California. Oct. 5, 1914. Rehearing Denied Nov. 4, 1914.)

1. INTOXICATING LIQUORS (§ 216*)—PROSECUTION—INFORMATION—DESCRIPTION OF LIQUORS—"WINE"—"ALCOHOLIC LIQUORS."

In a prosecution for the sale of wine in no-license territory contrary to the Wyllie Act (St. 1911, p. 599), section 13 of which prohibits the sale of alcoholic liquors, and section 21 of which defines alcoholic liquors as including vinous liquors which contain more than 1 per cent. of alcohol, and which are not so mixed with other products as to prevent their use as a beverage, it is not necessary to aver that the wine contained more than 1 per cent. of alcohol, since the court can take judicial notice that wine is a drinkable vinous liquor containing more than 1 per cent. of alcohol.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 230–233; Dec. Dig. § 216.*

For other definitions, see Words and Phrases, First and Second Series, Wine; Alcoholic Liquors.]

2. CRIMINAL LAW (§ 452*)—EVIDENCE—EXPERT TESTIMONY—CHARACTER OF LIQUORS.

A witness who testified that he knew the difference between the taste of whisky, wine, and brandy is qualified, if any qualifications as an expert are necessary, to testify that the liquor which the defendant was accused of selling was wine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053–1055; Dec. Dig. § 452.*]

3. CRIMINAL LAW (§ 543*)—EVIDENCE—FORMER TESTIMONY—FOUNDATION.

Evidence that subpœnas for a witness, whose testimony was taken at the preliminary examination, had been issued several weeks before the trial and sent to the sheriffs of five different counties, that all had been returned unserved, and that the sheriff of the county in which the trial was held had made search for the witness in several counties without success, is sufficient foundation to permit the introduction of the testimony given by the witness at the preliminary examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

4. CRIMINAL LAW (§§ 543, 1153*)—REVIEW—DISCRETION OF TRIAL COURT—ADMISSION OF EVIDENCE.

The question whether sufficient diligence to procure the attendance of an absent witness had been shown to authorize the admission of his former testimony is largely within the discretion of the trial court, and its action will not be set aside unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236, 3061–3066; Dec. Dig. §§ 543, 1153.*]

5. CRIMINAL LAW (§ 1086*)—APPEAL—REVIEW—SCOPE—MATTERS NOT IN RECORD.

Error in the refusal to give instructions requested by one charged with a crime cannot be considered, where the requests are not contained in the record, even though they were inadvertently omitted therefrom, and the counsel claim that identical requests are set forth in the record of a companion case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2769, 2770, 2772, 2794; Dec. Dig. § 1086.*]

6. CRIMINAL LAW (§ 761*)—TRIAL—INSTRUCTIONS INVADING THE PROVINCE OF JURY—ADMITTED EVIDENCE.

In a prosecution for the unlawful sale of intoxicating liquor under the Wyllie act, where the court excluded testimony offered by the prosecution to the effect that the place of sale was no-license territory, because the court took judicial notice of that fact, but the result of the election was not disputed, and the defendant in his testimony stated that the town was dry, an instruction that the town was no-license territory was not erroneous, even though the court could not take judicial notice of that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1738, 1754–1764, 1771, 1853; Dec. Dig. § 761.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Joseph Mueller was convicted of the unlawful sale of alcoholic liquors in no-license territory, and he appeals. Affirmed.

Jas. T. Matlock, Jr., of Red Bluff, for appellant. U. S. Webb, Atty. Gen., for the People.

SHAW, J. The defendant was convicted of an unlawful sale of alcoholic liquors in a district which had been declared "no-license territory," under the provisions of the act generally known as the "Wyllie Law." Stats. 1911, p. 599. His appeal is from the judgment of conviction and from an order denying a new trial.

Specifically, the charge against him was that he "did willfully and unlawfully sell alcoholic liquor, to wit, wine, to one Sam Stephens, within no-license territory, to wit, in the city of Red Bluff, in said county (Tehama), said wine not having been manufactured on the premises where the same was sold," etc.

Section 13 of the act declares it to be unlawful for any person, "within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors, except as provided in section 16" thereof. It is not claimed that the case comes within any of the exceptions mentioned in section 16, and they need not be considered.

[1] 1. It was not necessary to aver that the wine alleged to have been sold contained 1 per cent. or more, by volume, of alcohol. The act forbids the sale of "alcoholic liquors" within "no-license territory." Section 21 reads thus:

> "The term 'alcoholic liquors,' as used in this act, shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contains one per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

Wine is a well-known form of vinous liquor, and it is common knowledge that it contains alcohol. It is an alcoholic liquor of the class described in the act as "vinous liquor." Its character is so well known that the court takes judicial notice of these qualities, and also that it contains considerably more than 1 per cent. by volume, of alcohol, that it is intoxicating when taken into the stomach, and that it may be used as a beverage. Black on Intoxicating Liquors, § 5; 23 Cyc. 61. We are not aware of any case holding specifically that judicial notice will be taken of the fact that ordinary wine contains more than 1 per cent. of alcohol, but we do not doubt that it will. The fact itself may easily be ascertained by reference to any dictionary, or treatise on the subject. Cent. Dic.; Stand. Dic.; Webster's Dic.; Enc. Brit. vol. 29. The designation of the liquor as "wine," therefore, is equivalent to a statement that it was a drinkable vinous liquor containing more than 1 per cent., by volume, of alcohol, and no further or more specific allegation was required. If there is any liquor known as "wine," containing less than 1 per cent., by volume, of alcohol, it is a fact so unusual and exceptional that it need not be contradicted in the information. It is unnecessary to determine whether or not such fact would be a defense, if proven, for there is no claim that the wine sold by the defendant did not contain more than 1 per cent. of alcohol.

[2] 2. The witness, Montgomery, testified that he knew the difference between the taste of whisky, wine, and brandy. In effect, he said that he could distinguish the different kinds of alcoholic liquors by the taste. This was sufficient to qualify him as a witness to testify that he had tasted the liquor sold by the defendant, and that it was wine. We do not mean to say that it was matter requiring an expert, or that it was necessary to show his qualifications, but if it was, he was qualified, under the testimony he gave.

[3] 3. The testimony of Stephens, to whom the liquor was sold, was regularly taken at the preliminary examination. This testimony was read at the trial, after the taking of evidence to show that Stephens could not, with due diligence, be found within the state, as provided in section 686 of the Penal Code. The defendant contends that due diligence was not shown by the evidence taken. It appeared from the evidence that the sheriff of the county had had a subpœna issued to him for Stephens, several weeks before the trial, and had searched for him, but was unable to find him; that other subpœnas had been issued to the sheriffs of Shasta, Butte, and Glenn counties, respectively, and had been returned not served; that two other subpœnas had been issued to other counties and returned without service, and that the county sheriff had searched for him in other counties than his own, but that he was unable to find him, and that the returns of service on the subpœnas showed that no service had been made.

[4] The question whether or not sufficient diligence had been shown is a matter largely within the discretion of the trial court, and its action cannot be set aside unless an abuse of discretion is shown, that is, unless it appears that the evidence was insufficient to support the finding of due diligence. We are of the opinion that there was sufficient evidence in this case. People v. Lewandowski, 143 Cal. 576, 77 Pac. 467; People v. Grill, 151 Cal. 599, 91 Pac. 515; People v. Witty, 138 Cal. 578, 72 Pac. 177; People v. Reilly, 106 Cal. 650, 40 Pac. 13; Heintz v. Cooper, 104 Cal. 670, 38 Pac. 511.

[5] 4. Error is alleged with respect to the refusal of the court to give certain instructions asked by the defendant. The transcript certified to the court does not contain

these alleged requests. Consequently we cannot take notice of the objection. Counsel claim that the omission to insert these in the transcript was inadvertent, and that the identical instructions are set forth in the transcript in a companion case, numbered 1859, entitled People of the State of California v. Joseph Mueller. Whether these instructions are the same or not, we are not justified in considering them as a part of the record in this case.

[6] 5. The appellant claims that the court erred in instructing the jury that the city of Red Bluff is no-license territory within the meaning of the Wyllie Law. It is not necessary to discuss this question here. For if it be admitted that the court cannot take judicial notice thereof, then the fact of its character as no-license territory is subject to proof by evidence, in the same manner as other facts of similar character. While the court excluded testimony on behalf of the prosecution on the subject because it ruled that it could take judicial notice of the fact, there was in truth no dispute on the subject during the trial, and the defendant himself testified, in effect, that Red Bluff was no-license territory. He did not declare this in technical language. He used the ordinary, but expressive, colloquial phrase that "the town was dry" at the time of the sale in question, and that he kept his wine there, "after the town went dry." But there was no uncertainty as to his meaning, there was no objection that such testimony was incompetent evidence of the fact, nor any motion to strike it out. His entire examination showed that the fact was well known both to him and to his counsel. Under these circumstances, the declaration of the court that it would take judicial notice thereof, and the instruction to the jury that it was no-license territory, could not have prejudiced the defendant in any substantial right, and does not constitute sufficient ground for reversal, even if it were erroneous. There are no other objections deserving notice.

The judgment and order are affirmed.

We concur: SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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168 Cal. 531

PEOPLE ex rel. DORRIS v. McKAMY.
(L. A. 3869.)

(Supreme Court of California. Oct. 5, 1914.)

1. Courts (§ 1*) — Jurisdiction — Legislative Control.

The Legislature cannot confer upon the courts jurisdiction beyond that given, or authorized to be given, them by the Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–4, 6–9, 91–106; Dec. Dig. § 1.*]

2. Officers (§ 74*)—Removal—Proceedings—Jurisdiction—Supreme and Appellate Court—Constitutional Provisions.

The summary proceeding for the removal of an officer on accusation by an individual, prescribed by Pen. Code, § 772, is a criminal proceeding not prosecuted by indictment or information, and therefore section 770, providing for appeals in such proceedings to the Supreme Court, is contrary to Const. art. 6, § 4, allowing appeals to that court in criminal cases, where judgment of death has been rendered; nor would an appeal in such proceedings lie to the appellate court, whose jurisdiction in criminal matters is by the same constitutional section extended to all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101–103, 105, 106; Dec. Dig. § 74.*]

3. Courts (§ 203*)—Jurisdiction—Supreme Court—Constitutional Provisions.

In the provision of the amendment to Const. art. 6, § 4, made in 1904, whereby the District Courts of Appeal were created, that such courts should have jurisdiction in such special proceedings as might be provided by law, excepting cases in which appellate jurisdiction is given to the supreme court, the exception refers to cases in which the Constitution gives jurisdiction to the Supreme Court, and does not impliedly authorize the Legislature to confer jurisdiction upon that court, over any and all special proceedings.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 203.*]

4. Officers (§ 74*)—Removal—Proceedings—Appellate Courts—Jurisdiction—Constitutional Amendment.

Const. art. 6, § 4, as amended in 1904, which provides that all statutes now in force regulating appeals to the Supreme Court shall apply to the District Courts of Appeal, does not make applicable to the courts of appeal Pen. Code, § 770, giving an appeal to the Supreme Court in summary proceedings under Pen. Code, § 772, for the removal of a public officer, since the section allowing such appeal was unconstitutional at the time of the adoption of the amendment.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101–103, 105, 106; Dec. Dig. § 74.*]

5. Officers (§ 74*)—Removal—Proceedings — Supreme Court — Jurisdiction — "Trial."

Const. art. 4, § 18, which provides that officers not subject to impeachment may be tried for misdemeanors in office in such manner as the Legislature may provide, did not authorize the enactment of Pen. Code, § 770, allowing appeals to the Supreme Court in summary proceedings under Pen. Code, § 772, for the removal of such officers, since the word "trial" ordinarily includes nothing beyond proceedings in the court in which the case originated, except where there is a trial de novo after appeal.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101–103, 105, 106; Dec. Dig. § 74.*

For other definitions, see Words and Phrases, First and Second Series, Trial.]

6. Courts (§ 89*)—Rules of Decision—Decisions of Same Court.

Where the Supreme Court had in three cases, in which no question as to its jurisdiction was raised, entertained, under Pen. Code, § 770, an appeal in proceedings for the removal of public officers under Pen. Code, § 772, but in two cases had dismissed a similar appeal for want of jurisdiction, the right to appeal cannot be said to have become settled by a uniform course of decision so as not to be open to re-examination.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

In Bank. Appeal from Superior Court, Kern County; G. W. Mahon, Judge.

Proceeding by the People of the State of California, on the relation of N. C. Dorris, against James McKamy, to procure the removal of the defendant from the office of City Marshal. From a judgment depriving the defendant of his office, and allowing a recovery of $500 in favor of the informer, defendant appeals. Appeal dismissed.

Matthew S. Platz, of Bakersfield, for appellant. Alfred Siemon, of Bakersfield, and Samuel T. Bush, of San Francisco, for respondent.

SLOSS, J. This is a proceeding brought under section 772 of the Penal Code, for the removal of the defendant from the office of city marshal of the city of Bakersfield. The court found against the accused, and rendered judgment depriving him of his office, and allowing a recovery of $500 in favor of the informer. The defendant appealed to this court from the judgment, and the respondent now moves to dismiss the appeal on the ground that, under the Constitution, there can be no appeal from such a judgment.

[1] Section 772 is a part of chapter 2 of title 2 of part 2 of the Penal Code. The chapter is entitled "Removal of Civil Officers Otherwise than by Impeachment." One of its sections (770) provides that:

> "From a judgment or decree of removal from office under any provision of this chapter, an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action. * * *"

The respondent's contention is that this provision is nugatory as a legislative attempt to enlarge the constitutional jurisdiction of this court. That the Legislature has no power to confer upon the courts jurisdiction beyond that given or authorized to be given them by the Constitution has long been settled. Pac. T. & T. Co. v. Eshleman, 166 Cal. 640, 647, 690, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, and cases cited. The proceeding, it is claimed, is a "criminal case"; and as it is neither a case "where judgment of death has been rendered," nor one "prosecuted by indictment or information in a court of record," it is not within the appellate jurisdiction conferred upon the Supreme Court or the District Courts of Appeal by the Constitution. Article 6, § 4. If an appeal lies to either of these courts, a dismissal would not be ordered "for the reason only that the appeal was not taken to the proper court"; but the cause would be transferred to the proper court. Const. art. 6, § 4.

[2] That the proceeding is criminal can hardly be questioned. This was clearly decided in Re Curtis, 108 Cal. 661, 41 Pac. 793; the court saying:

> "The charge against the respondent is of a public offense—a neglect of official duty, or misdemeanor in office—and the proceeding against him is a criminal proceeding in the nature of an impeachment."

It was held further that the case, though criminal, was not one "prosecuted by indictment or information." These holdings were reaffirmed in Wheeler v. Donnell, 110 Cal. 655, 43 Pac. 1, the court citing section 15 and other sections of the Penal Code in support of the proposition that the proceeding is a criminal one, "and in its nature a prosecution for crime." See In re Burleigh, 145 Cal. 35, 78 Pac. 242. In each of these cases an appeal from the judgment was dismissed. It is true that the appeals there involved were sought to be maintained by the accuser after judgment in favor of the accused. The only appeal authorized by section 770 is one "from a judgment or decree of removal from office." But this was not made the ground of decision. The opinion in Wheeler v. Donnell states that the conclusion reached in the Curtis Case was "based upon the broad proposition that the proceeding is a criminal one, not prosecuted by information or indictment, and therefore without the appellate jurisdiction of this court." And this reasoning, says the court in the later case, is "entirely satisfactory." We find no specific reference to section 770 in either the Curtis Case or Wheeler v. Donnell. In the former the court makes the remark that "the Legislature has made no provision for a review of the action of the superior court." This observation is incorrect, if it was intended to apply to a judgment sustaining the charges and removing the officer. But if the court's general line of argument be sound, the provision of section 770 could not alter the result. If the case is not one of which this court has, under the Constitution, appellate jurisdiction, such jurisdiction cannot be exercised, regardless of whether the Legislature has or has not undertaken to confer it.

[3] The decisions in the two cases just discussed were rendered prior to the amendments of 1904 to article 6, § 4, of the Constitution, creating the District Courts of Appeal, and dividing between them and the Supreme Court the jurisdiction on appeal from the superior courts. We do not see that the question is affected by this change. The appellate jurisdiction in criminal cases is still limited to cases prosecuted by indictment or information in a court of record, those in which judgment of death has been rendered being committed to the Supreme Court, and all others to the courts of appeal. Except for cases transferred from a District Court of Appeal, the amended section gives to the Supreme Court no appellate jurisdiction which it did not have under the former provision. Some of the appellate jurisdiction which had before been vested in the Supreme Court is transferred to the new courts. They are given such jurisdiction, inter alia, in proceedings of "usurpation of office, contesting elections and eminent domain, and in such other special proceedings

as may be provided by law (excepting cases in which appellate jurisdiction is given to the supreme court)." The appellant seeks to sustain this appeal as one in a "special proceeding." But the Constitution nowhere authorizes the Legislature to vest in the Supreme Court appellate jurisdiction of any special proceedings other than those enumerated in the constitutional grant of jurisdiction to this court, as, for example, "such probate matters as may be provided by law." The clause above quoted does authorize the Legislature to confer upon the District Courts of Appeal appellate jurisdiction of special proceedings not falling within the excepted class of those "in which appellate jurisdiction is given to the Supreme Court." The exception, we think, must be read as excluding those special proceedings (e. g., matters of probate), which are, by the Constitution itself, committed to the jurisdiction of the Supreme Court. The language of the constitutional provision, and its entire framework, are inconsistent with the idea, urged by appellant, that the exception embodies an implied grant of authority to the Legislature to give the Supreme Court appellate jurisdiction over any and every kind of special proceeding.

[4] Section 770 (which, on its face, gives an appeal to the supreme court alone) cannot be treated as applying to the District Court of Appeal by virtue of the paragraph of section 4 of article 6 of the Constitution, declaring that:

> "All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to appeals to the District Courts of Appeal so far as such statutes are not inconsistent with this article. * * *"

This provision was not intended to create a right of appeal where none existed before. Its purpose was to enable the newly organized courts of appeal to entertain and dispose of appeals which had been theretofore cognizable in the Supreme Court, but which fell within the appellate jurisdiction of the courts brought into existence by the amendment. The statutes made applicable to the District Courts of Appeal were "statutes now in force." If the views herein expressed be correct, section 770 was invalid (hence not in force), under the Constitution as it stood before the amendment of 1904. The section was not therefore brought to life or made applicable to the District Courts of Appeal by the provision quoted above.

We have assumed, for the purposes of this decision, that the proceeding may properly be classed as a "special proceeding," and that the term "special proceedings," as found in article 6, § 4, of the Constitution, includes proceedings of a criminal, as well as of a civil nature. We are not to be understood however, as deciding these questions.

[5] The appellant makes the further contention that the validity of section 770 may be sustained under section 18 of article 4 of the Constitution. That section, after designating certain officers who shall be liable to impeachment, goes on to provide that "all other civil officers shall be tried for misdemeanor in office in such manner as the Legislature may provide." We do not think this section should be interpreted as authorizing the Legislature to enlarge the appellate jurisdiction of the higher courts beyond the limits expressly laid down in another part of the Constitution. The Legislature is authorized to provide for the manner in which officers may be tried. Except where there is a trial de novo after appeal, as in certain appeals from justices' courts, the word "trial," as commonly understood in our practice, includes nothing beyond proceedings in the court in which the case originated. In criminal cases, it embraces steps tending to and culminating in a judgment of conviction or acquittal. An appeal is no part of a trial. It is a means for remedying errors which have occurred at a precedent trial. This section, then, does not authorize the Legislature to grant a right of appeal to this court in cases which the Constitution has not included within its appellate jurisdiction.

[6] The conclusion here reached has been suggested by the District Court of Appeal for the third appellate district in Larue v. Davies, 8 Cal. App. 750, 97 Pac. 903; but, as the point of jurisdiction had not been urged by the respondent, the court did not definitely decide it. Appeals from judgment of removal from office have been entertained by this court, both before and since the adoption of the Constitution of 1879; but in these cases no question of the right of appeal was raised. Triplett v. Munter, 50 Cal. 644; People v. Ward, 85 Cal. 585, 24 Pac. 785; Matter of Shepard, 161 Cal. 171, 118 Pac. 513. In view of the declarations of this court in Re Curtis and Wheeler v. Donnell, the doctrine that an appeal will lie certainly cannot be said to have become settled by a uniform course of decision (see Lord v. Dunster, 79 Cal. 477, 21 Pac. 865) so as to prevent the court from deciding the question when it is fairly presented, as it is here.

The appeal is dismissed.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

168 Cal. 456

GRANTS PASS LAND & WATER CO. v. BROWN. (L. A. 3282.)

(Supreme Court of California. Oct. 2, 1914.)

1. Boundaries (§ 46*)—Evidence and Establishment—Agreements Between Parties.

Where owners, uncertain as to the surveyed boundary line, agree upon its true location, mark it upon the ground or build up to it, occupy on each side up to the line, and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would result from a change, the line becomes in law the true line, regardless of the accuracy of its location as shown by subsequent measurements; but if such agreement is intended to take land from one owner and transfer it to the other, or is not intended to settle any uncertainty as to the true line or to fix the true line, it is invalid and does not change the legal boundary or affect the title of either party to land previously owned.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212–226, 249–251; Dec. Dig. § 46.*]

2. Frauds, Statute of (§ 70*)—Interest in Realty—Agreement as to Boundaries.

The apparent transfer of lands, where a boundary line agreed upon by the parties varies from the true line, does not violate the statute of frauds, since it merely serves to establish the location upon the ground of the line described.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.*]

3. Boundaries (§ 37*) — Evidence — Agreement Between Parties.

Where a boundary line agreed upon by the parties varies from the true line and affects the ownership of land, the proof of such agreed location should be clear.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184–194; Dec. Dig. § 37.*]

4. Boundaries (§ 46*) — Establishment — Agreement Between Parties.

The doctrine as to boundary lines by agreement between the parties applies only to lines so far as marked or actually located by the agreement, and an agreement as to a part only of a line cannot be extended by construction or implication, so as to embrace a part of the bounds which were not included in the agreement.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212–226, 249–251; Dec. Dig. § 46.*]

5. Adverse Possession (§ 94*)—Payment of Taxes—Sufficiency.

In an action to quiet title to land part ot a grant, the defense of payment of taxes to boundary lines agreed to by the parties failed, where such lines did not wholly inclose the parcel in dispute within the bounds of the grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 528, 529; Dec. Dig. § 94.*]

6. Appeal and Error (§ 1009*)—Findings—Conclusiveness.

In an action to quiet title, a finding on conflicting evidence in favor of defendant on the issue of estoppel by representation as to the boundary line, made by plaintiff's predecessor in title, was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

7. Boundaries (§ 47*)—Agreement of Parties—Equitable Estoppel.

In an action to quiet title to a ranch, whose boundary lines had been surveyed by a government surveyor, a finding that plaintiff's predecessor in title had represented to defendant, when about to purchase adjoining land, that the lines in part agreed upon by the parties within the real bounds of the ranch were the true boundary lines established an estoppel to deny such agreed boundaries.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 227–231; Dec. Dig. § 47.*]

8. Vendor and Purchaser (§ 232*)—Notice to Purchaser—Possession by Third Person.

In an action to quiet title, where defendant, upon representation by plaintiff's predecessor in title as to agreed boundary lines, immediately took possession of the land up to such boundary, the plaintiff was put upon notice of the facts, and charged with notice of the rights of defendant against his predecessor by reason of the estoppel to deny such agreed boundary lines.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–545, 548–562; Dec. Dig. § 232.*]

In Bank. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Grants Pass Land & Water Company against John Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. McKinley, of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant. J. B. McLaughlin, of Los Angeles (Earl Rogers, of Los Angeles, of counsel), for respondent.

SHAW, J. The plaintiff appealed from the judgment within 60 days after its entry, and brings up the evidence in a bill of exceptions.

The complaint states a cause of action against the defendant to quiet title to 1,198.67 acres of land, constituting a part of a large Mexican grant known as the Rancho Providencia. The defendant is the owner of land adjoining said ranch along a part of the easterly and southerly sides thereof. The dispute between the parties concerns the location of the boundary line between the two tracts. The plaintiff proved a record title from the government to the land it claims, extending to the easterly and southerly lines of the Providencia Rancho. The defendant established a title of record from Ramon Villa to the adjoining parcels of land described as the southeast quarter of the southeast quarter and lots 2, 3, 4, and 5 of section 26, township 1 north, range 14 west, San Bernardino base and meridian. Villa obtained title to all these parcels from the government under the homestead laws. The southeast quarter of the southeast quarter contains 40 acres. It does not adjoin the rancho, and its lines are not involved. According to the government survey and patent to Villa, lot 2 contains 25.43 acres, lot 3, 26.10 acres, lot 4, 34.65 acres, and lot 5, 19.83 acres, amounting in all to 106.01 acres. These fractional subdivisions of the section are caused by the irregular course of the rancho lines, which cut off the remaining portions of the sectional subdivisions indicated by the lot numbers.

The parcel of land in controversy lies wholly within the Providencia Rancho, according to the government surveys under which both parties derive title. If those surveys control, the land in dispute belongs to plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

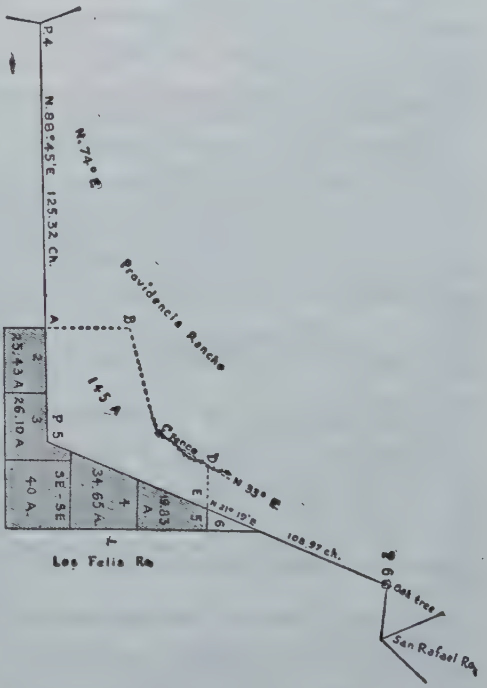
The defendant claims title to this parcel by virtue of an alleged agreement of the adjoining owners as to the location on the ground of the surveyed division lines, followed by possession up to the agreed line and acquiescence therein for many years. He also claims title by adverse possession and by virtue of an alleged estoppel against the plaintiff's predecessors in interest. The defendant never paid taxes, except upon assessments of the lands describing the same, as in the patent to Villa, and containing the number of acres of each lot according to the government survey. This acreage and description would not include the parcel in controversy. To meet this objection to his adverse possession, the defendant invokes the doctrine that, in a case where such agreed line varies from the true line as surveyed, a conveyance or payment of taxes, according to the original description, will be taken to extend to the agreed line, and to cover, or exclude, as the case may be, the intervening land. Price v. De Reyes, 161 Cal. 490, 119 Pac. 893; Young v. Blakeman, 153 Cal. 483, 95 Pac. 888. In virtue of this rule he argues that his tax payments covered the disputed parcel of which he claimed to have possession at the time. It will be seen, therefore, that the claim of adverse possession must fall, unless there was a line established by agreement, possession, and acquiescence, as alleged and sufficient to comply with the above-stated rule. The court found generally in favor of all the defenses asserted.

[1-3] The rule regarding agreed boundaries is stated in Young v. Blakeman, supra, as follows:

> "When such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements."

The apparent transfer of land under this rule, if the agreed line varies from the true line, is held not to violate the statute of frauds; the reason given being that it is a fixing of the line and merely serves to establish the location upon the ground of the line described in the deeds. Sneed v. Osborn, 25 Cal. 630. But as it does in fact, so far as the agreed line varies from the true line, affect the ownership of land, it has been well said that the proof of such agreed location should be clear. McNamara v. Seaton, 82 Ill. 500. And if the line is located and agreed to, not for the purpose of settling an uncertainty in the minds of the parties as to the position of the true line upon the ground, but to take land from one owner and transfer it to the other, or without the intent to fix the true line, such agreement is invalid and does not change the legal boundary nor affect the title of either party to the land he previously owned. Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151. In such a case the title can be changed only by adverse possession for the period of limitation.

Applying these rules, the evidence does not support the finding that the division line was fixed as claimed. In the year 1877, David Burbank owned the Rancho Providencia, containing thousands of acres. Its lines and those of the government sections adjoining its southerly and easterly lines had been surveyed by William P. Reynolds, government surveyor. Villa in that year settled on the lots in section 26 as a homestead claim. We know of no case where a tract proportionally so large has been included by this means. The subjoined map shows the extraordinary character of the claim here made.



The shaded portions of the map represent the 146.01 acres of land embraced in Villa's homestead entry. The lines from the point marked "P4" to that marked "P5," and thence to "P6," at the oak tree, represent the lines of the government survey of the southerly and easterly lines of the rancho and the true division lines between the rancho and the homestead entry. The lines running from A, through B, C, and D, to E, represent the lines which it is claimed were agreed upon by Villa and Burbank as the division lines. The land included within the lines so extended is very rough, brushy, and mountainous. A small valley lies across it opening towards the northwest and extending from the westerly part of lot 4 across the so-called agreed line at the point marked "C." In this valley there are about 20 acres of comparatively level land. The mountains on each side near the point "C" are very steep and rough. A small stream runs down the valley at times, and a few rods northeast of "C" is a spring. The fence referred to in the testimony is indicated by the line interspersed with crosses, and it extends along that part of the line only and no farther, being only some 1,700 feet in length. The distance from the point "B" to "D," along the claimed line, is about 3,500 feet.

[4, 5] The most that can be said in favor of the defendant on the subject of the agreed line is that the evidence tends to show that an agreement was made about the year 1877 between Villa and Burbank, fixing the line for about half the distance from the point "B" to the point "D," across the said valley, that a brush fence was built across the valley which, with the adjacent steep mountain sides, served to turn stock, and that Villa and his successors thereafter occupied and claimed the land composing the valley and its slopes. No agreement was made as to the other parts of the boundaries.

It may be doubted whether in any case so large and irregular a parcel as that shown on the map, departing so far from the true line, could be acquired by an adjoining owner, under the law as to agreed boundaries placed or made with intent to mark or fix the true line. The map itself seems almost conclusive to the effect that they were not fixing a true line, but only placing a boundary for occupancy and not for title. But we need not decide the question. The doctrine applies only to lines so far as marked or fixed by the agreement. The actual location is the thing to which the parties must agree. Where such agreement extends to a part, only, of the line, it cannot be extended by construction or implication, so as to embrace a part of the bounds which were not considered or included in the agreement and as to which there was no agreement. The part of the line which was fixed does not inclose the parcel now claimed, but only runs along a part of one side thereof. This defense, therefore, must fail, and that based upon adverse possession also fails because of the failure to show payment of taxes by the defendant on the land within the real bounds of the Providencia Rancho.

[6, 7] By way of estoppel the defendant alleged, and the court found, that when he was about to purchase the land from Villa he inquired of the plaintiff's predecessor in interest, who was then the owner of the lands claimed by plaintiff, and was informed by said predecessor that the northern and western boundary lines as indicated by the fence, and certain monuments and trails extending in each direction therefrom, were the boundary lines between the premises then owned by Villa, which the defendant was then about to buy, and the lands then owned by said predecessor in interest; that, believing and relying upon said statements, the defendant bought the said lands from the said Villa and paid the purchase price thereof and entered into possession, and that he has ever since occupied and claimed the same up to the line said to be the true line by said predecessor, being induced to purchase by the said representations of the said predecessor.

The evidence was sufficient to show that these allegations were true. It appeared that Brown had visited the premises in company with Villa, before buying, and that they had gone over the agreed line as heretofore mentioned and as shown on the map, and had also examined the trails leading therefrom to the corners, as shown on the map at the points "B" and "C." Thereupon the defendant went to Pomeroy, the said predecessor, told him that he was about to buy the Villa lands, but was unwilling to do so without a survey, because he was not certain of the statements of Villa as to the true line, stating to him where Villa had represented the lines to be, whereupon Pomeroy informed him that no survey was necessary, that the lines shown to him by Villa were the true lines of the respective tracts, and that there would be no trouble if he should purchase the property, and that, in reliance upon this assurance, he bought and paid for the property and took possession thereof. It is true that Pomeroy denied these statements, and declared that this line was not the true line, and that he had never stated to any one that it was the real boundary; but this merely raises a conflict in the evidence as to which, whatever may be our opinion in regard to the truth, we are bound by the decision of the court below in favor of Brown. The lines thus admitted by Pomeroy extended to the corners and there intersected the projected end lines of the Villa homestead claim. Thus it would include the parcel now in dispute. Under these circumstances, we think the estoppel is established. Stanley v. Green, 12 Cal. 148.

[8] Inasmuch as Brown immediately took possession of the parcel and has remained in possession ever since his purchase, the plaintiff, claiming under Pomeroy, was put upon notice of the facts and must be held to be charged with notice of the rights of Brown against Pomeroy by reason of the estoppel.

The judgment is affirmed.

We concur: SULLIVAN, C. J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(168 Cal. 570)

NICHOLS v. DAVIS. (S. F. 6347.)

(Supreme Court of California. Oct. 6, 1914.)

1. APPEAL AND ERROR (§ 1024*)—REVIEW—QUESTIONS OF FACT.

The trial court's decision on a motion to dismiss attachments made upon conflicting affidavits will not be interfered with, even though the evidence leaves the facts in doubt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 820, 3816–3823, 3836, 3837, 4020–4022, 4025–4028; Dec. Dig. § 1024.*]

2. ATTACHMENT (§ 113*)—AFFIDAVITS—SUFFICIENCY—NEGATIVING SECURITY FOR INDEBTEDNESS.

An attachment affidavit in an action on notes alleging that the notes were made and payable in the state, and that the payment of the same had not been secured by any mortgage or lien upon real or personal property or pledge upon personal property, did not show affirmatively as claimed that there was any security for any of the notes.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 307–311; Dec. Dig. § 113.*]

3. ATTACHMENT (§ 122*)—AFFIDAVITS — BY WHOM MADE.

Under Code Civ. Proc. § 538, authorizing the issuance of writs of attachment upon an affidavit by or on behalf of plaintiff, and section 558, providing, relative to applications to discharge attachments, that if it satisfactorily appears that the writ was improperly or irregularly issued, it must be discharged, but that the attachment shall not be discharged if, at or before the hearing of the application, the writ, affidavit, or undertaking shall be amended and made to conform to the provisions of that chapter, where the original affidavit was made by plaintiff it was not error to permit the filing of an amendatory affidavit signed by one of plaintiff's counsel.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323–337; Dec. Dig. § 122.*]

4. ATTACHMENT (§ 249*)—MOTIONS TO DISMISS—EVIDENCE.

On a motion to dismiss attachments on the ground that the debt sued on was secured by assignments of certain contracts, it was not necessary for plaintiff to introduce the assignments for the purpose of showing that the debt was not thereby secured, where they would have proved nothing more than was admitted, and an officer of the assignee made affidavit stating in detail the purposes for which the assignments were made.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 861–876; Dec. Dig. § 249.*]

5. ATTACHMENT (§ 249*)—MOTIONS TO DISMISS—EVIDENCE.

Assuming that, on a motion to dismiss an attachment, the mere denial by affidavit of the truth of the attachment affidavit shifts the burden of proof to the attaching creditor, this burden was sufficiently met as to the claim that the debt sued on was secured by assignments of contracts by an affidavit stating in detail the purposes for which the assignments were made, which was accepted by the trial court as true.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 861–876; Dec. Dig. § 249.*]

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by Elmer E. Nichols against J. O. Davis. From an order denying a motion to dismiss certain attachments, defendant appeals. Affirmed.

J. E. Pemberton, of San Francisco, Keyes & Martin, of Berkeley, and J. O. Davis, of San Francisco, for appellant. J. A. Elston, of Berkeley, and George Clark, of San Francisco, for respondent.

MELVIN, J. Defendant appeals from an order denying his motion to dismiss certain attachments.

[1] This appeal presents many of the same questions that were decided by the District Court of Appeal in Nichols v. Davis, 23 Cal. App. 68, 137 Pac. 41. The dispute here is between some of the same parties; the difference being that in the former case Rosina P. Davis was a codefendant with her husband, while in this action he is the sole defendant. Counsel for appellant call our attention to the fact that the notes on which that suit was based were signed only by the defendant and his wife, while those involved in the present action were executed by him jointly with the Keystone Construction Company, which latter circumstance, it is argued, lends additional and convincing weight to appellant's sworn allegations that he signed only as a surety, and that the indebtedness was secured by assignment to the bank (the real creditor) of certain paving contracts belonging to the corporation. The obvious answer to this contention is that, in the decision of the motion to dismiss the attachments in that case as in this, the court acted upon conflicting affidavits, and, while this case may have some elements in appellant's favor not appearing in the other one, we cannot say that the court erred in accepting the truth of the allegations of the affidavits filed on respondent's behalf. The affidavits with reference to the alleged security are in all essential particulars the same in both cases, except that different notes are involved in the two actions. The opinion of the District Court of Appeal is therefore applicable to both cases.

[2, 3] In this case, as in the other of the same title, the original affidavit of attachment was signed by the plaintiff. Later the court permitted counsel for plaintiff to file an amendatory affidavit signed by one of their number. The original affidavit contained the following language (referring to the promissory notes):

> "That such contracts were made and are payable in this state, and that the payments of the same have not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property."

The amended affidavit varies the above phraseology by inserting after the word "same" the words "or of any part of the same." A more specific description of the note was contained in counsel's affidavit than that which appeared in the one signed by plaintiff. Upon the authority of the opinion of the District Court of Appeal cited above, we conclude: (1) That the affidavits do not show affirmatively, as appellant asserts they do, that there was any security for the notes in the shape of a lien on personal property; (2) that it was proper to permit the filing of an amendatory affidavit; (3) that the court did not err in allowing the filing of the latter affidavit signed by counsel rather than by plaintiff; (4) that the amendments permitted were not to the substance, but merely to the form, of the affidavit; (5) that the affidavits were sufficiently certain as to the amounts claimed to be due.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[4, 5] The only other point made by appellant is that, as he traversed by affidavits the statement contained in the general affidavits of plaintiff on attachment, the burden of proof then shifted to plaintiff to show by detailed evidentiary facts that he was correct in the general conclusions drawn. He asserts that, under this rule, it was incumbent upon plaintiff to produce the best evidence—namely, the assignments of the contracts by the Keystone Construction Company—rather than the affidavit of Mr. Naylor containing the conclusion that the said assignments had no relevancy to the notes in suit. It is immaterial here upon whom the burden is cast in a motion to dissolve a writ of attachment. The issue was presented and the court decided it upon the conflicting evidence. Nor was it necessary for respondent to introduce the assignments of the contract. Such assignments would prove nothing more than that which was admitted. The important matter was the relation of these assigned contracts to the notes mentioned in the complaint and in the affidavit of attachment. Mr. Naylor, an officer of the bank, met the averment that there was security for the notes in the shape of assigned contracts by an affidavit declaring in detail the purposes for which the assignments were made. It was for the trial court to weigh this testimony and to determine the facts from it. Assuming, without deciding, therefore, that the burden of proof shifts to the attaching creditor upon a mere denial by affidavit of the truth of the affidavit on attachment, that burden was in this case met by the affidavit of Mr. Naylor, detailing the transaction between the bank and the Keystone Construction Company, which was evidently accepted by the trial court as the truth. Even where the evidence upon such a motion leaves the facts in doubt the court will not interfere. Note 4 Cyc. 797.

The opinion of the District Court of Appeal to which we have referred above is as follows:

"Defendants appeal from the order denying their motion to dismiss certain writs of attachment upon several grounds, of which only the following are urged in defendants' opening brief: That the affidavits used at the hearing 'show affirmatively that there was security in the shape of a lien on personal property'; that the affidavit originally filed was so defective as not to admit of amendment under section 558 of the Code of Civil Procedure as amended in 1909 (Stats. 1909, p. 253); that the amended affidavit is fatally uncertain.

"1. Plaintiff is the assignee of certain promissory notes assigned to him by the payee, the First National Bank of Berkeley. The pleadings in the action are not in the record, but we infer from what elsewhere appears that the notes in question were signed by both defendants. In his affidavit defendant, J. O. Davis, deposed that the 'said notes are in equity the obligations of the said Keystone Construction Company, and that plaintiff and the said First National Bank of Berkeley at the time of the filing of suit on said notes had full notice of such facts'; that, at the time of the execution of said notes, the said company was engaged in the performance of certain contracts with the city and county of San Francisco, involving a large amount of money—stating the particulars—and that said company, at the request of said bank, assigned to it the said contracts as security for the promissory notes of said company and other of its debts 'which debts the notes sued upon herein are in equity a part.' How this equity arises is not shown.

"Witness Naylor, vice president of the bank, testified that the Keystone Construction Company 'was never in any way connected with the transactions of the loaning of the money by said bank to J. O. Davis'; that 'it was never at any time intended by the parties to the said assignments (of the Keystone Company contracts) that the same should be deemed security for the payment of the promissory notes hereinbefore mentioned; that it was at all times understood between the said bank and the said company that the assignments should constitute merely authorities to collect such moneys as might be collected by the said bank from said city and county of San Francisco.' Other statements are made by the deponent further explaining the relation of the parties, all of which controvert the claim made by defendants that these Keystone Construction Company assignments were intended as security for the notes in suit.

"2. It is contended that the affidavit filed on the issuing of the writs was 'a worthless affidavit, one which was, in legal effect, only blank paper,' and would not, under section 558, Code of Civil Procedure, justify the filing of a new affidavit by another affiant in such a case as this—citing O'Connell v. Walker, 12 Cal. App. 694 [108 Pac. 668]. In that case the objection arose out of the statement as to security which was in the alternative. The indebtedness sued upon accrued, and the action was commenced, as we understood the case, before the amendment of section 558 in 1909, and, besides, the question of the right to amend did not arise in the case.

"The only cases we have found decided on appeal referring to the amendment of the statute are Jensen v. Dorr, 157 Cal. 437, 441 [108 Pac. 320], and Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458 [110 Pac. 331]. In the latter case the notary who executed the jurat resided in, and was commissioned as a notary of, Kern county. The affiant was in the city of Los Angeles, and the notary called him up over the telephone and took his statement and admitted the oath while the affiant was in Los Angeles. The court, for reasons given, said: 'Inasmuch, however, as the act of Kaye (the notary) in administering the oath was a nullity, and the purported affidavit void, it follows that there was nothing to amend. The authorized amendment of the affiant contemplates the existence of an affidavit. There could be no irregularity in that which had no existence.' Upon the point that in the present case the amended affidavit was improperly made by the plaintiff's attorney, the case cited shows that an affidavit may be made by or on behalf of the plaintiff. Code Civ. Proc. § 538. We see no reason why an amended affidavit also may not be made on behalf of the plaintiff. Said section 558 reads as follows: 'If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged; provided that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.' In construing this section in the case cited, Mr. Justice Shaw, speaking for the court, said: 'Under this proviso the attaching party may by amendment supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof.' In that case, there was, in effect, no affidavit at all, hence there was nothing to amend, and the statute gives authority only to amend what was in existence. That was as far as the case called for decision. We can conceive of an affidavit not absolutely void yet lacking in some substantive particular, but showing an honest attempt to follow the statute. It is not always easy to distinguish between matter of form merely and substance in dealing with statutory remedies and with statements required in affidavits. We should hesitate to differ from our learned brother, and it may be that his construction of the statute is a safe and sound one. In the case in hand, however, such construction may be accepted and the order appealed from, in our opinion, upheld.

"The original affidavit read: "That said attachment is not sought, and the said action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendant.' In its amended form it reads the same down to the word 'defendant,' which is put in the plural, 'defendants,' and the words 'or of either of them' added. This, we think, was allowable. The first affidavit read: 'Elmer E. Nichols being duly sworn says that he is the plaintiff in the above-entitled action; that said defendants in the said action are indebted to him in the sum of ten thousand ($10,000) dollars gold coin of the United States over and above all legal set-offs and counterclaims upon seven express contracts for the direct payment of money' with interest at 7 per cent. and payable in this state, and that payment of the same has not been secured, etc. In the amended affidavit these several seven promissory notes are described, and it is stated: 'For a more particular description reference is made to the verified complaint on file herein, which is referred to and made part of this affidavit;' and, 'that such contracts were made and are payable in this state and that the payment of the same and each of them and each part of them has not been secured,' etc.; that 'the plaintiff is absent from Alameda county, Cal. (where the action was being tried), and will not return for four days. Affiant makes this affidavit for and at the direction of plaintiff, and affiant is familiar with the facts.' This amended affidavit extends and elaborates and particularizes what was attempted, but was perhaps imperfectly stated in the original affidavit. There was not in that affidavit an entire 'absence of that which constitutes the substance of the act required as a prerequisite to the issuance' of the writ.

"3. We do not think the criticism is well founded that 'from aught that appeared from the affidavit the payment of some of the promissory notes had been secured.' It is urged that the phraseology with reference to the security is the 'negative pregnant found anywhere in the books.' Among the facts to be stated in the affidavit the statute reads: 'And that such contract was made payable in this state and that payment of the same has not been secured by any mortgage,' etc. The language used in the affidavit is: 'That payment of the same (the contracts just previously mentioned) and of each of them and of each part of them has not been secured,' etc. Where there is a single contract or promissory note it would be sufficient to allege, in the language of the statute, 'that the payment of the same has not been secured,' etc., without adding, 'nor has any part thereof been secured.'

"It seems to us that where several contracts are the subject of the action it would be a sufficient compliance with the statute to allege 'that such contracts were payable in this state, and that the payment of the same has not been secured by any mortgage,' etc. Here the affiant has gone further and alleged 'that each of them and each part of them has not been secured,' etc. The rule with regard to a negative pregnant as also an affirmative pregnant has reference more particularly to a pleading which must not be ambiguous. An affidavit in an attachment is not strictly a pleading, but is more a matter of evidence and is to be given a fair and reasonable construction in arriving at its meaning. So construed, the affidavit plainly enough states that said contracts have not been secured, nor has either of them nor has any part thereof been secured. There is, in fact, no implication or admission that one or more of the contracts is not secured.

"In our opinion, the original affidavit was not a nullity; that it was capable of amendment, and, as amended, it was sufficient to justify the writ."

The order from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 564

TOWNSEND v. BUTTERFIELD.
(L. A. 3330.)

(Supreme Court of California. Oct. 5, 1914. Rehearing Denied Nov. 4, 1914.)

1. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES TO PERSONS ON STREETS—ACTIONS—PLEADING.

Where the complaint alleged that defendant unskillfully, carelessly, and negligently ran his automobile, which was driven wantonly and maliciously, at a speed in excess of 20 miles per hour, into plaintiff, the gravamen of plaintiff's case is unskillful driving, and not wantonness and malice due to driving in excess of 20 miles per hour.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—INJURIES TO PERSONS ON STREETS—ACTIONS—EVIDENCE.

In an action by one run down by an automobile while he was driving along a street an unbroken horse whose movements were controlled by a long rope, the question whether he was negligent in so driving the horse *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. NEGLIGENCE (§ 141*) — ACTIONS — LAST CLEAR CHANCE DOCTRINE—INSTRUCTIONS.

An instruction that the party who has the last clear chance to avoid an accident, notwithstanding the previous negligence of his opponent, is considered solely responsible, while extremely terse, actually embraces all of the elements of the last clear chance doctrine.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382–399; Dec. Dig. § 141.*]

4. NEGLIGENCE (§ 141*)—INSTRUCTIONS—LAST CLEAR CHANCE.

This instruction sufficiently informs the jury that defendant is not liable unless he discovered plaintiff's position of danger in time to have avoided injuring him by the use of ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382–399; Dec. Dig. § 141.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CURED BY OTHERS.

Where other intructions charged that the question of defendant's negligence should be judged by the conditions existing at the time of the accident, and if defendant's servant did what appeared to him best, and in doing so acted as a reasonably prudent man, his conduct was not negligent, and defendant was not liable, any failure of the instruction on last clear chance to submit to the jury the question whether defendant did exercise ordinary care after discovering plaintiff's peril, was cured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHERS.

Where other instructions charged that plaintiff could not recover if his own negligence contributed to the injury, the failure of an instruction on last clear chance to expressly declare that there could be no recovery if the accident was caused by the concurrent negligence of the parties was cured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

7. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.

Where a correct instruction is given, a party desiring a fuller exposition of the law is bound to request additional instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628–641; Dec. Dig. § 256.*]

In Bank. Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Harry R. Townsend against F. D. Butterfield. From a judgment for plaintiff and an order denying new trial, defendant appeals. Affirmed.

Anderson & Anderson, of Los Angeles, for appellant. Harriman, Ryckman & Tuttle, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The plaintiff sued to recover damages arising from personal injuries alleged to have been caused by the defendant's negligence. The plaintiff was traveling on horseback eastward, leading and driving an unbroken horse by a 60-foot lariat fastened around the horse's neck. He kept the led horse ahead of him, using the lariat to stop him when he shied or attempted to run. An automobile belonging to the defendant, and driven by his chauffeur, was going westward on the same street. As plaintiff and the automobile approached each other, the unbroken horse became frightened by some act of a man at the side of the street and started running across the street toward the end of another street opening into it on the opposite side. Plaintiff drew the lariat tight, attempting to stop the horse, but the horse kept on in the direction it had started, thus keeping the lariat tight and obstructing the road. As he was doing this the automobile kept on its course and struck the plaintiff, breaking his right leg and throwing to the ground the horse he was riding. The automobile was brought to a stop some 15 feet beyond the place of the collision.

[1] The complaint alleges that the defendant "so unskillfully, carelessly and negligently and recklessly ran, propelled, and operated said automobile that said automobile was driven wantonly and maliciously, and at a rate of speed in excess of 20 miles per hour, upon, against, and over the plaintiff." We do not agree with the appellant in his claim that, under this allegation, the gravamen of the plaintiff's case is wantonness and malice due to driving at a speed exceeding 20 miles an hour. The essence of the charge above quoted is that the defendant so unskillfully and negligently ran the automobile that it was driven against the plaintiff. This charge could be established by proof of the collision, that it was caused by negligence of the defendant, without proof of malice, wantonness, or recklessness and without proving that the automobile was going 20 miles an hour.

[2] There was sufficient evidence of negligence on the part of the defendant's chauffeur, for the consequences of which, under the circumstances, the defendant was legally responsible. It is unnecessary to detail the evidence at length on this subject. There was little, if any, evidence of contributory negligence on the part of the plaintiff. Defendant's only criticisms of the conduct of the plaintiff are: First, that when the led horse started to run across the street the plaintiff should have dropped the rope and let him run away; second, that after checking or stopping the led horse in the middle of the street, he should have tried to turn or pull him back to the side from whence he started, instead of trying, as he did, to get across the street with him before the automobile should reach the place. It is obvious that a horse controlled by a rope or lariat in the manner stated might become extremely difficult to manage when frightened, and that the jury would not be bound to find the driver or leader negligent, in such emergency, merely because he failed to act in a manner which a deliberate review of the case after the event might show to have been wiser or safer than the course he followed. It was not an inherently negligent act to take an unbroken horse along a street. Highways

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

are made and maintained for the free passage of persons, and of their horses and cattle when properly controlled. There was no evidence that the method of controlling the unbroken horse by means of a rope or lariat fastened to his neck, while taking him along the highway, was an improper or careless method. The use of a rope for that purpose would seem to be a proper precaution and preferable to driving him along with no means of control or check. Under these circumstances it cannot be claimed that the question was not properly left to the jury.

[3, 4] It is further contended that the following instruction, given to the jury at the request of plaintiff, concerning what is known as the doctrine of "the last clear chance" is erroneous:

> "You are instructed that the party who has the last clear chance to avoid the accident, notwithstanding the previous negligence of his opponent, is considered solely responsible."

The instruction is taken almost literally from the opinion in Esrey v. S. P. Co., 103 Cal. 545, 37 Pac. 500. It may be admitted that it is extremely bare and terse as a statement of the doctrine. The trial judge might well have required the counsel to prepare a more complete statement on the subject. But, while it would have been better if it had been expressed so as to be more specifically applicable to the particular facts of the case and so that its full meaning and effect would have been more readily perceived, its terms, when given full force according to the meaning of the language, actually embraced all the elements of the doctrine. The appellant sums up his objections by the statement that this, in connection with the other instructions, fails to submit to the jury the following elements of the doctrine of the "last clear chance," namely:

(1) Whether or not the plaintiff's danger was perceived by defendant in time to enable him, by ordinary care, to have avoided injuring plaintiff.

(2) Whether, after discovering plaintiff's situation of peril, defendant did exercise ordinary care, or did neglect to do some act within his power which, if done, would have prevented the injury.

(3) Whether or not both parties were guilty of concurrent negligence continuing to the time of the accident and each contributing thereto.

(4) "Whether or not the defendant knew of the danger and could have avoided it against the plaintiff, who did not, in fact, knew thereof."

The first point is clearly covered by the statement in the instruction that the defendant must have had the "last clear chance to avoid the accident." He would not have had a clear chance to avoid the accident, unless he had seen the plaintiff's predicament in time to avoid it.

[5] If the point stated in the second objection is not embraced in the instruction itself, it is sufficiently covered by other instructions given, to the effect that the conduct of the defendant's chauffeur was not to be judged by the light of after-acquired knowledge, but by the conditions existing at the time of the accident, and that if he did that which appeared to him at the time best to do, and in so doing acted as a reasonably prudent man, his conduct could not be considered negligent, although in the light of subsequent events it might so appear. The conditions existing at the time of the accident, and which then appeared to him, included his knowledge, as well as the physical facts themselves. From these instructions the jury must have understood that in considering whether or not the defendant used ordinary care to avert the accident they must determine whether or not he perceived the perilous situation of the plaintiff at the time, and whether, after perceiving it, he brought on the injury by his own want of ordinary care.

[6] The objection relating to continuing concurrent negligence was covered by other instructions declaring that the plaintiff could not recover if his own negligence contributed, in whole or in part, directly or proximately, to the injury, "in no matter how slight a degree." It is also embraced in the instruction attacked, by the words "notwithstanding the previous negligence of his opponent," and by the statement that the chance of the defendant to avoid the injury must be the "last" chance. These phrases imply that the cases embraced in the instructiion are not those where the negligence of both parties continues and contributes up to the moment of the accident, but those only where the negligence of the party held liable is at the very time the sole producing cause. There are cases where the plaintiff's negligence continues and contributes at the time and the defendant is aware of the fact, as, for instance, where the defendant perceives that the plaintiff is absent-minded, or unaware of the predicament in which he has carelessly put himself, and, with that knowledge, fails to avert the accident when, with reasonable care, he might have done so. This case is not of that character, and the omission to advise the jury as to that class of cases did not prejudice the defendant.

We do not see wherein the fourth objection is not within the observations already made regarding the other three.

[7] If the defendant desired a fuller and more elaborate instruction on the doctrine of the last clear chance, it was his duty to prepare and present the same to the court, or in some way make known to the court the lack of a clearer instruction and his desire for a better definition of the rule. Having failed to do this, he cannot now complain of the meagerness of the instruction.

These comprise all the points presented in the argument. We find no substantial error in the record.

The judgment and order are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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168 Cal. 577

RECLAMATION DIST. NO. 673, OF SACRAMENTO COUNTY v. DIEPENBROCK et al. (Sac. 2100.)

(Supreme Court of California. Oct. 6, 1914. Rehearing Denied Nov. 5, 1914.)

1. PARTIES (§ 95*)—DEFECTS — AMENDMENT — NAME OF PLAINTIFF—CORPORATE NAME.

Under Code Civ. Proc. § 473, allowing amendments by correcting the name of the party, a complaint which designated the plaintiff as "Swamp Land Reclamation District No. 673" may be amended by striking out the first two words so as to conform to the correct corporate name; such change not amounting to the substitution of another party who had no interest in the original cause of action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 160–166; Dec. Dig. § 95.*]

2. DRAINS (§ 82*)—ASSESSMENTS — PROCEEDINGS—CORRECTION OF LISTS.

Under Pol. Code, § 3460, authorizing the commissioners to amend the lists of the charges assessed for a drainage district, either before or after the lists have been filed with the county treasurer, such correction may be made after the list has been returned by the treasurer to the trustees of the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. § 82.*]

3. DRAINS (§ 82*) — ASSESSMENT — PROCEEDINGS—CORRECTION OF LISTS.

The fact that the correction was made during the pendency of an action to foreclose the lien of the assessment does not preclude recovery in that action, since such correction did not create the lien, but merely made the list conform to the existing facts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. § 82.*]

4. DRAINS (§ 78*) — ASSESSMENT — SEPARATE TRACTS.

The fact that a landowner occupied part of his land and leased the rest to other parties does not divide the land into separate tracts which must be separately assessed by a drainage district.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 78.*]

5. DRAINS (§ 75*) — DISTRICTS — REPORT OF WORK DONE.

A report of the board of trustees of a drainage reclamation district which listed the outstanding warrants and stated the purpose for which they were issued, and estimated the amount of indebtedness not covered by warrants, and stated the purpose for which it was incurred, complies with the requirement of Pol. Code, § 3459, that the report contain a statement of the work done or to be done and its estimated cost.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72; Dec. Dig. § 75.*]

6. DRAINS (§ 43*) — DISTRICTS — REPORT OF WORK DONE.

A report by the trustees of a drainage district, which stated that a break had occurred in a certain cross levee, and that it would be necessary to widen and strengthen the levee and raise it to a uniform height, giving the amount of earth which would have to be removed and the cost thereof, is sufficient under Pol. Code, § 3455, requiring the trustees to report the plan for new work; it not being necessary to separate the assessments for widening and strengthening the levee from those for raising it to a uniform height.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 55; Dec. Dig. § 43.*]

7. DRAINS (§ 43*) — DISTRICTS — REPORT OF WORK DONE.

A report, stating that it would be necessary to replace the old boiler of a drainage district with a new one, and giving the cost of the new one, need not specify the plan for such work or state the capacity of the boiler, since the work is merely repair work and not new or additional work.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 55; Dec. Dig. § 43.*]

8. DRAINS (§ 82*)—ASSESSMENTS—APPORTIONMENT OF BENEFITS.

An assessment by the commissioners of a drainage district for outstanding indebtedness which was classed as incidentals against the land in proportion to acreage is not essentially unfair, and the burden is upon the landowner to show that such assessment was not in proportion to the benefits to the land, as it was required to be by Pol. Code, § 3456.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. § 82.*]

9. DRAINS (§ 82*) — BENEFITS — APPORTIONMENT — REVIEW — FINDINGS BY LOWER COURT.

Where there was no essential unfairness in the method of apportioning the benefits among the landowners in a drainage district, the judgment of the lower court that the assessment was in proportion to the benefits will not be disturbed.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 81, 83–87; Dec. Dig. § 82.*]

10. DRAINS (§ 78*) — ASSESSMENT — DESCRIPTION OF LAND.

A description in an assessment for a drainage district by reference to the lands of adjoining owners, which correctly and fully described one side thereof and partially described each of the other sides, is sufficient to identify the land and to sustain the assessment.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 78.*]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Reclamation District No. 673 of Sacramento County against M. H. Diepenbrock and others. Judgment for the plaintiff, and defendants appeal. Affirmed.

R. Platnauer, of Sacramento, for appellants. C. A. Elliott, of Sacramento, for respondent.

MELVIN, J. This is an action to foreclose a lien for an assessment for reclamation purposes on defendants' land. Judgment was in favor of the plaintiff, and from said judgment defendants appeal.

[1] The plaintiff in the complaint as originally filed was designated as "Swamp Land Reclamation District No. 673." It developed at the trial that the true name of the corporation was "Reclamation District No. 673," and on motion the court permitted the strik-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing out of the first two words of the title of plaintiff as pleaded. This is assigned as error by appellants. In the answer defendants attacked the corporate existence of "Swamp Land Reclamation District No. 673," and the argument is that by plaintiff's admission that there was no such corporation as the one named, there was no plaintiff originally, and therefore nothing to amend. This theory would give the plaintiff power to make admissions but nothing else. It is true that where one party has brought suit, the court may not arbitrarily permit the substitution of another party who possessed no interest in the original cause of action and had acquired none by assignment. That is the rule expressed in Dubbers v. Goux, 51 Cal. 154, but the case at bar does not properly fall under the rule. In Merced Bank v. Price, 9 Cal. App. 189, 98 Pac. 383, emphasis is laid upon the fact that the substitution of Mrs. Dubbers for her husband in Dubbers v. Goux permitted her not to prosecute the same action as the one which he had begun, but *"another and distinct cause of action in her separate right."* That case is therefore not authority for the one before us, because in the first place there was in this case really no substitution of parties, but a mere correction of a misnomer, and in the second place the cause of action remained exactly the same. The correction made was fully justified under section 473 of the Code of Civil Procedure. In Nisbet v. Clio Mining Co., 2 Cal. App. 441, 83 Pac. 1077, the authorities are discussed and the rule approved which sanctions an amendment to correct a mistake in pleading the corporate name of a party to an action. With the conclusions reached by the District Court of Appeal in that case we fully agree, and we find no error in the action of the court in the case before us, permitting the amendment.

[2] The land described in the assessment list as the property of the defendant was designated by naming the owners of the surrounding lands. There were certain omissions to name tracts, the mention of which would add to the clearness of the description. What was done by the court when this fact became apparent is best demonstrated by a quotation from the findings:

> "That on the 28th day of June, 1911, when said case was on trial it was disclosed by the evidence that a mistake had been made by said commissioners in describing the said tract of land of said defendant Diepenbrock, in said assessment list. That thereupon said commissioners, who were all three present in court, corrected the description of said Diepenbrock's lands in said assessment list by adding to said description the particulars omitted therefrom, thereby making said description of said Diepenbrock's land read as it appears in said amended complaint.
>
> "That the description of said Diepenbrock's land in said assessment list, before correction, was sufficient to identify the tract of land sought to be assessed, and the errors in said description were not of a character to mislead defendant as regards said assessment, or the land sought to be impressed with the lien thereof."

Appellants insist that the commissioners had lost power to make the correction because the list had been returned by the county treasurer to the trustees of the district. Respondent's counsel call attention, however, to section 3460 of the Political Code which is as follows:

> "The commissioners appointed by the board of supervisors must make a list of the charges assessed against each tract of land; and if there be any error or mistake in the description of the land, or in the name of the owner, or if any land which should be assessed has been or shall be omitted from the list, or if there is any error or mistake in any other respect, the commissioners shall amend or correct the same at any time, either before or after the lists shall have been filed with the treasurer of the county."

Appellants interpret the language of the above quoted section as meaning that the power to amend lasts only during the time that the treasurer retains the list. The language of the section is very broad, and we cannot say that the legislative intent was to express the limitation for which appellants contend. The words "either before or after the lists shall have been filed with the treasurer of the county" are, taken by themselves, subject to no such limited interpretation. If the time for amendment were to be restricted to the period during which the lists should remain in the actual possession of the treasurer, it would have been easy to frame the statute in such way that the desired limitation should be expressed. Instead, the very broad language of the quoted section was used by the Legislature. We are of the opinion that the commissioners were acting within the authority vested in them by section 3460 of the Political Code.

[3] It is next contended that no recovery can be based upon the amended assessment because, as counsel phrases it, "the amended assessment list relied upon as creating a lien upon the land of the defendant first came into existence during the trial of the action." But the correction did not create the lien. It merely made the list conform to existing facts. The commissioners had performed their duties of viewing and assessing the land, but certain errors in the description had been made. It was thoroughly within the discretion of the court to permit such correction as would make the list conform to the facts, but no new assessment was thereby made—no new lien was created. It has been held by the court that where, by inadvertence, property has been placed by description in the wrong range, a new cause of action is not set up when the complaint is amended to conform to verity. Heilbron v. Heinlen, 72 Cal. 377, 14 Pac. 24. And, as is well said by counsel for respondent:

> "The power which section 473 gives to the court concerning the correction of pleadings is analogous to that given to the commissioners by section 3460, and their correction of the list did not substitute a new cause of action for the old."

[4] As part of the property of Mr. Diepenbrock was occupied by himself and farmed under his direction and part was held by other persons under lease, it is contended that this made the holding two separate tracts for the purposes of assessment. But the uses to which land is devoted do not necessarily divide it into tracts. This was one body of land and was properly assessable as such.

[5] The next assignment of error is that the report of the board of trustees fails to contain a statement of the work already done, and that the assessment is therefore void. In this behalf section 3459 of the Political Code and Swamp Land District v. Silver, 98 Cal. 51, 32 Pac. 866, are cited. Paragraph 6 of the report contains this language:

> "That the following is a statement of work done and which is unpaid for, and for which warrants of said district have been issued and are outstanding, and are due and unpaid."

This is followed by a list of the warrants and the purposes for which they were issued. Then follow statements that the board estimated the amount of outstanding debts against the district for which no warrants had been issued as $850, and that said indebtedness "accrued for fuel oil, lubricating oil, services of engineer to operate the pump, and incidentals pertaining to operating said pump." Section 3459 of the Political Code requires a statement in the report of the "work done or to be done and its estimated cost." Respondents are correct in the interpretation of this language as meaning "the work done and unpaid for," and as not requiring a detailed statement of all work performed under the expended assessment. Such data would be of no use to the commissioners in assessing the "estimated cost" upon the land of the work "done or to be done." Paragraphs 4 and 5 of the report state the general character of the work performed under the former assessment, and that the work already done and not paid for is evidenced by outstanding warrants (except an indebtedness of $850). In paragraph 6 the purposes for which warrants were issued and the rest of the debt incurred are sufficiently set forth. There is nothing in Swamp Land District v. Silver, supra, supporting the assertion that the statute was not complied with substantially.

[6] The appellants assert that the proceedings of the board of trustees were of no effect because there was a failure to report to the supervisors any plan for new work of widening and strengthening the cross levee, as required by the provisions of section 3455 of the Political Code. The portion of the report which is attacked is as follows:

> "That a break has occurred from the high water of the winter of 1907 and 1908, in the cross levee of said district, and portions thereof have been washed away, and it has been estimated by a competent engineer and the said board of trustees, estimated and determined that it will be necessary to widen and strengthen said cross levee, and to raise it to a uniform height, and that it will require the excavation and removal of four thousand cubic yards of sand and earth to make such repairs and improvements to said cross levee, and that it will cost twenty-five cents per cubic yard, making a total of $1,000.00 to do said work and make said repairs and improvements to said cross levee, and the said board of trustees did also approve and adopt said plan of repairing and improving said cross levee and the estimated cost thereof."

It is insisted that this is very far from being a report of any *plan* for the new work of widening and strengthening the cross levee, and Reclamation District v. Bonbini, 158 Cal. 202, 110 Pac. 579, is cited as supporting this position. But the facts of the two cases were entirely different. In the Bonbini Case it is held that the report must contain a statement of the new work to be done "as clear and definite as in the case of original plans." The opinion then proceeds as follows:

> "We may assume that the statement of the first item of proposed new work, viz., the extension of the head levee for about three-fourths miles and the raising of the present head levee on an average of two feet is sufficient, though probably not as clear and definite as it might be made. But we do not see how this can be held as to the item of raising the levees along the San Joaquin river and French Camp slough, which, including also the 'repair' of said levees, amounts to the large sum of $33,000, without any designation of the amount proposed to be used for raising the levees. There was absolutely nothing in the statement from which any one could draw an inference as to the extent to which the trustees were to raise these levees, if indeed they had come to any conclusion upon that point themselves, which does not appear. It does appear that the landowners, by resolution adopted May 4, 1907, had authorized and directed the trustees to formulate a plan for the reclamation and protection of the lands, including their drainage, and to employ necessary engineers and chainmen to furnish the proper plan and estimate of cost, but nothing appears to have been done by the trustees under this resolution other than the presentation of the statement under discussion. So far as the particular point we are discussing is concerned, we have the mere statement of the trustees that they proposed 'to * * * raise the levees,' and that the estimated cost thereof is some undesignated portion of $33,000. This, in our judgment, is utterly insufficient to give to the landowners the notice which the law contemplates they should have, and insufficient to serve as a basis for the assessment in so far as such proposed work is concerned."

It will appear at a glance that the criticized part of the report in the case at bar is more nearly analogous to the first item mentioned in the above quotation, which was declared to be sufficient, than to the second, which was held to be fundamentally defective. Assuming, but not deciding that the work described is, strictly speaking, *new* work and not repair or replacement of old work damaged by floods, the report is not vulnerable to the attack based upon the ruling in the Bonbini Case. The faulty specification of that case lacked two material elements of the one attacked here, namely: (1) The amount of earth required to make the improvements which had been found necessary; and (2) the cost per yard of such earth.

It is true that the amount necessary to repair the breaks and that required to widen and strengthen the levee and that to be devoted to raising it to a uniform height were not segregated, but there was sufficient statement of the bulk of material and cost per yard to enable the landowners to ascertain the specific purposes of the assessment, the real utility of the contemplated improvements, and the probable protection which the district was to receive from the work. The failure of segregation in the report before us of the exact amount of earth which was to be applied to each part of the general improvement of the cross levee was not so important as the lack of separation of the two elements of specification "a" in the Bonbini Case, i. e.: (1) The extension of the head levee for "about" three-fourths of a mile, and (2) the raising of said levee "on an average" of two feet. Yet that specification was held to be sufficient, and so must this be.

[7] The eighteenth paragraph of the report specified that the boiler then in use for making steam to run the pump was not only old and worn out, but inadequate to carry the amount of steam necessary for operating the engine used for driving the pump; that it would be necessary to replace the old boiler with a new one; and that the estimated cost of such new boiler would be $4,523. Appellant complains that the report fails to adopt a new plan for this contemplated improvement or to specify the capacity of the new boiler which is left to future determination by the trustees. But the replacing of an old boiler by a new one amounts to no more than the repair of old work. There is no change of plan involved but the substitution of a new and efficient piece of machinery for one that had become worn out and inadequate. The important information for the landowner was the cost of the new boiler and that was given.

[8, 9] It is asserted that the assessment was not made in proportion to the benefits which would result to each tract from the work of reclamation, because the board included the balance of all of the money which was to be raised to pay the outstanding indebtedness of the district under the head of "incidentals," and assessed it against each acre of land in the district equally. Appellants invoke section 3456 of the Political Code as forbidding such method. Unless there was something essentially unfair about this plan of apportioning the debt for "incidentals," we must uphold the judgment of the lower court, based upon its finding that the amounts charged against the various tracts of land in the district were proportionate to the respective benefits conferred by the improvements, because while undoubtedly the landowner may, in a case of this sort, question the fairness of the plan adopted by the commissioners (Reclamation District No. 531 v. Phillips, 108 Cal. 309, 39 Pac. 630, 41 Pac. 335; Reclamation District No. 537 v. Burger, 122 Cal. 444, 55 Pac. 156; Reclamation District No. 108 v. West, 129 Cal. 624, 62 Pac. 272), the burden of proof is upon him to overcome the presumption in favor of the validity of the assessment (Reclamation District No. 70 v. Sherman, 11 Cal App. 419, 105 Pac. 277). And appellant made no showing independent of the testimony and documentary evidence offered by the plaintiff. The testimony of Commissioner Kercheval was to the effect that, as there was nothing to show what the outstanding indebtedness was for, it was classed as a debt for "incidentals," and assessed equally upon all of the land of the district. We cannot see anything essentially unfair in such a plan, and therefore cannot disturb the finding of the trial court.

[10] We have carefully considered the contention that the original description of appellant's property to be assessed was not sufficient. The court found to the contrary. The method pursued, as we have indicated, was a description of the tract to be assessed by reference to lands of adjoining owners. This was a recognized form of description. Reclamation District v. Wilcox, 75 Cal. 450, 17 Pac. 24. The south boundary in the original and in the corrected assessment was described in the same way. The north boundary as set forth in the original description contained the designation of one more adjacent tract than the amended call and the east boundary one less, while three tracts were added to the description to make the western boundary complete. It thus appears that each exterior line was at least partially designated in the original description, and all of the southern boundary was therein correctly set forth. It is unnecessary to cite the many decisions of this court which approve a very liberal construction in dealing with descriptions of land. One of the best considered and most frequently cited of these is Best v. Wohlford, 144 Cal. 736, 78 Pac. 294, in which it is held that the designation of the land in a deed will be sufficient "if it afford the owner the means of identification, and does not positively mislead him, or is not calculated to mislead him" (quoting from Cooley on Taxation, p. 745). In Irrigation District v. De Lappe, 79 Cal. 355, 21 Pac. 825, the court by intendment extended a call of 540 feet to 5,400 feet, and one of 200 feet to 2,000 feet. Liberal construction has been extended even to tax deeds, although tax proceedings are in invitum, and in Bosworth v. Danzien, 25 Cal. 300, the court said:

> "The test, then, to which every false call occurring in the course of tax proceedings is to be subjected, is this: Has it probably had the effect to mislead the landowner in relation to the land assessed, advertised, and sold?"

Much more liberally should the court view an attempted description like that contained in the original assessment, in view of the power of correction vested in the commissioners by section 3460 of the Political Code. The court properly found that the original description was sufficient to apprise the owner of the land sought to be assessed.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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168 Cal. 587

MARIN WATER & POWER CO. v. TOWN OF SAUSALITO. (S. F. 6390.)

(Supreme Court of California. Oct. 6, 1914.)

1. Waters and Water Courses (§§ 200, 203*)—Domestic Water Supply—Regulation of Rates.

Under Const. art. 14, § 1, providing that the use of all water appropriated for sale, rental, or distribution is a public use, and subject to the regulation and control of the state, and that the rates or compensation to be collected for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or other governing body of the city and county, or city or town, and shall continue in force for one year and no longer, the fixing of rates contemplated is a legislative function, and such section does not apply to the case of a municipal corporation owning its own water system and purchasing water in bulk for sale to its inhabitants, and hence a 10-year contract by such a municipal corporation for the purchase of water in bulk was not invalid as in violation of such section.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 274, 289, 290–299; Dec. Dig. §§ 200, 203.*]

2. Waters and Water Courses (§ 203*)—Domestic Water Supply—Regulation of Rates.

The right to regulate rates to be paid for a service or commodity rests fundamentally upon the dedication to public use of the property of the person or corporation compelled to submit to the regulation, and hence a sale of water to a town owning its own water system was not subject to the rate-regulating power of the town conferred by Const. art. 14, § 1, unless it constituted a dedication of the water to public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

3. Municipal Corporations (§ 57*)—Legislative or Proprietary Capacity.

A municipal corporation in administering a public utility, such as a water system, even within its own limits, does not act in a legislative capacity, but in a proprietary and only quasi public capacity.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

4. Waters and Water Courses (§ 203*)—Domestic Water Supply—Regulation of Rates.

A sale and delivery of water in bulk to a town owning its own water system for sale by it to its inhabitants was not a dedication of the water to a public use, and hence was not subject to the power of the municipality to regulate rates conferred by Const. art. 14, § 1.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

5. Municipal Corporations (§ 226*)—Domestic Water Supply—Contracts of Municipality—"Municipal Purposes."

Under Municipal Corporation Act (St. 1883, p. 269) § 862, subd. 3, authorizing trustees of cities of the sixth class to contract for supplying the city with water for municipal purposes, a municipal corporation of the sixth class owning its own water system had power to purchase water in bulk for sale to its inhabitants; the supplying of water to its inhabitants being a "municipal purpose."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 645–650; Dec. Dig. § 226.*

For other definitions, see Words and Phrases, First and Second Series, Municipal Purposes.]

6. Municipal Corporations (§ 226*)—Domestic Water Supply—Contracts of Municipality.

When a municipal corporation possesses authority to contract for a supply of water for its own use and the use of its inhabitants, the terms and duration of the agreements rest within the sound discretion of the municipal authorities, and the contract may only be overthrown by the courts for fraud, abuse, excess of authority, or inequity in the terms of the agreements, and a 10-year contract by a town owning its own water system for the purchase of water in bulk for sale to its inhabitants, which provided that the maximum rate should be 30 cents per thousand gallons, when the water furnished did not exceed an average during the year of 200,000 gallons per day, with a reduction in rate if the amount exceeded 200,000 gallons, and that the town would pay for not less than 200,000 gallons a day, and further granting the seller of the water permission to use the streets of the town for water mains for the purpose of supplying water to points beyond the town, and providing that when the town ceased to take its entire water supply and that of its inhabitants, from such seller, the seller should be granted a franchise to occupy the streets of the town for the purpose of supplying the town and its inhabitants with water, was not vulnerable to any of the objections enumerated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 645–650; Dec. Dig. § 226.*]

7. Waters and Water Courses (§ 200*)—Domestic Water Supply—Contracts of Municipal Corporations.

In a contract by a town owning its own water system for the purchase of water in bulk, there was no inconsistency between provisions fixing the maximum rate at 30 cents per thousand gallons when the water furnished did not exceed an average of 200,000 gallons per day, with a reduction in rate where the water furnished exceeded that amount, and a provision binding the town to pay for not less than 200,000 gallons a day, during the life of the agreement.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

8. Waters and Water Courses (§ 200*)—Domestic Water Supply—Contracts of Municipal Corporations.

A provision in a contract by a town owning its own water system for the purchase of water in bulk for sale to its inhabitants, binding the town to pay for not less than 150,000 gallons per day the first year, and 200,000 gallons thereafter, was valid.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. CONTRACTS (§ 10*)—MUTUALITY OF OBLIGATION.

A contract by a town for the purchase of water in bulk for sale to its inhabitants, which bound the town to pay for a specified minimum quantity, was not rendered unenforceable by provisions that the seller would use due diligence to maintain its pipes in good condition, and employ its best endeavors to cause an adequate supply of water to flow through its pipes, and that in case of a deficiency it would prorate the supply of water between the town and its other customers; this not, as claimed, entitling the seller to payment for the specified minimum quantity if it merely used its best endeavors to furnish water, but being the usual provision excusing a party to a contract from absolute performance because of an emergency, which does not render the contract void for lack of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

10. CONTRACTS (§ 10*)—MUTUALITY OF OBLIGATION.

If as claimed, a contract between a town and a seller of water in bulk, lacked mutuality in that the seller was only required to use due diligence, and employ its best endeavors to furnish water, the contract was nevertheless enforceable where the seller was able and willing to perform and did perform all of its duties, including the supplying of an abundance of water, since unilateral contracts are sustained upon execution of the optional consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

11. WATERS AND WATER COURSES (§ 200*)—DOMESTIC WATER SUPPLY—CONTRACTS OF MUNICIPAL CORPORATIONS.

A 10-year contract by a town of the sixth class for the purchase of water in bulk for sale to its inhabitants, which fixed the maximum rate at 30 cents per thousand gallons if the water furnished did not exceed an average of 200,000 gallons per day, and bound the town to pay for not less than 200,000 gallons per day after the first year, was not void as unreasonably binding the town to make payments which might possibly be raised by taxes to be paid by a decreased population.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

12. WATERS AND WATER COURSES (§ 182*)—DOMESTIC WATER SUPPLY—USE OF STREETS.

Civ. Code, § 548, providing that no corporation formed to supply any city, etc., with water, must do so unless previously authorized by an ordinance of the authorities thereof, or unless done in conformity with a contract between the city, etc., and the corporation, so far as it makes a street franchise necessary, was abrogated by the adoption of Const. art. 11, § 19, which in 1908, when a contract for a supply of water was made, provided that in any city where there were no public works owned and controlled by the municipality for supplying it with water, any individual or corporation should, under the direction of the superintendent of streets or other officer, and under such general regulations as the municipality might prescribe, have the privilege of using the public streets and of laying pipes and connections so far as necessary to introduce into and supply the city with water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 267; Dec. Dig. § 182.*]

13. WATERS AND WATER COURSES (§ 200*)—DOMESTIC WATER SUPPLY—CONTRACTS OF MUNICIPAL CORPORATIONS.

Civ. Code, § 548, providing, relative to contracts between a city, etc., and a corporation formed to supply water, that no exclusive right shall be granted, if still in force, was not violated by a contract by a town owning its own water system, for the purchase of water for sale to its inhabitants, where the contract provided that whenever the town should cease to take its entire water supply and that of its inhabitants from the seller, the seller should be granted a franchise to occupy the streets of the town, thus contemplating the possibility of purchases of water from sources other than those owned by the seller.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

14. WATERS AND WATER COURSES (§ 200*)—DOMESTIC WATER SUPPLY—CONTRACTS OF MUNICIPAL CORPORATIONS.

Pol. Code, § 4412, providing that the common council of a city may contract with gas and water companies for supplying the streets and public buildings with necessary gas and water, the rates to be paid to be fixed for a term not exceeding five years, and the city authorities to reserve the right to abrogate the contract, if still in force, applies only to the supplying of water to public buildings, and has no application to the purchase of water by a town for sale to its inhabitants.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

15. WATERS AND WATER COURSES (§ 200*)—DOMESTIC WATER SUPPLY—CONTRACTS OF MUNICIPAL CORPORATIONS.

A city or town having power to buy water for its own distributing system may agree to purchase water up to a given quantity exclusively from one company, and such contract will be enforced though the city should conclude to procure a supply of water of its own in addition to its own works, since the power to contract for a reasonable length of time implies the power to forego other means of procuring water for a like period.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

16. MUNICIPAL CORPORATIONS (§ 870*) — LOANING CREDIT—CONSTITUTIONAL PROVISIONS.

A contract by a town to purchase water for sale to its inhabitants, which bound the town to pay for a specified minimum amount, did not violate Const. art. 4, § 31, providing that the Legislature shall have no power to give or lend, or authorize the giving or lending, of the credit of any city and county, city, etc., in aid of or to any person, association, or corporation, though to supply such water it was necessary for the seller to build a pipe line to the town from the nearest point reached by its system, and even though it would not have extended its system to such town if the contract had not been made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1817; Dec. Dig. § 870.*]

17. WATERS AND WATER COURSES (§ 200*)—DOMESTIC WATER SUPPLY—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Notwithstanding Civ. Code, § 3311, providing that the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is the excess of the amount due from the buyer over the value to the seller, together with the excess of the expenses properly incurred for carriage over those which would have been incurred if the buyer had accepted the property, where a contract by a town for the purchase of water for sale to its inhabitants bound it to pay for a specified minimum quantity, the agreed minimum rate was the measure of recovery, the amount of water delivered having been less than the specified minimum, since the promise to pay such minimum sum was a part of the direct obligation of the contract, and in no sense a covenant for liquidated damages in case of breach.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

18. MUNICIPAL CORPORATIONS (§ 254*)—ACTIONS—DEFENSES—INADEQUACY OF FUNDS.

Under a contract by a town for the purchase of water for sale to its inhabitants, by which it agreed to create a fund to be called the water supply fund, and fix and establish water rates sufficient to pay for all water supplied by the seller, and if such fund in any month was insufficient to meet the payments then due, to cause to be transferred thereto from the general fund an amount sufficient to supply the deficiency, the depletion of such funds was not a defense to an action against the town for an amount due on the contract, and it was not necessary to allege that there was money in such fund from which the claim could be paid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 696–700; Dec. Dig. § 254.*]

19. WATERS AND WATER COURSES (§ 203*)—DOMESTIC WATER SUPPLY—REGULATION OF RATES.

Const. art. 14, § 1, relative to the regulation of rates to be collected for water supplied to any city and county, city or town, or the inhabitants thereof, does not apply to the rates or compensation to be collected by a municipality itself for water furnished by it.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

In Bank. Appeal from Superior Court, Marin County; E. T. Zook, Judge.

Action by the Marin Water & Power Company against the Town of Sausalito. From a judgment for defendant on demurrer, plaintiff appeals. Reversed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellant. O. F. Meldon, of Sausalito, and Thomas, Beedy & Lanagan, of San Francisco, for respondent.

MELVIN, J. Plaintiff sued for the sum of $8,447.76 balance due for water furnished defendant under a contract for use in defendant's municipal water system. Defendant demurred generally, the demurrer was sustained without leave to amend, and from the judgment entered in accordance with said ruling the plaintiff prosecutes this appeal.

The essential facts appearing from the pleading are as follows: Plaintiff is a Californian corporation, with power, among other things, to supply water to the incorporated towns in Marin county and to the inhabitants thereof, for domestic and other purposes and to carry on a general water business. Defendant is a municipal corporation of the sixth class. In 1908 the town of Sausalito incurred a bonded indebtedness of $100,000 for the construction of waterworks for the distribution of pure, fresh water to said town of Sausalito and the inhabitants thereof. Subsequently, pursuant to resolution regularly passed by the board of trustees of the town of Sausalito, the president of that board was empowered to execute a certain contract, set forth in full in the resolution and approved by the board, whereby the Marin Water & Power Company agreed to furnish, and the town of Sausalito obligated itself to take, a supply of water for distribution through its municipal water system. It was recited in the resolution, among other things, that:

> "Public interest and necessity require and demand that such supply be obtained from the Marin Water & Power Company, a corporation engaged in the business of developing and supplying water within the county of Marin, and said Marin Water & Power Company being the only person, firm, or corporation in the county of Marin presently able to contract for and furnish to the said town of Sausalito a supply of water sufficient and adequate for the needs of said town of Sausalito."

Acting under the power conferred by the resolution, the president of the board of trustees executed the agreement which is the basis of this action. In the preamble to this agreement the water company (the "second party") is mentioned as "willing to supply water to said town of Sausalito as a body politic, and not to inhabitants thereof otherwise than as [to] the same may be supplied to said inhabitants by said municipality through its own distributing system and under its own exclusive control." By the agreement said second party obligates itself to proceed diligently to lay its pipes, conduits, etc., from Corte Madera, to the town limits of Sausalito and to maintain said pipes, conduits, etc., in good condition during the life of the contract. The water company waives all rights which it might otherwise have of supplying water to any person within the town limits of Sausalito except the Northwestern Pacific Railroad Company. The water company also agrees accurately to measure all of the water furnished. By the terms of the contract the Marin Water & Power Company is to "receive and accept as payment for all water furnished the maximum rate of thirty (30) cents per thousand gallons when the total amount of water furnished to first party shall not exceed an average during the respective year of two hundred thousand (200,000) gallons per day. And when such average amount of daily consumption shall exceed two hundred thousand (200,000) gallons the rate per thousand gallons for all water furnished shall diminish proportionately." Then follows a schedule prescribing a reduction in the rate where the amount used shall exceed 200,000 gallons a day. The seventh paragraph of the agreement is in the following language:

> "First party, in consideration of the foregoing agreements to be performed by second party, hereby agrees that it will, during the first year

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the term hereof, pay for not less than one hundred and fifty thousand (150,000) gallons of water per day, and after said first year, for not less than two hundred thousand (200,000) gallons per day for every year during the life of this agreement."

Time of payment and method of calculating amounts due are the next subjects treated, and the "first party," the town of Sausalito, agrees to create by ordinance a fund to be called the "Water Supply Fund" and (to quote further):

> "First party agrees that it will fix and establish water rates to be paid by its customers in said municipality, which shall be sufficient to pay for all water supplied to it by second party, and will cause to be collected and paid into said fund all said water rates, and it agrees that said fund shall be subject to the payment to second party of amounts to become due to second party hereunder, and should said fund in any month be insufficient to meet the payments then due second party hereunder, first party will at once cause to be transferred to said fund, from the general fund of first party, an amount sufficient to supply such deficiency."

This is followed by a provision that nothing in the agreement shall be deemed as incurring any indebtedness by the party of the first part in violation of section 18 of article 11 of the Constitution of California. The second party is granted permission to use the streets of Sausalito for its water mains for the purpose of supplying water to points outside of and beyond said town. The first party further agrees that whenever it shall cease to take its entire water supply and that of its inhabitants from the second party (except when said second party is unable to furnish said supply) the second party shall then be granted a franchise to occupy the streets of Sausalito for the purpose of supplying said town and its inhabitants with water for domestic and all other purposes. The term of the agreement is 10 years from the 1st day of August, 1909, the town of Sausalito reserving an option for an extension of the contract for an additional period of ten years.

At the time of entering into the contract plaintiff owned a water system, the most southerly point of which was at Corte Madera, six miles from Sausalito. Immediately upon the execution of the contract plaintiff proceeded diligently to construct its pipes from Corte Madera to the town limits of Sausalito, at a cost of more than $111,000. Prior to August 1, 1909, defendant installed a water system within its corporate limits and since said date defendant has been continuously taking water from plaintiff, using part of said water for its own municipal needs and selling the remaining part to its inhabitants and to others at rates established by said municipal corporation. During the year ending July 31, 1911, defendant took from plaintiff under the contract something in excess of 42,000,000 gallons, an average of less than 200,000 gallons a day. Plaintiff does not know what amount of money was in defendant's water fund on September 1, 1911, but for water furnished during that year plaintiff has received $13,452.24. It asserts that the amount due under paragraph VII of the agreement was $21,900, and prays judgment for the balance of $8,447.76 alleged to be due.

[1-4] The order of the superior court sustaining the demurrer is based upon a written opinion by the learned judge of that court, and we will first discuss the point upon which that opinion rests, which is, in brief, that the contract, being for the supply of water for a period greater than one year, is void by reason of the limitations expressed in section 1 of article 14 of the Constitution of California as that article existed at the time the contract was made. Appellant's position is that the provisions of that section of the Constitution were never intended to apply and do not apply to a contract for the supply of water to a municipality in gross for use and sale by it through its own water system, but if intended to apply to such a transaction, they are void by reason of conflict with the Constitution of the United States.

The pertinent portion of article 14, § 1, as it existed when the contract was made, is as follows:

> "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer."

Pursuant to this section the act of March 7, 1881 (Stats. 1881, p. 54) was passed. It provided in detail the steps to be taken by the legislative body of each municipality in fixing water rates annually. While the words of this section of the Constitution are very general and refer to the "rates or compensation" to be collected for the use of water supplied to a municipality "or the inhabitants thereof," it is clear from the context that the fixing of rates contemplated is a *legislative* function, and it seems equally plain that there was no intention of the framers of the Constitution to make the section in question apply to the case of a municipal corporation owning its water system and purchasing water in bulk for sale to its inhabitants. The right to regulate rates to be paid for a service or commodity rests fundamentally upon the dedication to public use of the property of the person or corporation compelled to submit to the regulation. Such was the doctrine of the case of Munn v. Illinois, 94 U. S. 123, 24 L. Ed.

77, and such has been the principle followed for hundreds of years in all jurisdictions deriving their jurisprudence from the common law. In Munn v. Illinois, Mr. Chief Justice Waite quoted the language of Lord Chief Justice Hale, written more than 200 years before, that when private property is "affected with a public interest, it ceases to be juris privati only." Judge Dillon in his work on Municipal Corporations (5th Ed.) p. 2233 thus expresses the rule:

> "The regulation of rates is governmental in its nature, and the power is intended to be exercised for the benefit of the inhabitants of the municipality."

The same principle is expressed in Contra Costa Water Co. v. City of Oakland, 159 Cal. 333, 113 Pac. 668. But a city does not always act in a legislative capacity. It does not so act in administering a public utility such as a water system even within its own limits, but "in a proprietary and only quasi public capacity." South Pasadena v. Pasadena Land Co., 152 Cal. 593, 93 Pac. 490. In the case last cited this court was considering the status of a municipal corporation operating its own water system for the benefit of its own citizens and also selling water to a part of the inhabitants of another city, and it was made clear that such a corporation in its capacity as a vendor of water is upon practically the same plane as a water company engaged in the same business. In the earlier case of Davoust v. City of Alameda, 149 Cal. 70, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, it was held that a municipal corporation operating an electric light plant is liable for injuries caused by the negligence of its servants in the operation of such utility just as another corporation or person would be. In the opinion in that case, Western Saving Fund Society v. Philadelphia, 31 Pa. 183, 72 Am. Dec. 730, is approvingly quoted to the following effect:

> "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise. * * * The whole investment is the private property of the city, as much so as the lands and houses belonging to it. * * * It [the city] stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred."

The true scope of article 14 of the Constitution was under discussion in Thayer v. California Development Co., 164 Cal. 134, 128 Pac. 27. The court was there interested in determining what constitutes a dedication of water to public use, and the following language was employed:

> "According to the theory of the plaintiff in this case, whenever the owner of a water supply determines to and does sell it for a price agreed on between himself and the purchasers, it immediately becomes subject to public use, and any other person to whom it can be conveniently distributed in the same manner would have the right to a proportionate share of the water on the same terms as the purchasers, and, if the supply is limited, the first purchasers must divide with all others who may come in and claim a share. Under that theory, where a person having a surplus of water parts with a portion of it by sales to others, he thereby appropriates such portion to purposes of sale and dedicates it to public use. This application of the section would destroy private rights in water and convert every sale thereon into a dedication to public use. We do not believe that the Constitution was intended to have such effect, or that it should be so construed. Article 14 taken as a whole shows plainly that it was intended to regulate the use of water appropriated and dedicated generally for sale and distribution among an indefinite number of users. It could not have been intended to declare that a single sale of a part of his water by one having more than he needs would convert the use into a public use in which others could share. If a single sale could not do this, other sales of like character would not accomplish it. The section must be understood to apply to cases where one has appropriated water generally, for sale, rental, or distribution, and not to cases where sales are made to particular persons at a fixed price by ordinary contracts of purchase and sale."

If the sale of water under contract to the city was not a dedication of it to public use, it is clear that such sale was not subject to the rate-regulating power of the municipality conferred by the fourteenth article of the Constitution. We are of the opinion that such sale and delivery were no more a dedication of the water to a public use than would have been a similar transaction between the owner of surplus water and a corporation engaged in the distribution of water to a city. It has been held that the selling of water to a public service corporation does not make the persons using such water customers of the company that sold it, at an agreed price, to the distributing company. Garrison v. North Pasadena Land, etc., Co., 163 Cal. 239, 124 Pac. 1009. It is no doubt true that the plaintiff in this action is a public service corporation but it has not dedicated its water supply to the inhabitants of Sausalito nor to the city in the usual sense of the term. The relation of the plaintiff to the municipality as such is purely contractual, and it has no relation to the inhabitants or individual water users as such.

Respondent cites authorities to the effect that a board of supervisors or other governing body of a municipality may fix rates for water supplied to such city, city and county or town, but the cases involved facts differing greatly from those presented by this record. For example, it was held in Spring Valley Water Works v. San Francisco, 61 Cal. 18, that water supplied to the city and county "is as fully covered by the express language of the article" (article 14, subd. 1) "as is water supplied to the individual consumers," and that the supervisors had power to fix a rate for water sold to the city. But there the court was considering the sale of water to the city and county as a consumer, using, for various municipal purposes, water purchased from a company occupying its streets under a franchise to sell to individuals and to collect rates. Of course the municipality may, in its governmental capacity, regulate the rates at which water may be delivered to it by a public service corporation and received by the municipality in its role of consumer. Such was the ruling in Spring Valley Waterworks v. Schottler, 110 U. S. 348, 4 Sup. Ct. 48, 28 L. Ed. 173. In the case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 270, 29 Sup. Ct. 50, 53 L. Ed. 176, it was held that a city may not unless by law authorized thereto, surrender by contract a *governmental* power such as fixing rates, and that the city's position as a heavy rate payer did not disqualify the council from fixing telephone rates.

The case of Freeport Water Co. v. Freeport City, 180 U. S. 592, 21 Sup. Ct. 493, 45 L. Ed. 679, was one involving a contract whereby a city granted to a water company the exclusive right to supply the city with water for 30 years. Such contracts were permitted by the law of Illinois, but cities were given power to authorize a corporation to construct waterworks and to maintain them at such rates as may be fixed by ordinance and for a period not exceeding the 30 years. A bare majority of the Supreme Court of the United States held that the interpretation given to the statute by the Supreme Court of Illinois must prevail because the words "fixed by ordinance" might as well mean "fixed by ordinance from time to time," as the state court decided, or "fixed by ordinance for the whole period of thirty years." But in that case it was expressly held that a city may be invested with power to bind itself by an irrevocable contract not to regulate water rates, citing in support of that view several cases, among them being Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. 736, 44 L. Ed. 886. But we need not review in detail all of the authorities brought to our attention by respondent. No case has been presented holding that a municipal corporation may vary the terms of its own solemn contract, under the guise of rate regulation, when it has gone into the business of furnishing to its citizens a commodity which it purchases, under said contract at wholesale. Section 1 of article 14 is no bar to a city's entering into a contract such as the one before us and if the contract be void it must be for some other reason.

[5, 6] Section 862, subdivision 3, of the Municipal Corporation Act (St. 1883, p. 269) gives to trustees of cities of the sixth class power "to contract for supplying the city with water for municipal purposes." Appellant insists that under that grant of power the city had the right to enter into this agreement. That the supplying of water to its inhabitants is a municipal purpose there can be no doubt (City of South Pasadena v. Pasadena Land & Water Co., supra), and it is the general rule that when a municipal corporation possesses authority to enter into contracts for the supply of water for its own use and for the use of its inhabitants, the *terms* and *duration* of the agreements rest within the sound discretion of the municipal authorities, and such contracts may only be overthrown by courts in cases of fraud, abuse, or excess of authority, or inequity, in the terms of the agreements. Dillon, Mun. Corp. (5th Ed.) § 1307. We are of the opinion that this contract is not, upon its face, vulnerable to any of the above enumerated objections.

[7, 8] Respondent insists, however, that the town has paid more than was due under the contract because the number of gallons of water admittedly furnished during the year would be worth, at 30 cents per thousand gallons, less than the amount admittedly paid to plaintiff. In support of this contention it is said that paragraphs VI and VII of the agreement are inconsistent, and that this inconsistency must be resolved in favor of the town. One of these paragraphs provides that the second party shall receive a maximum rate of 30 cents per thousand gallons when the total amount of water furnished shall not exceed an average of 200,000 gallons per day. The seventh paragraph, previously quoted herein, binds the town to pay for not less than 150,000 gallons the first year, and not less than 200,000 gallons for every other year during the life of the agreement. We fail to see any inconsistency in these two paragraphs. By the former paragraph, 200,000 gallons per day is fixed as the point beyond which the proportional diminution in the rate shall begin, while by the latter the town binds itself to pay for at least 200,000 gallons per day after the first year. Minimum payment clauses have been held valid in contracts between individuals. We see no reason to change the rule in the instance of a contract to which one of the parties is a town. In Beck v. Indianapolis Light & Power Co., 36 Ind. App. 600, 76 N. E. 313, the contract in suit bound the consumer to use enough electric current to make a monthly bill of $1 or pay the amount of said bill should sufficient current be not used. The court said:

> "This stipulation is a part of the direct obligation of the contract, and cannot be properly construed to be an agreement to pay damages for the breach thereof" (citing Johnston et al. v. Cowan, 59 Pa. 275).

[9, 10] Respondent also attacks the agreement on the ground that the town had no power to promise to pay the plaintiff $60 per day for "trying to furnish water." This position is taken in view of the language of the third paragraph in which the water company promises to "use due diligence to maintain its pipes" in good condition; to employ its "best endeavors" to cause an adequate supply of pure water to flow through its conduits, and in case of deficiency to prorate the supply between Sausalito and its other customers. This same contention is made in sev-

eral forms in respondent's brief, but wherever made is without merit. It is said that all the company needed to do to entitle it to be paid for 200,000 gallons a day was to build a pipe line and then use its "best endeavors" to make enough water flow through it. The paragraph in question is not reasonably subject to such construction. It is the usual provision whereby a public service corporation protects itself from liability for failure to furnish its commodity because of strikes, accidents, and the like, against which it cannot reasonably provide. Where a party to a contract is excused from absolute performance because of an emergency the contract is not thereby void for lack of mutuality. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co., 35 Ind. App. 351, 74 N. E. 43, 111 Am. St. Rep. 171. In Klosterman v. United Electric Light & Power Co., 101 Md. 33, 60 Atl. 252, the court was discussing a contract whereby certain subscribers agreed to pay a sum not less than a stated amount for electricity during the season "whether lamps burn or not." The agreement contained this language:

> "The electric company does not bind itself to furnish current at any particular time after the application has been accepted."

It was held that there was no lack of mutuality, the quoted language being intended to protect the defendant from unforeseen delays, such as strikes, but did not exempt it from complying literally with all of the terms of the contract, unless prevented from so doing by the exceptional occurrences against which it sought to provide. Generally a contract by which one party agrees to use his "best endeavors" to promote the sale of a commodity produced by the other party and to purchase from the producer all of such commodity as he may need and binding the producer absolutely to sell is valid and not wanting in mutuality. Spencer v. Taylor, 69 Kan. 493, 77 Pac. 276; Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 2, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 113 Am. St. Rep. 603, 6 Ann. Cas. 973. Analogous to these are cases in which a vendee agrees merely to buy what he needs of a certain product and the vendor absolutely promises to sell. Such a contract imposes upon the vendee the duty of buying what he requires from the vendor and upon the latter the obligation to sell to him at the contract price. Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553; Klipstein v. Allen (C. C.) 123 Fed. 992. And even contracts unilateral at first are sustained upon execution of the optional consideration. In this pleading it is alleged that at all times the plaintiff was ready, able, and willing to perform and did perform all of its duties arising under the agreement, including the supplying of an abundance of pure, fresh water; so that even if we should look upon the obligation of plaintiff to use its best endeavors as wanting the quality of mutuality at first, the perfect success of such endeavors, as pleaded, makes the agreement one capable of enforcement. Spires v. Urbahn, 124 Cal. 110, 56 Pac. 794; Gallagher v. Equitable Gaslight Co., 141 Cal. 707, 75 Pac. 329; Bell v. Southern Pacific R. R. Co., 144 Cal. 573, 77 Pac. 1124.

One of the cases upon which respondent lays great stress as bearing upon the alleged unfairness of the contract is Flynn v. Little Falls Electric & Water Co., 74 Minn. 183, 77 N. W. 38, 78 N. W. 106. The contract there discussed was one in which the city as a consumer was dealing with the water company. It was not acting as a water-selling corporation. The case is therefore not of any great value to us here. It was held by the Supreme Court of Minnesota that the long term of the contract, 30 years, the great number of hydrants to be paid for (35 or 40 per cent. more than the then present needs of the municipality), and the excessive price per hydrant (100 per cent. more than the real value) rendered the agreement void for unfairness. It was held, however, that the municipality had power to make reasonable contracts for the supply of water to it and its inhabitants.

[11] Nor is the contract void because it unreasonably binds Sausalito to make payments which may possibly be raised by taxes to be paid by a decreased population. Respondent cites, in the discussion of the possible decrease of the population and the bearing of such a phenomenon upon the agreement before us, the case of Westminster Water Co. v. Mayor & Common Council of Westminster, 98 Md. 552, 56 Atl. 990, 64 L. R. A. 630, 103 Am. St. Rep. 424. The citation is not apt. The contract there considered was one for the introduction of a supply of water into the city to be used in part for the suppression of fires and the sprinkling of streets. It was held ultra vires because it sought to bind the city *perpetually*, and unreasonable because it would deprive the council of legislative rights.

[12-14] Section 548 of the Civil Code is no bar to the purchase of water by a city under such a contract as this. That section was enacted in 1872, long before the adoption of section 19 of article 11 of the Constitution, and so far as it makes a street franchise necessary, was abrogated by that section, which at the time this contract was made gave to any corporation the right to occupy the streets of a city for the purpose of supplying water to the inhabitants or to the city itself. If we regard that part of section 548 of the Civil Code prohibiting the granting of an "exclusive right" as still in force, this agreement does not violate it because the contract does contemplate the possibility of the town's future purchase of water from sources other than those owned by plaintiff. Section 4412 of the Political Code, even if still in force, has reference to the supplying of water to public buildings and the term of

contract for such service. Obviously it has no application to the facts of this case.

[15] It is contended that the contract disables the city from acquiring a municipal water supply of its own, and Long v. City of Duluth, 49 Minn. 285, 51 N. W. 913, 32 Am. St. Rep. 547, is cited. That case held that Duluth could not grant a monopoly and exclude itself from establishing a municipal water plant. Here Sausalito has established a municipal water system and formed a monopoly for itself by excluding the plaintiff and all others from serving its inhabitants. But we see no reason why a city or town clothed with power to buy water for its own distributing system may not agree to purchase water up to a given quantity exclusively from one company. Such a contract would be enforced even if the city should conclude to procure a supply of its own in addition to its own works. The power to contract for a reasonable length of time implies the power to forego other means of procuring water for a like period. Walla Walla v. Walla Walla Water Co., 172 U. S. 7, 19 Sup. Ct. 77, 43 L. Ed. 341.

[16] Does defendant's promise to pay for not less than 200,000 gallons of water a day amount to a loan of the credit of the town contrary to the provisions of section 31 of article 4 of the Constitution? Our answer to this question is in the negative. It is contended that the promise to pay for 200,000 gallons of water per day was based upon the covenants of the company to do certain things, among them to build a pipe line from Corte Madera, and that therefore the construction of the said pipe line was accomplished upon the loaned credit of the municipality. But we cannot accept that view. The obligation of the company was to be ready to deliver 200,000 gallons of water per day. The building of the pipe line without the delivery of the water, or the ability to deliver it, would have entitled the plaintiff to nothing at all. There is no parallel between this case and Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670. In that case the rental which the town agreed to pay was based in part, at least, upon the consideration of the company's promise to build and operate a railroad outside of the city as the company's private enterprise. Here the company had a water supply distant from Sausalito, and the city contracted in view of that circumstance. The company's promise to extend its pipes at its own expense so that it might deliver water to the city was not at all analogous to the promise discussed in the Higgins Case. Of course, the contracting parties considered, as was proper, the reasonableness of the terms in view of the service to be rendered and the cost of performing such service, but we fail to see how the fact that part of the cost to the company was to be incurred after the signing of the contract converted any of the stipulations thereof into a loan of the town's credit. If the water company, at the date of the bargain with the city, had owned a pipe line capable to conveying sufficient water to the limits of the town, the trustees, in deciding whether or not the terms discussed were reasonable, would have taken into consideration the value of that pipe line as a part of the works of the water company. We fail to see how the situation was changed by the fact that conduits from Corte Madera to Sausalito were necessary before the Marin Water & Power Company could deliver water to the latter city. Neither does the fact, if it be a fact, that the water company would not have extended its system to Sausalito if this contract had not been made, in any way alter the situation. But it does not by any means appear that the extension of the water system of the plaintiff was induced solely by reason of the town's patronage. While the water company obligated itself to lay pipes from Corte Madera, it also secured the privilege of laying its mains through the streets of Sausalito for the purpose of delivering water to persons residing beyond and outside of that town.

Alter v. Cincinnati et al., 56 Ohio St. 59, 46 N. E. 69, 35 L. R. A. 737, declared unconstitutional an act which sought to permit cities to own waterworks in partnership with private proprietors. That authority is not at all in point here, and contains nothing in conflict with the views here expressed.

[17] Respondent assigns as a reason why its demurrer was properly sustained, the failure of the complaint to set forth the damage suffered by appellant which, according to respondent's theory, should be measured by the terms of section 3311 of the Civil Code as the difference between the contract price and the value to the water company of the water which the town of Sausalito did not take. The contract with which we are here concerned, however, is not the usual agreement to accept and pay for personal property. It is, as we have shown, one of that class of agreements in which one of the parties promises to pay a minimum sum for a commodity at a fixed rate, such amount to become due whether enough of the commodity to equal such minimum price at the agreed rate is required or not. Such agreements have been upheld, and the minimum rate has been sustained as the true measure of recovery; the promise to pay such sum being a part of the direct obligation of the contract and in no sense a covenant for liquidated damages in case of breach. Beck v. Indianapolis Light & Power Co., supra; Klosterman v. United Electric Light & Power Co., supra.

[18] The omission from the complaint of an allegation that there was money enough for the payment of plaintiff's claim in the "water supply fund" or in the "general fund" (to which plaintiff had promised to look for payment in case of deficiency in the former fund) was not a failure to state a cause of action. The condition of a particular fund

would have nothing to do with the justness of a claim, and the depletion of such a fund is never a defense to an action against a municipality. The averment of the amount of money in a fund from which a given claim must be paid is therefore not necessary. Weaver v. San Francisco, 111 Cal. 327, 43 Pac. 972; Higgins v. San Diego Water Co., 118 Cal. 528, 45 Pac. 824, 50 Pac. 670; Doland v. Clark, 143 Cal. 179, 76 Pac. 958.

[19] Respondent asserts that the town by going into the business of furnishing its inhabitants with water itself becomes subject to the provisions of article 14, § 1, of the Constitution, and that it violates that section of the Constitution when it agrees to establish for a period of 10 years rates which will produce a sum sufficient to pay for all water furnished by the water company. In People v. Stephens, 62 Cal. 237, Mr. Justice Ross writing the opinion of the court, declared it too plain for argument that the rates or compensation required to be fixed by that section of the Constitution did not mean the rates or compensation to be collected by the municipality itself for water which it should furnish. Feil v. City of Cœur d'Alene, 23 Idaho, 63, 129 Pac. 643, 43 L. R. A. (N. S.) 1095, was a case dealing with the bonds issued to pay for a municipal water system which was to be purchased. In the dissenting opinion of Mr. Justice Stewart is a statement that the city may annually regulate rates in spite of an ordinance pledging it to keep in force prices sufficient to pay the expenses of operation and other charges in favor of the bonds. This is not authority on the point in support of which it is cited.

Respondent cites authorities to support the proposition that furnishing water to a town for distribution through its municipal system is a dedication of the water to a public use. He cites authority to the effect that water may be condemned as for a public use even where the distribution is to be made in part through the instrumentality of corporations other than the one seeking the condemnation. Undoubtedly that is the doctrine of such cases as State v. Superior Court of King County, 52 Wash. 199, 100 Pac. 317, 21 L. R. A. (N. S.) 448, the strongest authority on this point which is presented, but cases of eminent domain throw no light upon the main question in this case. While the water supplied by plaintiff to defendant is ultimately applied to public use, does the contract price therefor constitute the "rates" or the "compensation" subject to the "regulation" mentioned in section 1 of article 14 of the Constitution? We have been compelled to answer that question in the negative.

The judgment is reversed.

We concur: LORIGAN, J; HENSHAW, J.

SHAW, J. (concurring). I concur in the judgment, but I do not think it is necessary to consider all the questions discussed in the opinion of Justice MELVIN. I base my concurrence upon the following propositions: I think it sufficiently appears that the Marin Water & Power Company was a public service corporation, engaged in selling water to the public. It does not follow, however, that all of the water it owned was actually applied to public use or ever had been so applied. The water which it agreed to sell and deliver to the town of Sausalito by the contract sued on was water which had not been previously used, either by the said company or by the public. If it had appeared that some rate-fixing authority having power in that behalf had fixed rates to be charged by the Marin Water & Power Company for sales of water by it to public use, it may be that a contract between the company and a purchaser for the sale of water at a different rate would be, to that extent, inoperative. But in this case no rate-fixing power having jurisdiction to fix rates for that company had ever exercised such power, and no rates at which that company should sell this water had been fixed. In this situation, the company clearly had the right to fix its own rates and make agreements with others for the sale of its water upon such rates, and such contracts would be binding upon both parties, at least until the proper authority had fixed a different rate. Fresno C. & I. Co. v. Park, 129 Cal. 437, 62 Pac. 87; Stanislaus Water Co. v. Bachman, 152 Cal. 730, 93 Pac. 858, 15 L. R. A. (N. S.) 359. This being an action to recover the amount due on such a contract for the sale of the water at a rate fixed by the parties, and no governmental authority having fixed a different rate, there can be no legal objection to the validity of the agreement, which is available as a defense to the claim for payment of the price agreed upon. Of course, if the Marin Water & Power Company was not a public service corporation, or had not dedicated the water which was the subject of this particular sale to any public use, there can be no question but that the contract under consideration would be valid and enforceable. In either case, therefore, I think the contract was valid and that the plaintiff was entitled to recover the amount due under it.

What the effect would be if a rate were fixed by competent authority for the government of said company in its supply to consumers is a question not here involved. Nor does the question arise whether the town of Sausalito could, by ordinance, fix rates for the Marin Water & Power Company different from those fixed by this contract. It has not fixed such rates. It is not seriously disputed that the town may control the rates to be charged by it to its inhabitants for this water so long as it does not thereby prevent the enforcement of this contract. What would be the result if such rates were too small to enable it to pay the sums due the company is another question not here involved. The possibility that it may do this is no defense to an action for water already furnished, nor does it make the contract invalid as against public policy. In my opinion none of these questions need be decided in this case. The case, as presented, is the very simple and ordinary case of an action to recover a sum due upon a contract as the purchase price of property sold and delivered in pursuance thereof.

For these reasons I think the plaintiff was entitled to recover, and that the judgment should be reversed.

I concur: SLOSS, J.

168 Cal. 617

SCHMIDT et ux. v. UNION OIL CO.
(Sac. 2110.)

(Supreme Court of California. Oct. 8, 1914.)

APPEAL AND ERROR (§ 827*)—HEARING—SETTING ASIDE SUBMISSION—PLACING CASE ON WRONG CALENDAR.

Where the clerk of the Supreme Court inadvertently numbered a case as among those to be placed upon the calendar for the Sacramento district, though the appeal was from a county in the San Francisco district, and it was argued at Sacramento without any one appearing for the appellant, who had no notice of the setting of the case, the submission would be vacated and the cause placed upon the San Francisco calendar, since while counsel may not be entitled to specific notice that a case is set on one of the calendars for hearing, they are entitled to assume that it will not be put upon the calendar of a district to which the case does not belong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3208; Dec. Dig. § 827.*]

In Bank. Appeal from Superior Court, Fresno County; M. L. Short, Judge.

Action by C. H. Schmidt and wife against the Union Oil Company. From a judgment for plaintiffs, defendant appeals. Submission of the cause vacated, and cause restored to the calendar.

Sutherland & Barbour, of Fresno, Thomas O. Toland, of Los Angeles, and W. A. Sutherland, of Fresno, for appellant. Joel H. Smith, of Selma, Geo. Cosgrave and M. K. Harris, both of Fresno, and Harris & Hayhurst, for respondents.

PER CURIAM. This is an appeal from a judgment of the superior court of Fresno county. The trial was had before Hon. M. L. Short, judge of the superior court of the county of Kings, sitting in Fresno county. In the division of counties of the state into districts for the hearing of appeals in this court, Fresno county is placed in the district of San Francisco and Kings county in the district of Sacramento. When the transcript on appeal was filed the clerk of this court assumed from the name of the judge that the appeal was from the county of Kings, and inadvertently numbered the case as among those to be placed upon the calendar for the Sacramento district. The appeal was subsequently assigned to department 1 and was placed upon the calendar of that department for argument at Sacramento on May 6, 1914. When the case was called for hearing there was no appearance for the appellant, counsel for respondent alone appearing and arguing, and the cause was submitted.

The appellant now calls our attention to the fact that the appeal was set for hearing in the wrong district, and that the appellant did not, nor did its attorneys, have any notice of the setting of the case. It is also stated that said attorneys desired and now desire to make an oral argument in support of the appeal.

Under these circumstances it is plain that the hearing and submission of the cause were irregular. The appeal should have been treated as one belonging to the San Francisco district, in which event it would have taken its proper place upon the San Francisco calendar. While counsel may not be entitled to any specific notice that a case is set on one of our calendars for hearing, they are entitled to assume that it will not be put upon the calendar of a district to which the case does not belong.

It is therefore ordered that the submission be vacated, and that the cause take its place among those to be set on the San Francisco calendar. The clerk is further directed to notify the attorneys for the respective parties of this order.

168 Cal. 612

WARDEN et al. v. CITY OF SOUTH PASADENA. (L. A. 3354.)

(Supreme Court of California. Oct. 8, 1914.)

1. MUNICIPAL CORPORATIONS (§ 827*)—TORTS—DEFECTS IN DRAINS.

Where a city laid a drain pipe of sufficient size and proper construction to carry the water of a natural gully under a street, to which drain the owner of the land on the lower side of the street connected a smaller drain of inferior construction to carry the water through his land, the city is not liable to a grantee of the owner for damages caused by the flooding of the premises, due to the inferior construction of the drain through the land, and the cracking of the drain under the street because of pressure caused by the smaller connection.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1772–1776; Dec. Dig. § 827.*]

2. EVIDENCE (§ 245*) — ADMISSIONS — PUBLIC OFFICERS.

Declarations by the city street superintendent and engineer that the city put in the drain under the lot, which declarations were made when they were not acting in behalf of the city or speaking for it, are not admissible in evidence against it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 937–944; Dec. Dig. § 245.*]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Julia P. Warden and another against the City of South Pasadena. Judgment for plaintiffs, and defendant appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

John E. Carson, of Los Angeles, for appellant. John F. Poole, of Los Angeles, for respondents.

SHAW, J. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The cause of action sued on arose, originally, in favor of Mrs. T. P. Jackson. The complaint alleges that it was assigned by Mrs. Jackson to the plaintiffs. The evidence shows that it was assigned to the plaintiff Julia P. Warden, and neither the complaint, the findings, nor the evidence show that the two plaintiffs sustained the relation of husband and wife, nor that the cause of action was the separate property of Julia P. Warden. No objection is made on this account by the defendant, and therefore, for purposes of this decision, we will assume that, if the plaintiffs are husband and wife, the subject of this litigation became the separate property of Julia P. Warden, and that C. D. Warden is a nominal party only.

The complaint alleges that Mrs. Jackson was the owner of a lot in the city of South Pasadena, situated at the southwest corner of Foothill street and Fair Oaks avenue, on which she had erected a dwelling house in which she resided; that prior to her purchase of the lot the city constructed and placed a drain pipe across Foothill street, in front of said lot, and across the said lot; that said drain pipe was defectively constructed; and that, during a heavy rain storm, the drain pipe broke where it crossed Foothill street and thereby the said lot and residence were flooded with the water from the drain pipe and greatly damaged.

The answer admitted that the city had constructed and placed a drain pipe across Foothill street, but denied that it had constructed or placed any pipe across the said lot, or that the drain pipe across Foothill street broke, or that it was defectively constructed.

The evidence showed that, before Mrs. Jackson acquired the lot, one Hardison owned the land on both sides of Foothill street, including this and other lots; that a gully or depression some 8 or 10 feet deep, formed by storm water, extended through this land and the lot in question, crossing said street at the place where the drain pipe was afterwards placed; that the city at one time placed a wooden box or culvert across the street to carry the water of the gully under the street; and that, during Hardison's ownership, the city, being about to grade and improve the street, took out the wooden culvert and laid in its place a 16-inch vitrified iron drain pipe, composed of joints 2½ feet long, being the pipe in question. This pipe was put there solely for the purpose of carrying under the street the water naturally flowing in the gully. It was well laid, properly connected, and of sufficient size to carry the water and withstand all pressure that would be put upon it from storm waters flowing therein under the natural conditions existing at the time it was laid. After laying this pipe the street was by the city graded and filled in across the depression, so that its surface was 10 feet above the pipe. After this was done, Hardison, the owner, began the improvement of his land. He put in a 12-inch drain pipe in the gully above Foothill street for a distance of over 400 feet, connecting it at the street with the upper end of the 16-inch pipe. Below the street the gully ran through the lot afterwards sold to Mrs. Jackson. In this part of the gully Hardison also laid a 12-inch pipe extending from the street line into the lot beyond the place where the house was afterwards erected. This pipe he connected with the lower end of the 16-inch pipe, at the street line, by inserting the 12-inch pipe into the 16-inch pipe and cementing around the connection. He did this without the consent of the city and over the protest of its street superintendent, who also, at the time, warned him that he should not connect a 12-inch pipe with a 16-inch pipe. The city had no connection whatever with the laying of the pipe in the land of Hardison. Hardison used inferior pipe. Some of it was broken, and he patched it with other pieces of pipe and cement. After laying this drain pipe in his land, Hardison filled in the gully to a level with the surface of the street, covering the pipe and leveling his ground so as to make it suitable for building lots, and thereupon he sold the lot in question to Mrs. Jackson.

She knew that the lot had been filled and leveled and that the 12-inch pipe had been laid in it, and, with that knowledge, she built the house and occupied it.

There was evidence that the kind of pipe used by the city and by Hardison is not designed to stand pressure, and that it will not stand a pressure of a head of water exceeding 8 or 10 feet, but that it is well adapted for drainage purposes if properly laid; also that when a 12-inch pipe is used as an outlet for a 16-inch pipe it tends to cause an obstruction at the junction when there is a flood of water; that this would cause the water to back up in the pipe to its head; and that the resulting pressure would be the greatest upon the 16-inch pipe just above the junction. The head of the pipe at the upper end above the street crossing was some 20 feet higher than its elevation at the crossing. There was also evidence that the 12-inch pipe leaked freely below the junction, and that around the house the lot in question had settled very much prior to the excessive flood complained of. An examination of the 16-inch pipe the day after the flood showed that it had not broken, but that there was a small crack in the top of one joint, barely wide enough to admit a case knife blade, through which some water had flowed, but that not enough could have come through this crack to have caused any damage to Mrs. Jackson's property.

[1] There is no tenable theory on which the city can be held liable for this damage. The case is unlike the case of Kramer v. Los Angeles, 147 Cal. 668, 82 Pac. 334, on which the plaintiffs rely. In the city of Los Angeles there was once a natural gully or arroyo, extending through a considerable portion of the city over private property, which carried much water in times of flood. The city, with the consent of the lot owners, had built therein, and was maintaining, a public storm drain, which, from its imperfect construction, burst and flooded Kramer's premises. The decision was that the city, having built this drain, was bound to use due care in its construction and in maintaining it, and that it was liable for the damage caused by its defective construction. In the case at bar the city of South Pasadena had done nothing more than simply to place a drain or culvert under the street to carry water from the upper to the lower side thereof. It is not claimed that this pipe was not of ample size and sufficiently strong for that purpose, if the land above and below had been left in its natural condition, or if extensions connecting with it had been of the same size and properly constructed. The evidence was to the effect that the small crack in the city pipe was caused by too much pressure of water and that this pressure was due to the negligence of Hardison, the plaintiff's predecessor in interest, in connecting a 12-inch pipe as an outlet to a 16-inch pipe. There was no drainage system built or maintained by the city which included the pipes under Mrs. Jackson's lot. The city had not undertaken to maintain these pipes, and it was under no obligation to do so. The fault was that of Hardison, for whose acts the city was not responsible. His successors, so far as this matter is concerned, stand in his shoes, and must suffer the consequences of his negligence. They have no recourse on the city.

[2] There was some testimony given by Mrs. Jackson, for the plaintiff, to the effect that on the day after the injury the defendant's street superintendent and city engineer had informed her that the city had put in the pipe extending under the lot. Neither of them were at that time acting in behalf of the city, nor speaking for it, and the statements so made, even if they made them, would not bind the city nor constitute evidence against it. The street superintendent testified that he did not make the statement and it appeared that the statements of the engineer on their face purported to be a mere narration of information, and not a statement of fact. The evidence showed without conflict that Hardison had laid the pipe as above related. The city engineer did not hold that office at the time the pipes were laid, and whatever he may have said on the subject was mere hearsay. There was no substantial conflict in the evidence on the material facts in the case. The court erred in holding the city liable for the damage.

The judgment and order are reversed.

We concur: SULLIVAN, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

168 Cal. 516

HUMBLE v. GAY. (L. A. 3306.)

(Supreme Court of California. Oct. 5, 1914.)

1. Gifts (§ 34*)—Inter Vivos—Condition.

Where a man had offered to give his collection of rugs to a woman at the same time that he proposed marriage to her, but she did not then accept either the rugs or the proposal, a subsequent letter, in which he stated that the rugs were at her disposal, manifested an intention that the rugs were to be given to her only on condition of marriage.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 68–71; Dec. Dig. § 34.*]

2. Gifts (§ 49*)—Inter Vivos.

When the claim of a gift is not asserted until after the death of the alleged donor, it must be sustained by clear and satisfactory evidence of every element necessary to such a gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. § 49.*]

3. Gifts (§ 17*)—Inter Vivos—Written Instrument—Letter.

A love letter written by a man to a woman to whom he had proposed marriage, in which he stated that certain rugs were at her disposal, was manifestly not intended to be used by her as evidence of her right to the rugs, and therefore was not a valid gift to her, under Civ. Code, § 1147, providing that a gift is not valid unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery, unless there is an actual or symbolic delivery of the thing given.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 28–42; Dec. Dig. § 17.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Adelaide L. Humble against Frederick L. Gay. Judgment for plaintiff, and defendant appeals. Cause transferred to Supreme Court from the District Court of Appeal for failure of the Justices to agree. Reversed and remanded.

J. W. McKinley, of Los Angeles (Allen W. Ashburn, Jr., of Los Angeles, of counsel), for appellant. E. R. Young, of Los Angeles (C. R. Phelps, of Los Angeles, of counsel), for respondent.

PER CURIAM. This cause was transferred to the District Court of Appeal for the Second District. The justices of that court being unable to agree upon a judgment, the cause was duly transferred to this court for decision. The following opinion, prepared by

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hon. Victor E. Shaw of that court and concurred in by Mr. Justice James, is adopted as the opinion and judgment of this court:

Action in claim and delivery to obtain possession of 119 Indian blankets and rugs held by defendant as executor of the estate of Frank P. Sauerwein, deceased, which blankets and rugs plaintiff claims were the subject of a gift inter vivos made to her by Sauerwein. Judgment went for plaintiff, from which defendant appeals upon a bill of exceptions.

The only evidence touching the question in issue was that given by plaintiff, from which it appears that plaintiff, whose home was at Decatur, Ill., came to California in 1909, where, in February, 1910, she met Sauerwein, who at the time was the owner of the blankets and rugs in question, having them stored at the house of Mrs. Gay. During plaintiff's stay in California, which ended in April, 1910, she and Sauerwein saw much of each other. The acquaintance on his part developed to the extent that he sought an engagement of marriage with her, at which time, while discussing the rugs and a picture of his house at Taos, he said to her:

"They are yours; you may have those. I will give those to you."

"The day," says plaintiff, "that he said that I might have the rugs was the same day that he proposed to me. I did not accept him then or afterwards. I did not accept the rugs, and I did not accept his offer of marriage. We were never really engaged. * * * There was something probably as binding as that, or more binding. We were very close to each other."

On her way home, and while at the Grand Canyon, plaintiff wrote Sauerwein, who was in Los Angeles, in which letter she referred to the beauty of the rugs which she had seen at the Hopi House and expressed a desire to see his collection of rugs. In response to this letter Sauerwein, on April 9, 1910, wrote her as follows:

"My Dear Girl:

"Although I failed to find your letter, as I hoped, at the Art School, it came later to the house, where I found it on returning from my second daily visit at the doctor's office. It was a good letter. You believed that you wrote it under two different moods, because it was written at different times, but it really was much the same in spirit throughout. Possibly there *was* some slight expression born of the night, the absence of the sun's light; but it was *you* from first to last. You said much in a few brief pages. Especially welcome was the spirit in your words: 'When I see you we will talk about it in detail.' No matter what 'it' might be we were to talk about (it was the G. Cañon), the way you wrote the sentence appealed to me. I have wished much for you; awakening with a gray dawn this morning, the desire was almost oppressive.

"So, Miss Humble, you liked the old rugs at the Hopi House, and really have a desire to see *my* collection. I think you are very lacking in both enthusiasm and appreciation. Now why did you not say something to the effect that you had not before understood my liberality and princely generosity when I told you that *you might have them;* merely because I made no blatant boast, you did not give my collection a second thought. O *you!!* Well, you perverse person, I still have what I assure you is a very rare accumulation of Indian textiles, and—now mark my prodigal—what? selfishness—they *are* (I make a low salaam) at your disposal. There!

"I am very glad you liked Mr. Brant. You say that he is a very fine nature. I must not write more now, for a Mr. Maxwell is about due here to look at my work. Not to buy. He is the one writing the art papers for Chicago magazines. The day is gray and chill; yesterday was like it. I wish you had taken me to the desert. * * * [Signed] Francis."

The remainder of the letter refers to medical treatment being administered to him and negotiations for the sale of pictures. In reply to this letter plaintiff testified that she wrote Sauerwein saying:

"Mr. Sauerwein, I will accept the rugs, meaning I will surprise you by saying I will take the rugs, because he had offered them to me before and I wrote, sort of feeling he would be surprised about it; that I would now take the rugs since he had offered them to me before."

Plaintiff's contention that Sauerwein gave her the rugs, in the absence of any delivery thereof, is based upon the paragraph of this letter commencing with the sentence:

"So, Miss Humble, you liked the old rugs at the Hopi House, and really have a desire to see my collection."

While other letters passed between Sauerwein and plaintiff, no further reference by either of them appears to have been made to the rugs, or the alleged gift thereof. On April 19th Sauerwein left California for Stamford, Conn., where he died June 14, 1910. After the death of Sauerwein, plaintiff, in August, 1910, received a copy of his will, and on two occasions saw defendant in Chicago, where she talked to him about Sauerwein's estate; he telling her that Sauerwein had left everything to her. She did not tell defendant that Sauerwein had in his lifetime given her the rugs, though she told him that he had offered her everything he had. Plaintiff knew the rugs were packed and left by Sauerwein at Mrs. Gay's, and although she returned to California in March, 1912, and called at Mrs. Gay's, she made no claim to the rugs, nor referred to the fact that Sauerwein had given them to her; nor did she, until some two years after the death of Sauerwein and immediately before instituting this suit, disclose to any one connected with Sauerwein's estate the fact that she claimed the rugs as a gift.

Section 1146, Civil Code, defines a gift as "a transfer of personal property, made voluntarily, and without consideration." It may be made verbally, in which case it "is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee" (section 1147); or by an instrument in writing, sufficient in form and words used to transfer title, duly executed and delivered by the donor to the donee, with a purpose of transferring title and constituting means whereby the person to whom the gift is made may obtain actual possession thereof, in which case delivery of the property is not a necessary prerequisite to the validity of the gift. Estate of Hall, 154 Cal. 531, 98 Pac. 269.

[1, 2] Plaintiff relies upon the letter from Sauerwein, dated April 9, 1910, as such duly executed instrument in writing, sufficient in form and substance to transfer the title to the rugs. The claim of gift was not asserted by plaintiff until long after the donor's death. "When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift." Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 Pac. 389. "Gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts." Matter of Manhardt, 17 App. Div. 1, 44 N. Y. Supp. 836. See, also, In re O'Connell, 33 App. Div. 483, 53 N. Y. Supp. 748; De Puy v. Stevens, 37 App. Div. 291, 55 N. Y. Supp. 810. According to plaintiff's testimony the relation of Sauerwein to her was and had been that of a man addressing the woman whom he sought to make his wife. In view of this relation and the fact that he had on a former occasion, coupled with a proposal of marriage, which plaintiff did not accept, offered to give her the rugs and the house at Taos, it is but fair to assume that the statement contained in the letter, "they are at your disposal," was likewise intended to be coupled with the condition that plaintiff should agree to marry him. This conclusion is borne out by the fact that in the letter he speaks of the occasion "when I told you that you might have them," which refers to the time of his proposal. Hence, if the statement in the letter be deemed sufficient to transfer the title, it was without consideration, but on condition that plaintiff accept his proposal of marriage, which she says she never did. Whether the transaction be deemed a gift or a contract, performance of the condition was a necessary prerequisite to the passing of title.

[3] Not only are the words used in the letter, "they are at your disposal," inapt and inappropriate words of transfer, especially when inserted in a document which did not purport to be a conveyance (Davis v. McGrew, 82 Cal. 135, 23 Pac. 41), and therefore insufficient to transfer the rugs to plaintiff, but, in our opinion, it is manifest that Sauerwein never intended that this love letter should constitute the means whereby plaintiff should obtain from Mrs. Gay possession of the rugs. Says the Supreme Court, in Knight v. Tripp, 121 Cal. 674, 54 Pac. 267:

> "There must be both a purpose to give and the execution of this purpose. The purpose must be expressed—either orally or in writing—and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor. * * * It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

See, also, Allen-West Comm. Co. v. Grumbles, 129 Fed. 289, 63 C. C. A. 401. If it was not intended that the letter should divest Sauerwein of all dominion over the rugs and constitute the sole and only evidence of plaintiff's title as a means of enabling her to obtain possession thereof, then clearly some further act on the part of Sauerwein was contemplated as necessary in order for plaintiff to obtain possession thereof, in which case the letter was merely an expression of intention to make a gift.

The judgment is reversed.

(168 Cal. 536)

WILMARTH v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (Sac. 2070.)

(Supreme Court of California. Oct. 5, 1914. Rehearing Denied Nov. 4, 1914.)

1. Insurance (§ 527*) — Risks Insured against — Death while in "Passenger Elevator."

Under an accident insurance policy providing for double indemnity for any bodily injury sustained by insured while in a passenger elevator, the term "passenger elevator" did not refer to a definite type of elevator, but included any elevator ordinarily or customarily used for conveying passengers, though also used for conveying freight, and though not of any particular form, made in any particular way or with any particular kind of gates or safety contrivances.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.*]

2. Carriers (§ 280*)—Liability for Injuries—Owner of Elevators.

The liability of the owner of an elevator for injury to a passenger is analogous to that of a common carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

3. Evidence (§ 455*)—Parol Evidence—Construction of Contract.

In an action on an insurance policy providing for double indemnity for injuries sustained while in a passenger elevator, evidence as to a conversation between insured and the person who secured the insurance and delivered the policy relative to the meaning of the double indemnity clause was properly excluded, the words of the policy not being ambiguous, and it not appearing that such person had authority to amplify or extend the meaning of the language of the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.*]

4. Evidence (§ 455*)—Parol Evidence—Construction of Contract.

In an action on an insurance policy providing for double indemnity for injuries sustained while in a passenger elevator, evidence that among those engaged in the manufacture of elevators, the term "passenger elevator" had a definite meaning, and that the elevator in question, though used for the carriage of both passengers and freight, was not a passenger elevator, was properly excluded, as those words used in a policy of insurance are to be construed in their ordinary and popular sense.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on an insurance policy providing for double indemnity for injuries sustained in a passenger elevator, the admission of evidence that after the accident the elevator in question was used for carrying passengers was harmless, where it showed no different use subsequent to the accident than the use prior to the accident which had been established without contradiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

6. EVIDENCE (§ 474*)—OPINION EVIDENCE—NONEXPERT WITNESSES.

In an action on an insurance policy providing for double indemnity for injuries sustained in a passenger elevator, witnesses who had opportunities for observing the elevator in question and the frequency of its use were properly admitted to testify that it was used for passengers during a certain percentage of the trips, this being the sort of opinion evidence that nonexperts may give when they have opportunity of observation, ordinary attention, and intelligence and veracity, and the fact that they took no accurate or systematic data with reference to the trips of the elevator going to the weight rather than to the admissibility of the testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

7. INSURANCE (§ 527*) — RISKS INSURED AGAINST—DEATH WHILE IN PASSENGER ELEVATOR.

Under an insurance policy providing for double indemnity for injuries sustained while "in" a passenger elevator, the insurer was liable for the double indemnity, where insured sustained injuries from which he died while alighting from a moving elevator.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.*]

8. INSURANCE (§ 527*) — RISKS INSURED AGAINST—DEATH WHILE IN PASSENGER ELEVATOR.

Under an insurance policy providing for double indemnity for injuries sustained while in a passenger elevator, where insured stepped or fell from a moving elevator and then fell down the elevator shaft, if the moving cause of the killing originated in the elevator, the insurer was liable even though death was produced by the fall down the shaft, and hence an instruction that the double indemnity could not be recovered unless the injury was sustained while in a passenger elevator was properly modified by inserting after the word "injury" the phrase "or the proximate cause thereof."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.*]

9. TRIAL (§ 266*)—INSTRUCTIONS—REFERENCE TO AUTHORSHIP OF INSTRUCTIONS.

It was not error for the court to preface the instructions requested by each party with a statement as to the party that had requested such instructions, as the jurors must have known that when adopted the instructions became those of the court without regard to authorship.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 664–667; Dec. Dig. § 266.*]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Glenna Wilmarth against the Pacific Mutual Life Insurance Company of California. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

W. H. Davis, of Los Angeles, and A. M. Seymour and Archibald Yell, both of Sacramento, for appellant. Devlin & Devlin, of Sacramento, for respondent.

MELVIN, J. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The suit was upon a policy of accident insurance issued to Charles B. Wilmarth, husband of the plaintiff. Mr. Wilmarth was killed by a fall from an elevator, and the defendant acknowledged liability under the policy for the sum of $5,500, which was paid into court. The policy provided that the indemnity therein specified should be doubled if the bodily injury should be sustained by the insured "while in a passenger elevator (excluding elevators in mines)." Judgment was given for the amount of double indemnity, and appellant's principal objections thereto are based upon the alleged errors of the court in giving instructions relative to the meaning of the expression "passenger elevator."

The elevator in question was in the Studebaker building in the city of Sacramento. The building was five stories in height and was occupied by the Studebaker Company in the conduct of its business of selling automobiles, wagons, and other vehicles and farming implements. The record contains a photograph of the elevator, as well as a description of its dimensions. The floor of the elevator was 9 feet 2 inches wide and 19 feet 6 inches long. The long sides were protected by substantial wire nettings but the ends were open. At the entrances to the shaft on the floors of the building there were gates which moved in grooves in upright posts set at the corners of the shaft. These gates moved up and down and were balanced by weights attached to pulleys, much in the same manner that windows are commonly provided with counterweights.

The accident which resulted in Mr. Wilmarth's death occurred at a time when a salesman of the Studebaker Company, Mr. Halsey Smith, was in charge of the elevator. Mr. Shearer, an employé of a contractor who was doing some electrical work in the building, and Mr. Wilmarth, who was secretary of the association giving the Citrus Fair, got into the elevator at the ground floor. Mr. Wilmarth took a position near the operator and gave him a cigar, and in response to an inquiry by the latter said that he wanted to get off at the third floor. No attempt was made to stop the elevator at the second floor but Mr. Shearer stepped off there, the gate to the elevator shaft being raised. Mr. Wilmarth dashed past Smith as the elevator approached the second floor. The latter hearing a noise looked around and saw Mr. Wilmarth with his feet upon the floor of the building and the elevator just scraping his shoulders. Mr. Shearer who had stepped off the elevator at the second floor and had advanced 8 or 10 feet, heard an unusual noise and turning saw Mr. Wilmarth with his shoulders against the edge of the platform and his feet on the second floor. No part of his body was in the elevator. "I tried to catch him," said Mr. Shearer in his testimony. "The elevator was off the floor about 2½ or 3 feet, and he just tipped right back and went down the shaft and his feet dragged over. The elevator was going up all the time." The distance from the second floor of the building to the bottom of the raised gate was 6½ feet.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The evidence shows that the elevator had long been used for conveying both freight and passengers. It had a guaranteed capacity for 8,000 pounds which had probably been exceeded on at least one occasion. The Studebaker Company maintained an electric garage on the second floor, and eight or nine electric automobiles were daily taken up and down in the elevator. The third floor was not occupied by merchandise, but was being reserved for a Citrus Fair, which was to be given, and which was given, at a time commencing two days after the accident. About a week previous to Mr. Wilmarth's death a ball had been given on the floor assigned to the Citrus Fair by the management of that enterprise. The elevator was used in conveying the guests who attended the ball in large numbers. On that occasion the manager of the Studebaker Company put an extra man on the elevator to attend to opening and closing the gates and to prevent overcrowding. During the progress of the fair gates were placed inside the elevator, and ingress and egress were permitted only through one of these gates. The elevator was commonly used by the employés of the Studebaker Company in passing between the various floors of the building and in conveying customers. It was also used in moving all of the automobiles and other merchandise belonging to the corporation.

[1] Appellant's first point of attack is upon the following instructions given by the court:

"The court instructs the jury in this case that a passenger elevator, within the meaning of the terms of the policy of the insured, is one in which passengers are ordinarily carried. If you find from the evidence that the elevator referred to in the evidence was one in which passengers were, on and prior to February 11, 1911, carried up and down at various times, it was a passenger elevator within the meaning of the policy, at the time of the injuries received by Wilmarth, although it may have been used for purposes of carrying freight.

"The court instructs you that a passenger elevator need not be of any particular form, or made in any particular way, or with any particular contrivance or device. It does not mean that it must be used exclusively for the carriage of passengers. If it is customarily used for the carriage of passengers, this is sufficient to constitute it a passenger elevator within the meaning of the policy. If the jury believe that a large number of persons have been carried at various times in this elevator, as passengers, and has been used daily for the carriage of persons, it then is a passenger elevator.

"The court instructs the jury that a passenger elevator need not be of any particular form or size or have any particular kind of gate or safety contrivance. If an elevator is customarily used for the purposes of carrying human beings as passengers from one floor of a building to another floor in the same building, it is to be considered a passenger elevator."

The court refused the following proposed instructions of the defendant:

"I instruct you that if said elevator was designed and constructed for the carriage of freight and was prior to and up to the time of the injury to the insured used for the carriage of freight, then said elevator is not a passenger elevator within the terms of the policy of insurance issued by the defendant to said insured.

"I instruct you that an elevator designed and constructed for the purpose of carrying freight and used in the carriage of freight, although the same may at times be used for the carriage of passengers, is not a passenger elevator within the meaning of the policy of insurance referred to in the pleadings and evidence in this case."

Appellant contends that the purpose which the insurer had in mind was to offer double indemnity for accidents suffered in elevators devoted to the carriage of passengers exclusively, because such elevators are commonly more carefully safeguarded than those used for the moving of freight, and that the chances of accidents from their operation are very slight. The answer to this position of appellant is that if the insurer had intended such a limitation upon the term "passenger elevator" it would have been very easy to express the exact meaning desired. But, counsel for defendant assert there is a complete analogy between the terms "freight car" and "passenger car" and the expressions "freight elevator" and "passenger elevator," and the ordinary man when he uses the term "freight car" or "passenger car" immediately pictures in his mind a type of construction. So also (they argue), the terms "freight elevator" and "passenger elevator" convey definite pictures of types of elevators. There are two objections to this argument. One is that types of elevators are not crystallized in the mind like types of cars, and the other is that the only reason for associating the terms "freight car" and "passenger car" with definite forms of construction is that customarily the types named are devoted to the one or the other purpose of carrying merchandise or persons so that after all it is the *customary use* of the car which gives each term definite outline in the mind. While there are many elevators devoted exclusively to the carriage of passengers and many to the moving of merchandise only, there are very many used for both purposes. For illustration: In the building in which this opinion is being prepared there are three elevators. Two of them are used for the carrying of people only. The third, which is very large conveys merchandise and heavy articles of various kinds, but it is often used to carry passengers and is constructed with all of the same sort of safety appliances as those which are in use upon the other elevators. The only apparent difference between them is that one is larger and stronger than the other. Most of us are familiar with the "two-story" type of elevator, formerly much in vogue in rural hotels, having a compartment for passengers and beneath it one for carrying trunks. The analogy between elevators and cars therefore is not complete. But even if we were to accept an analogy between elevators and trains, such an elevator as we are here discussing would be quite similar to a "mixed train" which is recognized as a "passenger train." Chicago Great Western Ry. Co. v. St. Paul Union Depot Co., 68 Minn. 224, 71 N. W. 23.

[2] In determining the liability of the owner of an elevator for injury to a passenger this court has long been committed to the doctrine that the responsibility is analogous to that of a common carrier. Treadwell v. Whittier, 80 Cal. 576. At page 585, 22 Pac. 266, at page 269 (5 L. R. A. 498, 13 Am. St. Rep. 175), the report of the opinion in that case contains the following language:

> "The defendants used their elevator in lifting persons vertically to the height of 40 feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stagecoach or railway."

In that case, as in this, the elevator was used for moving merchandise and for transporting customers from floor to floor of the building. In Berliner v. Travelers' Ins. Co., 121 Cal. 459, 53 Pac. 919, 41 L. R. A. 467, 66 Am. St. Rep. 49, the court was discussing a policy of insurance which promised double indemnity if the injuries should be received while the person insured should be "riding as a passenger in any passenger conveyance using steam." He was killed while riding, by invitation of the superintendent, on the engine of a passenger train. It was contended that the engine was not a conveyance provided for the transportation of passengers. After citing the well-recognized rule that policies of insurance are to be liberally construed in favor of the assured, the court held that the locomotive was a part of the "conveyance" provided for the transportation of passengers. The court said, among other things:

> "If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used."

Speaking of the meaning of the word "passenger" as employed in that policy and applying to Mr. Berliner, the court further said:

> "Though upon the engine, he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see Lake Shore, etc., R. R. Co. v. Brown, 123 Ill. 186, 14 N. E. 197, 5 Am. St. Rep. 510; McGee v. Missouri Pac. Ry. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; Nashville, etc., R. R. Co. v. Erwin, 3 Am. & Eng. R. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word 'passenger' as here used is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point."

If the word "passenger" in a policy as applied to the individual must be measured by the relation of the carrier to the person injured, must not the word when used adjectively and applied to the conveyance or vehicle be similarly construed? We see no escape from such a conclusion.

In Travelers' Ins. Co. v. Austin, 116 Ga. 264, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125, the policy under review was one in which the beneficiary was guaranteed double indemnity if the insured were injured "while riding as a passenger and being actually in or upon a railway passenger car." Mr. Austin who was a paymaster of the railroad company was killed while traveling in his "pay car." It was held that he was not in contemplation of the contract a "passenger" and that his car, although it was capable of being used as a vehicle for the transportation of passengers and had formerly been so used, was not a "passenger car" within the meaning of the words of the policy. Special stress was laid in that case upon the fact that the assured, was an employé, and the court reviewed and carefully differentiated the facts from those of the Berliner Case, saying:

> "That case, however, cannot properly be compared to the one now under consideration, because the *relationship of the insured to the railroad company* in the two cases was widely different."

The authority is directly in point on the theory of respondent that the use to which a vehicle is put is the criterion.

In Ætna Life Ins. Co. v. Frierson, 114 Fed. 66, 51 C. C. A. 434, Mr. Justice Lurton, then a circuit judge, was examining a case involving a provision exactly similar to the one in the policy in the Berliner Case. Frierson had met his death while on a steamer in which he and his companions were being taken up an Alaskan river. One man on the boat was a passenger who had paid his fare. Others of the party were navigating the steamer, and all except the passenger nam ed above were to pay for their food and transportation with one-half of their earnings during the first two years in Alaska. It was held that Frierson was a passenger on a passenger conveyance and the learned judge said:

> "That the Jessie was not 'a public conveyance in the usual lines of travel as a common carrier of passengers' may be true. But, if the insurance company intended to limit the benefits of its contract to passengers who travel 'in conveyances operated in the usual lines of travel as common carriers,' it should have so stipulated. This it did not do."

Under the authorities above cited we are satisfied that the instructions given by the court were correct, and that those refused were properly rejected.

Appellant has cited numerous cases to the effect that one who rides in a freight elevator is not entitled to demand the same appliances for safety as are requisite to a passenger elevator, and that such a person assumes the greater risk incurred by intrusting himself to the less carefully safeguarded elevator, just as one who accepts carriage on a freight train does so at the peril of incurring the dangers incident to that mode of travel but absent from transportation on a passenger train. Such is the doctrine of Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158, cited by appellant. That was a case in which the elevator had been used for freight and for carrying employés of the defendant. The shaft was protected by gates similar to the ones in the Studebaker building. At closing time a number of workmen on the sixth floor crowded against the gate and the operator of the elevator refused to open it, proceeding on his way to the seventh floor. Some of the people in the front of the crowd raised the door and were pushed into the shaft by the pressure of their fellow workmen behind them. It was held that the gate was properly constructed, and that the negligence of the persons who raised it contributed to the accident. There was no question of injury to a passenger, and the case is only valuable as holding that an elevator not used exclusively for passengers, but mainly for freight, need not have the same safety devices as one dedicated exclusively to the carrying of passengers. So in Hall v. Murdock, 114 Mich. 233, 72 N. W. 150, the rule announced was that when a man is invited to ride upon a freight elevator—that is "one designed for freight alone"—he must be held to know that it is not equipped with the same regard to safety as a passenger elevator. Sievers v. Peters Box & Lumber Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399, dealt with an accident in which the person injured who was in the employ of the defendant, rode on a freight elevator on the first day of its operation by invitation of a fellow servant, but without the knowledge or consent of the employer. The case involved no determination with reference to an elevator held out by its owner to the use of passengers. Hoehmann v. Moss Engraving Co., 4 Misc. Rep. 160, 23 N. Y. Supp. 787, also involved the riding of a servant in a freight elevator without consent of his employer. Steele v. Southern Railway, 55 S. C. 389, 33 S. E. 509, 74 Am. St. Rep. 756; Chicago & Alton R. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; Louisville & Nashville R. R. Co. v. Bisch, 120 Ind. 549, 22 N. E. 662; McGee v. Missouri Pacific Ry. Co., 92 Mo. 209, 4 S. W. 739, 1 Am. St. Rep. 706, cited by appellant, are all "freight train" cases announcing the well-known doctrine that where a passenger is received by a company on its freight train the same degree of care is due him that the road owes to its passengers on its regular trains, except that in going on a freight train he acquiesces in the usual incidents and conduct of a freight train managed by competent and prudent men. Not one of these cited cases detracts from the doctrine that a passenger elevator is one in which passengers are ordinarily carried.

[3] Mr. Peck who secured the insurance for Mr. Wilmarth and delivered the policy to him was interrogated with reference to a conversation held with the assured in which the meaning of the double indemnity clause was discussed. Objections to these questions were sustained upon the ground that defendant was seeking to vary the terms of a written contract by parol. These rulings are attacked upon the ground that it was permissible to show the peculiar and special sense in which the parties to the contract understood its terms of doubtful meaning. In this behalf Wigmore on Evidence is cited (sections 2465 and 2461). We have no dissent to offer to the doctrines there laid down but they do not apply to the rulings which we are now considering for the reasons (1) that the words of the agreement are not ambiguous, and (2) it was not shown that the witness had authority to amplify or explain the meaning of any words in the contract to which he was not a party.

[4] Mr. Van Emon, a veteran manufacturer of elevators, was asked a number of questions for the purpose of establishing the facts that the term "passenger elevator" had attained a definite meaning generally, and that the elevator used by the Studebaker Company was not a "passenger elevator." The objections to such questions were properly sustained. The contract was not one requiring expert testimony for its interpretation. Whatever the terms "passenger elevator" and "freight elevator" may mean technically to those engaged in the manufacture of lifts, these expressions in a policy of insurance are to be construed in their ordinary and popular sense.

[5] Over the objection of defendant plaintiff was permitted to introduce evidence to the effect that after the accident the elevator was used for carrying passengers. In any view of the evidence defendant was not harmed by the rulings as the evidence es-

tablished, without contradiction, the manner in which and the purposes for which the elevator had been used prior to the accident, and the subsequent use was not different.

[6] Witnesses Richards and Smith were allowed to testify that the elevator was used for passengers during a certain percentage of the trips. Both were employés of the Studebaker Company who had opportunities for observing the elevator and the frequency of its use. This was the sort of opinion evidence that persons not experts may give, when they have "opportunity of observation, ordinary attention, and intelligence and veracity." Lewis, Authority on Matter of Opinion, c. 2, § 5. The objection that they had taken no accurate or systematic data with reference to the trips of the elevator went rather to the weight than to the admissibility of their testimony.

[7] Defendant moved for a nonsuit for alleged insufficiency of the evidence. The first ground of the motion was that the elevator was not a passenger elevator. This ground has been sufficiently discussed and determined adversely to appellant's contention. The second ground is that the injury sustained by decedent was not received while he was in an elevator. It is the theory of defendant that riding in an elevator is accompanied by very slight risk, while jumping on or from a moving elevator is decidedly dangerous, and that in promising double indemnity for injuries received in passenger elevators the insurer was purposely limiting the locus of the accident.

Three cases are cited in support of appellant's position. These are Anable v. Fidelity & Casualty Co., 73 N. J. Law, 320, 63 Atl. 92, Ætna Life Ins. Co. v. Vandecar, 86 Fed. 283, 30 C. C. A. 48, and Van Bokkelen v. Travelers' Ins. Co., 34 App. Div. 399, 54 N. Y. Supp. 307.

In the first case cited the facts were in brief these: The contract of insurance provided double indemnity for injury received while riding as a passenger "in or on a public conveyance propelled by steam." The assured left a train on which he was a passenger and went to a news stand while the train was stationary. The train started on time and the assured ran across the platform and attempted to get on board the moving train, with the result that he was thrown under the wheels and killed. It was held that he was not in or on the car at the time of the accident, and that the insurance company was not required to pay double indemnity.

The clause of indemnity considered in Ætna Life Ins. Co. v. Vandecar, supra, was the same as that before the court in the Anable Case. The assured testified that while standing on the platform as the train approached a station he had his valise in one hand and his other hand was in his overcoat pocket. A sudden lurch of the train threw a fellow passenger against him and he was precipitated to the ground. It was held that while riding on the platform the assured was not a passenger in a passenger conveyance using steam. It will be seen at once that this case is in absolute conflict with Californian authority. Berliner v. Travelers' Ins. Co., supra. Judge Thayer wrote a powerful dissenting opinion, in which he said among other things:

> "The defendant company intended to offer travelers special inducements to become insured against the risk of injury incurred while traveling, by promising them a double indemnity for that class of injuries, and a technical construction ought not to be placed on the policy to shield it from liability for a loss that is fairly within the terms of its contract. It must be borne in mind that the rule is to construe an insurance policy most strongly against the company, because such contracts are invariably drawn by the insurer, and reasonable doubts arising from the language which it has employed should be resolved against it. It cannot be said that the use of the word 'in' in the policy in suit so clearly evidences an intention to pay a double indemnity only in those cases where the insured is injured while traveling on the inside of a railway or street car as to put the case at bar beyond the reach of that rule of construction. In my judgment, the rule in question should, in itself, have led to a different interpretation of the clause relating to double indemnity than the one which has been adopted by the majority of the court."

This is quite in accord with the decisions in California, and we cannot consider the majority opinion as expressing the rule for us to follow.

The identical clause which was before the court in the other two cases came up for interpretation in the Van Bokkelen Case and the court gave strict interpretation to the language, holding that one injured by falling from an open platform of a car was not within the terms of the agreement for double indemnity. We are of the opinion, however, that even conceding the injuries to have followed Mr. Wilmarth's act of leaving the elevator the language of the policy is broad enough to cover such a case. It has been held by the Supreme Court of Georgia that the assured is entitled to recover the augmented indemnity, although he was injured in attempting to alight from a moving car. King v. Travelers' Ins. Co., 101 Ga. 64, 28 S. E. 661, 65 Am. St. Rep. 288.

"Actually traveling in a public conveyance" were the words construed in Tooley v. Assurance Co., Fed. Cas. No. 14,098. The assured was hurt while trying to get on board of the moving train which he had left temporarily at the station while it was at a standstill.

A man is "traveling by public conveyance" who attempts to board a moving omnibus. Champlin v. Railway P. Ins. Co., 6 Lans. (N. Y.) 71. The same language was held to apply to a person who was making a journey by connecting steamship and railway lines and fell upon a slippery sidewalk while walking from the steamboat landing to the railway station. Northrup v. Railway, etc., Assurance Co., 43 N. Y. 516, 3 Am. Rep. 724.

Theobold v. Assurance Co., 10 Exch. 45, was a case in which the policy referred to a "railway accident" which might be suffered by the assured while traveling "in any class of carriage." The assured was injured after the train reached its destination. He slipped on the step while descending from the carriage to the platform. He recovered damages. "A person may be said to be traveling in a public conveyance until he has alighted therefrom and completely disconnected himself therefrom and landed." May on Insurance, § 524.

In Depue v. Travelers' Ins. Co. (C. C.) 166 Fed. 183, the decisions were reviewed and the court expressed the opinion that they could not be fully reconciled.

> "The disposition of the courts to construe accident policies against the companies remains, even where the clause under consideration provides for double indemnity. But in that event it is ordinarily presumed that the parties had a special risk in view, and the construction will endeavor to carry out their intention. If the language, however, is fairly capable of a construction favorable to the insured, this will be given, although the clause provides for double indemnity. Thus, in Preferred Accident Ins. Co. v. Muir, 126 Fed. 926, 61 C. C. A. 456, a case decided in this circuit, the insured was fatally injured by being thrown from the platform of a rapidly moving car, but it was held by the Court of Appeals that double indemnity could be recovered under a clause providing therefor if the insured should be injured while riding as a passenger in 'or on' a public conveyance, the ground for the decision being that the court was not at liberty to say that, when the stipulation reads in 'or on' a public conveyance, this means inside a railroad car. On the whole, therefore, it seems to me that, since the question of double indemnity is not presented by the present controversy, I am at liberty to adopt what appears to be a reasonable construction of the language used by the policy in suit, and to hold that a flexible and not a rigid meaning should be attached to the words, 'while in a passenger elevator.'"

We fully agree with this interpretation which is in accord with the weight of authority.

[8] Appellant complains of the court's modifications of certain instructions. The purport of these instructions was that the plaintiff could not recover a double amount of insurance unless the bodily injury which resulted in Mr. Wilmarth's death "was sustained by him while in a passenger elevator." The court in each instance inserted the words "or the proximate cause thereof" after the word "injury." This was proper. If the moving cause of the killing of Mr. Wilmarth originated in the elevator, that was sufficient even though death was produced by the fall to the basement. In such cases the courts look to the proximate cause of the injury. Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

[9] The court prefaced each group of instructions by saying: "The following are the plaintiff's requested instructions," or, "The following * * * are given you as instructions requested by the defendant." The revealing of the sources of the instructions is assigned as error. We see no reason (and no authority is given) why the court may not thus indicate the authorship of any given instructions. The jurors must have known that when adopted the instructions became those of the court without regard to authorship. Therefore there was no error committed.

Judgment and order affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 551

LAKE TAHOE RY. & TRANSP. CO. v. ROBERTS, State Treasurer. (S. F. 6601.)

(Supreme Court of California. Oct. 5, 1914.)

1. Taxation (§ 144*)—Assessment of Corporate Property—Property Used in Business.

A steamboat in operation being a single indivisible fabric, where it is not used exclusively in the business of a railroad company, a part thereof cannot be so exclusively used within Const. art. 13, § 14, imposing a tax based on gross revenue on certain enumerated properties of railroad companies and on other property or any part thereof used exclusively in the operation of their business.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 250, 251, 258½, 259; Dec. Dig. § 144.*]

2. Taxation (§ 144*)—Assessment of Corporate Property—Property Used in Business.

Under Const. art. 13, § 14, imposing a tax on any property or any part thereof used exclusively in the operation of a railroad company's business, only property used exclusively or a severable part of property so exclusively used in the operation of the business can be taxed, and where property is partly used for railroad purposes the gross returns from the partial use are not an element in assessing the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 250, 251, 258½, 259; Dec. Dig. § 144.*]

3. Taxation (§ 144*)—Assessment of Corporate Property—Property Used in Business.

That the operation of steamboats by a railroad company stimulates and increases its rail receipts and induces travel over its rails does not render the steamers taxable as property used exclusively in the operation of the railroad business within Const. art. 13, § 14.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 250, 251, 258½, 259; Dec. Dig. § 144.*]

4. Taxation (§ 37*)—Assessment of Corporate Property—Property Used in Business.

If St. 1911, p. 534, § 8, providing relative to the taxation of public service corporations that the operative property of the companies enumerated therein shall also include any property not enumerated that may be reasonably necessary for use by such companies exclusively in the operation and conduct of the particular kinds of business enumerated in that act, conflicts with Const. art. 13, § 14, limiting the tax on the property of railroad companies to property or any part thereof used exclusively in the operation of their business, the provision of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Constitution must prevail and the statute cannot be upheld.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 64–66, 133; Dec. Dig. § 37.*]

5. TAXATION (§ 98*)—RAILROAD PROPERTY—"FERRYBOAT."

Steamers operated by a railroad company on Lake Tahoe which carry goods and passengers between California points, Nevada points and interstate points are not "ferryboats" within Pol. Code, § 3643, defining a ferryboat as a vessel traversing across any of the waters of the state between two constant points regularly employed for the transfer of passengers and freight, authorized by law so to do, and also any boat employed as a part of the system of a railroad for the transfer of passengers and freight plying at regular and stated periods between two points.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 196–198, 200; Dec. Dig. § 98.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Lake Tahoe Railway & Transportation Company against E. D. Roberts, as State Treasurer of the State of California. From a judgment for plaintiff, defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Raymond Benjamin, of San Francisco, for appellant. Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco (A. D. Plaw, of San Francisco, of counsel), for respondent.

HENSHAW, J. This action was brought to recover taxes paid by plaintiff under protest as having been illegally exacted. Judgment passed for plaintiff, and the defendant as state treasurer appeals.

Plaintiff is a California corporation and owns a railroad running from the town of Truckee to the town of Tahoe in the state of California. At Truckee its railroad connects with the Southern Pacific Railroad. It also owns four steamers which are operated on Lake Tahoe and which carry goods and passengers between California points on the lake, between Nevada points on the lake, and between interstate points on the lake. It has a traffic arrangement with the Southern Pacific Company by which rail passengers of the latter may be conveyed over the railroad of the plaintiff and upon its steamers to designated points on Lake Tahoe in either California or Nevada. It therefore publishes and files, as required by law, with the railroad commission of the state of California and with the interstate commerce commission, official tariff sheets indicating these facts and specifying its charges for transportation. The steamers are not only owned by but operated by the corporation plaintiff. Forty-five per cent. of the gross receipts from the operation of the steamers is obtained from purely local traffic. In the winter months the railroad entirely suspends operations, but the steamers continue in business carrying passengers, mail, freight, and express. No part of the receipts of the steamer transportation is received as compensation for railroad service, and, conversely, no part of the receipts from the railroad transportation is received as compensation for steamer service.

As required by law the plaintiff filed with the state board of equalization its report of the matters and things required for purposes of taxation for the year 1912. Subsequently, pursuant to a request of the board and under protest, it furnished a statement of its gross receipts from the operation of its steamers. This consisted of the total amount of receipts from the business of the steamers beginning and ending within the state of California, and a proportion of the interstate business based upon the relation of the mileage of such business conducted within the state and the entire mileage of the interstate business as provided in section 14, art. 13, of the Constitution. The board of equalization levied a tax amounting to $908.68 against plaintiff upon the steamer earnings. Plaintiff paid this tax under protest and subsequently brought its action for the recovery thereof. The court found that the steamers were not used exclusively in the operation of the railroad business of the plaintiff, in whole or in part, and they were not and are not properly, reasonably, or at all necessary for the use by plaintiff exclusively in the operation of its railroad business. The court therefore concluded that the steamers were not subject to taxation under the gross revenue system but were subject at the hands of local assessors to ad valorem taxes which they had paid.

[1, 2] The question thus presented is an extremely simple one, resting as it does solely upon the meaning of the language of section 14, art. 13, of the Constitution, which declares that, based upon gross revenue, railroad companies shall pay a tax to the state upon certain enumerated properties "and other property, or any part thereof used exclusively in the operation of their business in this state." The brief statement of facts above set forth shows conclusively that the steamboats of the plaintiff were not used exclusively in their railroad business, and with equal conclusiveness it shows that no severable part of the steamers is used exclusively in the operation of the business, for manifestly a steamer in operation being a single, indivisible fabric, while it may be said that it is partly used for a given purpose, it cannot be said, as the Constitution declares, that "any part thereof" is so used.

But appellant argues that the tax commission which framed this constitutional provision, and the Legislature which proposed it, were composed of men of experience and knowledge "who ought not to be charged even by inference with having intended when indicating the character of the property to be taxed in the manner proposed, to have deliberately used language with a view to the result that would necessarily follow" from the most natural construction of that language above indicated. Therefore appellant argues that the language does not mean what it says, but does mean that, if any property is "partly" used for railroad purposes, that "partial" use to the extent of its value estimated upon the business' gross returns is subject to be thus taxed. To the inference of the experience and intelligence of the tax commission and of the Legislature we may give ready assent; but it is precisely for this reason, and because these constitutional provisions were thus prepared with care by men understanding the plain use of plain language, that the construction for which appellant contends may not be sustained. Appellant, while arguing for the intelligence of the framers of this constitutional provision, asks us to declare that their language does not mean what it says, but something radically and essentially different from what it says. Thus, if the framers of this provision had meant that any piece of property partially used in the railroad business should be partially taxed they would have said so. But what they have said is that only property exclusively used, or only some part of it exclusively used, should be so taxed, with the result that when not so exclusively used the old form of local taxation should still obtain. If confirmation of this meaning of plain language were required it will be found in the practical difficulties which would arise from the construction contended for by appellant, difficulties which, if that construction was ever contemplated by the framers of the constitutional provision, they would have removed by provisions of law. To illustrate, if this substituted percentage tax based on revenue is to apply to a single piece of property partly used for railroad purposes, that indivisible portion of it not so partly used must be subject to local taxation by local assessors under the strict ad valorem tax, or it escapes taxation altogether. How shall a local assessor assess a portion of a steamboat? What portion shall he assess and what shall be the ad valorem value placed upon the portion which he does assess? All these would be practical questions under appellant's contention and would require answer at the hands of the law. The fact that these manifest contingencies have not been provided for by law is additional evidence that the framers of the Constitution meant what they said, namely, that only property used exclusively, or only a severable part of property used exclusively in the operation of the business of the company, should be included in the list of property whose sole and only tax is covered by the gross revenue percentage, and that the earnings of other properties not so exclusively used in whole or in part are not an element in the admeasurement of this tax.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The cases uniformly so hold. Thus, in C., B. & Q. R. Co. v. Rhein, 135 Iowa, 404, 112 N. W. 823, the statute declared that the railway property taxed should include all property "real or personal, exclusively used in the operation of such railway." The Supreme Court held that the telegraph lines of the railroad which were used in the ordinary transaction of its railroad business, but which were also leased to the Western Union Telegraph Company, were not exclusively used in the railroad business, and therefore were not within the purview of the statute. In Herter v. C., M. & St. P. Ry. Co., 114 Iowa, 330, 86 N. W. 266, it was decided that while grain elevators, operated by a railroad, were necessary and proper in the conduct of the road, they were not exclusively used in such conduct within the taxing statute if they were used by others. And to like effect is the decision of the Supreme Court of Illinois in Illinois Central R. Co. v. People, 119 Ill. 137, 6 N. E. 451.

[3] Further, it is argued that the steamboats are a necessary part of plaintiff's business and "to say that they are not a necessary part is to say that plaintiff would carry as many passengers over its rails to Tahoe if no way existed for those passengers to reach other points on the lake besides Tahoe. We doubt if any one would deny that the operation of the steamboats on the lake stimulates and increases plaintiff's rail receipts and induces travel over its rails that would not be gained if Tahoe was the only destination." All this may be conceded, but it is in no sense determinative of the question here, which is one of exclusive use. Thus, in Illinois Central R. Co. v. Irvin, 72 Ill. 452, where the precise question was whether a steamboat owned by a railroad was railroad property, it was said that "the only purpose and use of the steamboat is to facilitate and extend appellant's business as a common carrier to and from points south of Cairo," and the court declared that the boat was not railroad property and that the fact that the use of it added greatly to the revenue of the company was not relevant to prove that the boat was railroad property. In the same way the Supreme Court of Minnesota, in State v. St. P., M. & M. Ry. Co., 42 Minn. 238, 44 N. W. 63, decided that a hotel owned by the railroad company on the shores of Lake Minnetonka, over 90 per cent. of the guests of which came over defendant's railroad and which thus largely contributed to its business and income, bore no other relation to the operation of the railroad than did any other enterprise which might tend to improve the latter's business. And to the same effect is Milwaukee & St. P. Ry. Co. v. Bd. of Supervisors, 29 Wis. 116.

[4] We need not be at pains to discuss the proviso in the act of the Legislature of 1911 (Stats. 1911, c. 335, § 8), which defines operative property. If the definition is in har-

mony with the language of the Constitution, it does not affect the discussion hereinbefore had. If the definition does violence to the language of the Constitution, to that extent it cannot be upheld, for the definition of the Constitution itself must prevail. San Diego Ry. Co. v. State Board of Equalization, 165 Cal. 564, 132 Pac. 1044.

[5] That these steamers may not be classed as ferryboats under section 3643 of the Political Code is manifest from a reading of the section, as well as from the authority of Illinois Central Ry. Co. v. Irvin, supra.

For these reasons the judgment appealed from is affirmed.

We concur: LORIGAN, J.; SLOSS, J.; SHAW, J.; MELVIN, J.

25 Cal. App. 331

LINCOLN v. SIBECK. (Civ. 1586.)

(District Court of Appeal, Second District, California. Sept. 1, 1914.)

Appeal and Error (§ 783*)—Dismissal—Grounds—Motion for New Trial.

Irregularity of proceedings occurring prior to an order denying a new trial, as failure, under conditions not authorized by Code Civ. Proc. § 653, to have the statement on motion for new trial settled by the judge who tried the case, even if it be cause for affirmance of the order, is not ground for dismissal of the appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3125; Dec. Dig. § 783.*]

Action by Grant Lincoln against D. W. Sibeck. From an adverse judgment and order, defendant appeals. Motion to dismiss appeals denied.

James R. Choate, E. O. Leake, and Edgar F. Hughes, all of Los Angeles, for appellant. Robert T. Linney and Ralph W. Schoonover, both of Los Angeles, for respondent.

PER CURIAM. Motion to dismiss appeals from a judgment and from an order denying a motion for a new trial. The grounds of motion are: That the appeals were not taken within the time limited by law; that the statement on motion for a new trial was not settled and allowed as required by law.

The motion, in so far as it concerns the appeal taken from the judgment, is not pressed, and it appears that this appeal was regularly taken. The chief complaint as to the statement on motion for a new trial not having been regularly settled rests upon the fact that the superior judge of Alpine county, who heard the cause at the trial, did not settle the statement, notwithstanding that he was not shown to have been without the state, or otherwise conditioned as is specified in the cases mentioned in section 653, Code of Civil Procedure.

It is not contended as a ground for dismissal that the judge who passed upon the motion for a new trial was without jurisdiction so to do. It has been held that the matter of the irregularity of proceedings occurring prior to the making of an order such as that here appealed from cannot be considered on a motion to dismiss, although the same may constitute sufficient cause for affirming or reversing the order. In re Ryer, 110 Cal. 559, 42 Pac. 1082; Fish v. Benson, 71 Cal. 428, 12 Pac. 454.

Upon the authority of these decisions, the motion to dismiss the appeal from the order denying the motion for a new trial is denied. For the reason first stated, the motion as directed to the appeal from the judgment should also be denied; and it is so ordered.

25 Cal. App. 329

PEOPLE v. OSAKI. (Cr. 255.)

(District Court of Appeal, Third District, California. Aug. 29, 1914.)

1. Robbery (§ 24*) — Prosecution — Evidence—Sufficiency.

In a prosecution for robbery, evidence *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32–36; Dec. Dig. § 24.*]

2. Robbery (§ 23*)—Evidence—Admissibility.

Where the prosecuting witness claimed that, when in accused's restaurant, accused and another removed from his person a roll of bills, a question as to what was done with the bills after they were taken from the prosecuting witness is not improper, on the ground that it was not shown that accused was present at that time; the testimony called for being material, and it being obvious that accused was near.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 29–31; Dec. Dig. § 23.*]

3. Criminal Law (§ 1169*) — Appeal — Review—Admission of Evidence—Harmless Error.

In a prosecution for robbery, where the prosecuting witness' testimony clearly showed the commission of the offense, the erroneous admission of other evidence was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

K. Osaki was convicted of robbery, and, from the conviction and an order denying a new trial, he appeals. Affirmed.

Webster, Webster & Blewett and R. L. Beardslee, all of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The appeal is from the judgment of conviction of the crime of robbery and from the order denying defendant's motion for a new trial.

It is admitted by appellant that the record is unusually free from error, and only two points are made by him, both of which we deem devoid of substantial merit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] As to the sufficiency of the evidence, we need do no more than to call attention to the testimony of Frank Brooks, the prosecuting witness, in connection with a few admitted facts: Defendant and his codefendant, M. Osaki, conducted a small restaurant in the city of Stockton. On December 27, 1913, Brooks went into said restaurant, between 8 and 9 o'clock, to get something to drink—"some ginger and hot water, maybe a little whisky." As he started to go, the defendant caught him by the coat in the door, and "he says, 'You can't go out until you pay for it.' I says, 'I am just going to step to the door here, coming right back.' So I went back and paid it, then went out and got my drink, and came back, and my coffee, I thought, was not quite hot enough for me." Then, after a dispute as to whether a nickel was due from Brooks, he laid it on the counter and said, "There is your nickel," and started to go out, when appellant's codefendant threw a sugar bowl at Brooks, and, obviously, referring to appellant himself, the witness proceeded:

> "And that one there, whatever his name is, came running around the counter and jumped onto me on this side, and both of them bent me over this way and went through my pockets. One of them went in here and tore a button off my vest here, went in my shirt pocket there and got a roll of bills."

And furthermore:

> "They took $3 in silver out of my pants pocket there, my knife out of this one, and I had a key and a small silver watch chain out of the hip pocket here."

The jury undoubtedly believed the witness, and the only conclusion, therefore, possible was a verdict of guilty. We cannot say that credit should not have been given to the testimony, and we are therefore bound by it.

[2, 3] The other point is worthy of no more extended consideration. It relates to an objection to the following question asked of Brooks:

> "After you came in from getting your drink of ginger, what, if anything, was done with regard to this pack of bills by you?"

The point of the objection was that it was not shown that the defendant was present at the time. As to this, while the witness at that particular moment did not see defendant, the latter was undoubtedly near, and it was for the jury to say whether he saw what was done with the bills. Aside from that, it was a material circumstance in the case tending to show that the witness had the bills on his person; and it may be said, also, that, if the evidence was erroneously admitted, it could not possibly have affected the result, in view of the statements of the witness as to the actual commission of the robbery.

There is no reason for interfering with the verdict, and the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 332

PEOPLE v. GILMORE. (Cr. 340.)

(District Court of Appeal, Second District, California. Sept. 1, 1914.)

LARCENY (§ 66*)—PROSECUTION—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for larceny *held* sufficient to justify a conviction of an attempt to commit the offense.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 161; Dec. Dig. § 66.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Robert Gilmore was convicted of an attempt to commit the crime of grand larceny, and from the judgment of conviction and an order denying new trial, he appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged with the crime of grand larceny, and, upon trial, was convicted of an attempt to commit the offense with which he was charged. He appeals from the judgment and an order of court denying his motion for a new trial.

The only ground upon which a reversal is asked is that the evidence is insufficient to sustain the verdict. A brief statement of the case shows appellant's contention to be wholly without merit. No evidence was offered on behalf of defendant. That offered on behalf of the people shows that during the noon hour on December 18, 1913, defendant with a companion named Isenberg, entered the jewelry store of O. L. Wuerker, in Los Angeles, stating to Mr. Willard, manager of the store, that they desired to look at some diamond rings. Mr. Willard then took from the showcase a tray of diamond rings and exhibited them to defendant and Isenberg, who, after looking them over, indicated that none of them was satisfactory, defendant suggesting that they be shown a tray of rings which were in the show window. Mr. Willard replaced the tray of rings taken from the showcase and brought out the tray from the window. From this tray Isenberg selected a ring priced at $90, saying he would make a deposit of $2 upon it. Defendant meanwhile was looking at a ring from the tray priced at $285. As Willard reached for an envelope wherein to place the $90 ring selected by Isenberg, and while defendant was looking at the $285 ring, he (Willard) saw in the tray containing the rings an imitation diamond ring in size similar to the $285 ring, the latter not being in the tray. Willard picked up the tray and, as he returned it to the showcase, took therefrom the bogus diamond and said:

> "'I don't want this ring; come on, give me the good ring, and do it quick. You can't do that to me here. * * * I don't want your $2.' * * * I shoved the $2 back to him, and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

I took the $90 ring. He says: 'What do you mean by that?' I says: 'I mean you got to pay for that ring or give it to me quick.' As I said that, why Mr. Gilmore starts and turned around and run, and Mr. Isenberg. So I went out after them just as hard as I could go."

At the door defendant and Isenberg separated, one going north and one south. Willard followed Isenberg, and a gentleman who was entering the store followed defendant, who ran north to Second and Spring streets, thence to Broadway, thence south to the middle of the block, where he was caught and turned over to an officer. Willard further testified that, in place of the good ring, defendant placed in the tray a bogus ring of the same size. Both defendant and Isenberg were taken back to the store by officers, and, upon being searched, the imitation ring was taken from Gilmore's pocket, and later two other imitation diamond rings were found under the showcase near where Isenberg and defendant had been standing. When Willard ran out of the store to intercept defendant and Isenberg, another employé of the store, whose attention was attracted by the trouble, went to that part of the store where Willard had been exhibiting the rings and, reaching for the pad used in exhibiting diamonds, discovered the ring which is alleged to be the subject of the larceny. He stated that owing to the fact that a customer was standing against the showcase where this pad was, he was unable to say whether the ring was on top of the pad or underneath it. From this statement of facts disclosed by the evidence, and other circumstances indicative of guilt, it is impossible to perceive how the jury could have reached any other conclusion than that an attempt, as defined in section 664, Penal Code, and People v. Mann, 113 Cal. 79, 45 Pac. 182, was made to steal the ring. Defendant's failure to accomplish his intended purpose was clearly due to Willard's discovery of the bogus diamond placed in the tray as a substitute for the genuine one which defendant at the time had in his possession. Having been detected in the act, he abandoned his unlawful purpose and sought safety by fleeing.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 334

PEOPLE v. ISENBERG. (Cr. 338.)

(District Court of Appeal, Second District, California. Sept. 2, 1914.)

1. LARCENY (§ 66*)—ATTEMPT TO COMMIT—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a conviction of an attempt to commit grand larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 161; Dec. Dig. § 66.*]

2. CRIMINAL LAW (§ 517*)—CONFESSIONS—ADMISSIBILITY IN EVIDENCE.

A confession made by defendant on being interrogated by police officers after his arrest was properly admitted in evidence where it appeared that he was not coerced by any improper importunities or inducements to make same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146–1156; Dec. Dig. § 517.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Alonzo Isenberg was convicted of an attempt to commit grand larceny, and appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for respondent.

JAMES, J. Defendant was charged jointly with one Robert Gilmore with having committed the crime of grand larceny; the property alleged to have been stolen being a diamond ring of the alleged value of $200. The defendants demanded, and were accorded, separate trials. The jury in the case of appellant returned a verdict finding the defendant guilty of an attempt to commit the crime of grand larceny. From the judgment as entered upon that verdict, and from an order denying a motion for a new trial, this appeal was taken.

[1] The testimony as given at the trial presented in the main an undisputed statement as to the facts of the occurrence at which it was contended appellant participated in the theft of a diamond ring. Appellant and Gilmore together, in the daytime, entered a jewelry store in the city of Los Angeles, and, after some preliminary talk, asked to be shown diamond rings. The salesman took out a tray and exhibited the rings to them, and one of the two men proposed that he make a $2 deposit on a $90 ring. While this negotiation was going on the salesman discovered that an imitation diamond ring had been placed in the tray instead of the ring containing a genuine stone, and immediately demanded that his ring be returned. Upon this the appellant and Gilmore started out of the store and the salesman pursued them. Upon reaching the sidewalk Gilmore went in one direction and Isenberg in another, each traveling very swiftly. They were pursued and captured, and when brought back to the store an imitation diamond ring was found in the pocket of Gilmore, and later at the police station another ring of the same kind was found in the pocket of appellant. The ring which it was charged that the men had stolen was found either upon or under a small rubber mat lying on the showcase, where it seems to have been placed or dropped by appellant or his companion at the time they left the store. After his arrest appellant was interrogated by the police officers, and finally made a statement in which, it was testified, he told a complete story of how he and Gil-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

more had purchased the imitation diamond rings for a few cents, with the purpose of perpetrating the swindle which they attempted. Appellant denied that he had made this statement, when he testified at the trial, but all the other facts adverted to remain proven beyond dispute and without contradiction. Upon this state of the record it is contended that the evidence was insufficient to justify the conviction of appellant, and further that the court improperly allowed proof to be made of the alleged confession. The evidence was abundantly sufficient to justify the verdict of guilty; indeed, it would be hard to conceive how any jury of reasonable men could have reached any other determination upon the case. It is a matter for further remark that appellant appears to have been quite leniently dealt with, inasmuch as the evidence tended most strongly to show that not only was there an attempt to commit the crime of grand larceny, but that the crime charged had been completely consummated.

[2] The ruling of the court permitting evidence to be offered showing the making of the alleged confession was without error. No such a case is presented as that considered in People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918, decided in this court, and which is cited by appellant. Here it was made to appear by satisfactory evidence that appellant was not coerced by the use of any improper importunities or inducements to make the statement of which evidence was given at the trial. There are no other alleged errors urged in the briefs of counsel for appellant which require consideration. The record shows that appellant was accorded a fair trial and that his conviction was based upon evidence of clear and convincing character.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

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25 Cal. App. 383

BRUNSON v. CITY OF SANTA MONICA.

(Civ. 1495.)

(District Court of Appeal, Second District, California. Sept. 8, 1914.)

Appeal and Error (§ 70*)—Decisions Reviewable—Order Sustaining Demurrer.

Under Code Civ. Proc. § 963, authorizing appeals from certain judgments, and orders of the superior court, no appeal lies from an order sustaining a demurrer without leave to amend; the only method of reviewing such order being by appeal from the final judgment thereafter entered, if unfavorable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367–378, 386, 411; Dec. Dig. § 70.*]

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by C. E. A. Brunson against the City of Santa Monica. From an order sustaining a demurrer to the complaint, plaintiff appeals. Appeal dismissed.

E. Burton Ceruti, of Los Angeles, for appellant. Hutton, Jensen & Fogel, of Los Angeles, for respondent.

SHAW, J. The appeal is from "the whole of that certain order made and entered in this action by said court on the 29th day of December, 1913, sustaining the defendant's demurrer to plaintiff's amended complaint on file herein, without leave to amend." No appeal lies from an order sustaining a demurrer without leave to amend. Section 963, Code Civ. Proc. "The only method of review of such proceedings here is through an appeal from the final judgment thereafter entered in the action itself, if such judgment be unfavorable." Ashley v. Olmsted, 54 Cal. 616; Agard v. Valencia, 39 Cal. 292; Hibberd v. Smith, 39 Cal. 145. The record discloses no judgment entered in the action from which an appeal could be prosecuted.

The appeal purporting to have been taken from the order sustaining the demurrer is dismissed.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 363

JOHNSON v. WORKS, Superior Court Judge.

(Civ. 1618.)

(District Court of Appeal, Second District, California. Sept. 3, 1914.)

1. New Trial (§ 131*)—Motions—Settlement of Statement—Duty of Trial Judge.

On a motion for a new trial it is the duty of the trial judge to settle the statement by determining what it shall contain to the best of his ability, though the parties do not agree, and though no transcript of the testimony is furnished him; but where no transcript is furnished, and there has been a delay before the attempted settlement of the statement, the moving party cannot complain that the statement is settled in more general terms than it would be if the exact terms of the testimony were embodied in a transcript.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263–269; Dec. Dig. § 131.*]

2. New Trial (§ 131*) — Motions — Settlement of Statement—Duty of Trial Judge.

Where the trial judge's memory is not sufficient to enable him to determine what the statement of facts on a motion for a new trial shall contain, and no transcript of the testimony is furnished him, there are presumptions upon which he may act, taking into consideration the condition of the record and the duty of the party moving for a new trial to present a reasonably clear and accurate statement upon which he may act.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 263–269; Dec. Dig. § 131.*]

Petition by Harry G. Johnson for a writ of mandate against Lewis R. Works, Judge of the Superior Court for the County of Los Angeles. Peremptory writ issued.

L. B. Stanton, of Los Angeles, for petitioner. J. W. Hart, of Los Angeles, for respondent.

CONREY, P. J. The petitioner, Harry G. Johnson, is the plaintiff in a certain action against one M. A. Copps in the superior court of Los Angeles county, in which action the plaintiff seeks to recover a share of commissions alleged to have been earned by plaintiff and defendant on account of services in selling certain real property. Upon issues presented by the pleadings that action was tried before the respondent herein as judge of said superior court, and judgment was entered in favor of the defendant. The plaintiff duly served and filed a notice of intention to move for a new trial, upon the ground that the evidence was insufficient to justify the decision, and upon other grounds stated. Within due time the plaintiff served and presented for settlement a proposed statement on the motion for a new trial, and the said proposed statement, with the defendant's proposed amendments thereto, came before the respondent for settlement. The proposed statement purports to set forth all of the evidence and proceedings at the trial. By his proposed amendments defendant asks that portions of the proposed statement be stricken out and other testimony substituted therefor.

The proceedings at the trial were taken down by an official reporter, but no transcript thereof has been made. The petitioner alleges that, when the statement and amendments came before the respondent for settlement, respondent refused to make any settlement thereof. Respondent, in his return to the alternative writ issued herein, sets forth facts showing that the attorneys for plaintiff and defendant failed to agree with respect to said proposed amendments, or, in other words, that the plaintiff refused to accept said amendments. Respondent says that neither the statement as proposed by plaintiff, nor the proposed amendments, nor the two taken together, contain a true or fair statement of the evidence necessary to explain plaintiff's specifications attached to his notice of intention to move for a new trial; that there was other competent and relevant evidence upon said matters. Respondent denies that he has refused to settle the statement of the case, but in substance declines to do so unless a transcript is furnished to him of so much of the testimony of the witnesses as is necessary to explain the specifications attached to plaintiff's motion for a new trial, where the proposed statement of plaintiff conflicts with the proposed amendments of the defendant.

[1, 2] It is the duty of respondent to settle the statement by determining what it shall contain. The law will not require of him that which is impossible of performance. If his memory is not sufficient to enable him to determine what the statement of facts shall be upon any issue presented, there are presumptions upon which he may act, taking into consideration the condition of the record and the duty of the party moving for a new trial to present a reasonably clear and accurate statement upon which the judge may act. It is not our duty at this time to say how the respondent shall settle the statement on motion for new trial under the peculiar circumstances of this case, nor in what form he shall make a statement showing that there is evidence (as he says that there is) supporting the findings of the court, and that such evidence is in addition to that contained in plaintiff's proposed statement. It is sufficient at this time to say that in some form, and to the best of his ability to remember what occurred at the trial, it is the duty of the judge to settle the statement. In view of the fact that petitioner has not furnished respondent with a transcript of the testimony, and in view of the delay which occurred between the time of the trial and the time of attempted settlement of the statement, the petitioner cannot justly complain of the action of the court, if the statement as approved by the respondent shall be in more general terms with respect to the evidence contained therein than it would be if the exact terms of the testimony were embodied in a transcript. Vatcher v. Wilbur, 144 Cal. 536, 541, 78 Pac. 14.

We are of the opinion that a peremptory writ should issue, requiring respondent to settle said statement; and it is so ordered.

We concur: JAMES, J.; SHAW, J.

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25 Cal. App. 369

PEOPLE v. WEST et al. (Cr. 256.)

(District Court of Appeal, Third District, California. Sept. 4, 1914.)

1. CRIMINAL LAW (§ 625*)—TRIAL OF ISSUE OF INSANITY—STATUTORY PROVISIONS.

On a trial for homicide committed November 28, 1913, it was error to deny a motion to submit the question of defendants' present sanity to a jury, under Pen. Code, § 1368, providing that, if at any time during the pendency of an action a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be submitted to a jury, where the motion was supported by the affidavit of one of defendant's counsel stating that defendants were confined in a hospital for insane persons at the time of the homicide and had not been discharged as cured, or at all, that one of them was committed to the hospital on October 24, 1913, and the other on November 10, 1913, that counsel had made efforts to secure from them some statement concerning the crime, but that they refused to say anything about it, and acted as though suffering from delusions, and that in the opinion of the affiant they were insane, and not mentally competent to make a just and rational defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392–1398; Dec. Dig. § 625.*]

2. CRIMINAL LAW (§ 625*)—TRIAL OF ISSUE OF "INSANITY"—STATUTORY PROVISIONS.

On the trial of the question as to the present sanity of a person charged with crime, under Pen. Code, § 1368, the inquiry is not whether defendant knows the difference between right and wrong, and can distinguish the quality and consequence of his act, but whether he is mentally competent to make a rational defense.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392–1398; Dec. Dig. § 625.*

For other definitions, see Words and Phrases, First and Second Series, Insanity.]

3. CRIMINAL LAW (§ 625*)—TRIAL OF ISSUE OF INSANITY—STATUTORY PROVISIONS.

Under Pen. Code, § 1368, the question of a defendant's present sanity should be submitted to a jury whenever a doubt arises as to his sanity, and ordinarily the statements under oath of a credible person or persons that he is insane raise such a doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392–1398; Dec. Dig. § 625.*]

4. CRIMINAL LAW (§ 625*)—TRIAL OF ISSUE OF INSANITY—STATUTORY PROVISIONS.

If information comes through a proper source and proper channels that a person accused of crime is insane, or if through observation and personal inspection such information is disclosed to the court, a jury should be impaneled, under Pen. Code, § 1368, to pass upon accused's mental condition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1392–1398; Dec. Dig. § 625.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Willie Deen West and another were convicted of murder in the second degree, and they appeal. On rehearing. Reversed.

Theodore Hale, of Ukiah, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. A rehearing in these cases was granted by this court, and upon further consideration we have concluded that the judgment should be reversed and a new trial granted.

[1] The defendants were convicted in the superior court of the crime of murder in the second degree and sentenced to the penitentiary for life. At the time of the homicide, November 28, 1913, they were inmates and patients at the Mendocino state hospital for the insane, and deceased, at the time of his death, was also an inmate and patient of said institution. Before the trial the defendants regularly moved the court that the question of their present sanity be submitted to a jury as provided by section 1368 of the Penal Code. The court denied the motion, and in this we think prejudicial error was committed.

In support of said motion the defendants introduced and read the affidavit of one of their counsel, Mr. Hale McCowen, Jr. From this affidavit it appeared that, at the time of the homicide, the defendants were confined in the hospital as insane persons, and were being treated as such, and that neither had been discharged as cured or at all; that the defendant Peoples had been sent to the hospital upon the certificates of two surgeons of the United States Navy at Puget Sound, Wash., dated October 24, 1913. West was committed from the penitentiary at San Quentin upon the certification of the warden, the resident physician and surgeon, and the captain of the yard, that West was insane. The commitment was dated November 10, 1913. It is thus to be noticed how closely their commitment was followed by the homicide, and, it may be stated, the trial occurred soon thereafter. Mr. McCowen further set out in his affidavit that both he and his associate—

> "have each made efforts to secure from the said defendants some statement concerning the crime charged in the information; that said defendants refuse to say anything about the facts or circumstances of the offense and act as though suffering from delusions of some character; that affiant therefore alleges that it is his opinion that both of these defendants are mentally insane; and that neither of them is mentally competent to make a just and rational defense to the charge made against them."

It must be admitted that there was thus presented a very strong showing of present insanity. It is asserted by appellants' counsel that the facts—

> "constitute the strongest showing of present insanity which has ever been brought to the attention of a court in any case which has been appealed. We have examined the cases found in the reports, yet have found no case where an alleged crime was committed by insane men, who were being confined in a public hospital for the insane, and had never been cured, nor ordered discharged, and who continued in such a state of mental derangement that attorneys appointed by the court to defend them could obtain no assistance from the defendants in the conduct of their case."

We have not examined all the cases to verify the said assertion, but we are satisfied that upon the showing made the trial judge should have arrested the proceedings to have the sanity of the defendants determined by a jury. Upon mature consideration we do not think the counter showing made by respondent was sufficient to justify the court in its denial of the motion. It may be added that the conduct and statements of the defendants during the progress of the trial furnished additional evidence that they were incapable of making their defense, but we forbear any recital in detail of these circumstances.

We do not mean, of course, to decide that the defendants were insane at the time of the homicide, or that at the time of the trial they were incapable of making their defense; but our decision goes only to the extent that the court should have submitted the last question to a jury prior to any trial for the offense charged. The principle involved has been stated no more aptly, probably, than in the familiar quotation from Blackstone:

> "Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he had pleaded, the prisoner becomes mad, he shall not be tried—for how can he make his defense? If after he be tried and found guilty,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory execution shall be stayed, for, peradventure, says the humanity of English law, had the prisoner been of sound memory he might have alleged something in stay of judgment and execution."

[2] It cannot be too strongly emphasized that the question presented to the court was different from that involved in the consideration whether the defendants were responsible for the alleged homicide. As to their responsibility for the crime charged, the inquiry must be whether they knew the difference between right and wrong and could distinguish the quality and consequence of their act; but here the question was whether they were mentally competent to make a rational defense.

In Re Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378, the Supreme Court held that there is a difference between the medical view of insanity and the view upon which the statute is founded, and that the question must be determined with reference to the latter, and, after making the foregoing quotation from Blackstone, the opinion by Chief Justice Beatty proceeds:

> "This short quotation shows what all the books and treatises and decisions on the subject show, that the true and only reason why an insane person should not be tried is 'that he is disabled by the act of God to make a just defense, if he have one.'"

We need not attempt a more accurate discrimination between the insanity that excuses crime and the insanity that arrests the trial, although the distinction has been the subject of learned discussion in some of the decisions. Of course, a person may be sane enough to be responsible for crime, and yet incapable of making his defense; and, on the other hand, he may have mental capacity to be placed on trial, and yet be insane within the contemplation of the law as to responsibility for a criminal act.

[3, 4] And finally, as to the showing required to make it the duty of the court to submit the question of sanity to a jury, there is no discretion left in the court when a doubt arises as to the sanity of the defendant. And ordinarily, at least, if there are statements under oath of a credible person or persons that the defendant is insane, a doubt is or should be raised as to the defendant's sanity, and the question must be submitted to a jury. The only contingency is: Does a doubt arise? If information comes, through a proper source and through proper channels, that the defendant is insane, or if, through observation and personal inspection, the information is disclosed to the court, a jury must be impaneled to pass upon the mental condition of the accused. Marshall v. Territory (1909) 2 Okl. Cr. 136, 101 Pac. 139; People v. Ah Ying, 42 Cal. 18; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

We do not mean to say that the weight of the evidence and the credibility of the witnesses are not within the peculiar province of the trial judge, but we think that the circumstances here were such that it should be held as a matter of law that a doubt was or should have been created, and that it was the court's duty to submit the question as provided in section 1368 of the Penal Code.

We deem it unnecessary to notice specifically the cases cited by counsel, or to discuss other points made by appellants, as they will probably not arise again.

The judgment and order are reversed.

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25 Cal. App. 373

PEOPLE v. AKIN. (Cr. 261.)

(District Court of Appeal, Third District, California. Sept. 4, 1914.)

1. INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF OFFENSE INCLUDED IN CHARGE—ASSAULT WITH INTENT TO COMMIT RAPE.

A verdict of guilty of assault with intent to commit rape was not within the scope of an information charging that defendant did "accomplish an act of sexual intercourse with a female of the age of 11 years"; "assault" not being essential to the crime of carnal intercourse with a child of such age.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582–595; Dec. Dig. § 189.*]

2. INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF OFFENSE INCLUDED IN CHARGE—"ASSAULT"—"ATTEMPT."

An "assault" with intent to commit a crime necessarily embraces an "attempt" to commit the crime, but such "attempt" does not necessarily include an "assault."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582–595; Dec. Dig. § 189.*

For other definitions, see Words and Phrases, First and Second Series, Attempt, Assault.]

3. RAPE (§ 59*)—INSTRUCTIONS.

In a prosecution for feloniously accomplishing an act of sexual intercourse with a female 11 years old, it was error to instruct that if defendant attempted the rape, but did not succeed, he was guilty of an assault with intent to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88–100; Dec. Dig. § 59.*]

4. CRIMINAL LAW (§ 393*)—PHYSICAL EXAMINATION OF DEFENDANT.

A defendant charged with rape cannot be compelled, against his consent, to submit to an examination by a physician.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871–874; Dec. Dig. § 393.*]

5. CRIMINAL LAW (§§ 634, 636*)—JURY—VIEW OF PREMISES.

Where the jury, in a rape case, are sent to view the premises where the crime was committed, they should be accompanied by the judge and by the defendant, if he desires to go.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461–1482, 2120; Dec. Dig. §§ 634, 636.*]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Jack Akin was convicted of assault with intent to commit rape, and appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

J. Oscar Goldstein, of Oroville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was charged with having had carnal intercourse with a female under the age of consent, and he was convicted of "assault with intent to commit rape." Several reasons are urged by appellant for reversal, but the most serious question, which is not discussed or suggested at all, is whether the verdict is within the scope of the information; in other words, whether the defendant was convicted of a different crime from that charged against him.

[1] The charging part of the information is that:

> "The said Jack Akin did on or about the 12th day of May, A. D. 1913, at Butte county and state of California, and before the filing of this information, wrongfully, unlawfully, willfully, and feloniously accomplish an act of sexual intercourse with one Nora Heckart, the said Nora Heckart being then and there a female under the age of 16 years to wit, of the age of 11 years, and not being then and there the wife of the said Jack Akin."

It is thus to be seen that the element of force is not charged, as indeed it is not required to constitute the offense of rape on the person of a female under the age of consent. The crime of assault with intent to commit rape necessarily implies, however, the use of force and violence, and negatives the idea of consent upon the part of the victim. Of course, if the defendant had been charged with rape on the person of an adult, the element of force would have been included in the charge, and thus the information would have comprehended the crime of which he was convicted. Or, if the defendant had been convicted of an "attempt to commit rape," we could say that it was covered by the charge, because every crime includes an attempt to commit said crime. But "an assault implies repulsion, or at least want of consent on the part of the person assaulted." People v. Dong Pok Yip, 164 Cal. 146, 127 Pac. 1032.

[2] An "assault" with intent to commit a crime necessarily embraces an "attempt" to commit said crime, but said "attempt" does not necessarily include an "assault."

[3] This distinction was overlooked by the court in giving the following instruction:

> "You are instructed that if you believe to a moral certainty and beyond all reasonable doubt that Jack Akin attempted to rape Nora Heckart, but did not succeed in accomplishing sexual penetration, then you may find him guilty of an assault with intent to commit rape."

The instruction was given upon the supposed authority of People v. Gardner, 98 Cal. 127, 32 Pac. 880, but in that case, as is stated by the Supreme Court:

> "The defendant was convicted of an *attempt* to commit rape, and not of the offense of an *assault* with intent to commit rape, for which provision is made by section 220 of the Penal Code. There is a distinction between these offenses, and the facts required to prove an attempt are not necessarily sufficient to prove an assault with intent."

A case directly in point is State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754. In the opinion, written by the late Chief Justice Beatty of this state, who was then an associate justice of the Supreme Court of Nevada, it is said:

> "The common-law definition of 'rape' is 'the carnal knowledge of a woman forcibly and against her will.' 4 Blacks. Com. 210. The same definition is adopted by our statute. Comp. Laws, § 2350. Under this definition, an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of 12 years, with or without her consent, which is defined in the latter part of the section, and which is called 'rape.' It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. * * * By virtue of the provisions of sections 2464 and 2037, this defendant might have been convicted of an 'attempt to commit rape,' even if the child consented to all he did; but it was error to instruct the jury that he could be convicted of 'assault with intent,' etc., in that case. There can be no assault upon a consenting female, although there may be what the statute designates a rape."

The case was reversed for the error of the court in giving an instruction similar to the one given herein as above set out.

The same criticism might be made of the instruction given here, but in addition we think the verdict does not respond to the averments of the information. This is not a technical objection, but it goes to the fundamental right of the defendant to be formally charged with the crime of which he may be convicted.

[4, 5] In the event of a new trial, the alleged errors discussed by counsel will probably not appear again. However, it may be stated that the defendant cannot be required, against his consent, to submit to an examination by a physician, and, if the jury should be sent to view the premises, they should be accompanied by the judge and the defendant, if he desires to go.

For the reason stated, we think the judgment and order should be reversed; and it is so ordered.

We concur: HART, J.; CHIPMAN, P. J.

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25 Cal. App. 380

HARRIS v. BUCHER. (Civ. 1507.)

(District Court of Appeal, Second District, California. Sept. 8, 1914. Rehearing Denied by Supreme Court Nov. 7, 1914.)

CONTRACTS (§ 348*)—ACTION—PLEADING COMPLIANCE WITH LAW—OCCUPATION TAXES—PRESUMPTIONS.

One suing upon an express contract for services rendered as an architect need not prove compliance with Act March 23, 1901 (St. 1901, p. 644) § 5, making it a misdemeanor for any person to practice architecture without a certificate, and defendant, to defeat recovery on the ground of noncompliance, must show it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1095, 1754–1759, 1762–1780; Dec. Dig. § 348.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Fred T. Harris against Joseph Bucher. From a judgment for plaintiff, defendant appeals. Affirmed.

Ralph E. Swing, of San Bernardino, for appellant. Curtis & McNabb, of San Bernardino, for respondent.

SHAW, J. Action to recover a balance alleged to be due from defendant to plaintiff upon an express contract for services rendered by the latter in preparing plans and specifications for and superintending the construction of a building. Judgment went for plaintiff, from which defendant appeals upon a bill of exceptions.

The services rendered pursuant to the contract, as shown by the complaint, were those of an architect. Section 5 of "An act to regulate the practice of architecture," approved March 23, 1901 (Stats. 1901, p. 641), provides that:

> "* * * It shall be unlawful, and it shall be a misdemeanor, * * * for any person to practice architecture without a certificate in this state, or to advertise, or put out any sign or card, or other device which might indicate to the public that he was an architect: Provided, that nothing in this act shall prevent any person from making plans for his own buildings, nor furnishing plans or other data for buildings for other persons, provided the person so furnishing such plans or data shall fully inform the person for whom such plans or data are furnished, that he, the person furnishing such plans, is not a certificated architect."

The complaint, as to which no attack was made in the court below, did not allege any facts showing compliance on the part of plaintiff with the provisions of said statute; nor did the answer contain any allegations negativing such compliance on his part. In the absence of such issue being tendered by the pleadings, no evidence was offered touching the question. Appellant for the first time and in this court now insists that, in the absence of allegations bringing plaintiff within the terms of said provision of law, the complaint fails to state a cause of action. Whether it was necessary to allege and prove that plaintiff was a duly certified architect is the point decisive of the appeal.

While it is generally conceded that noncompliance with such provisions of law will be a bar to recovery for services rendered (Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880), there seems to be a conflict of authority as to whether plaintiff must allege and, if denied, prove his compliance with the law, or whether the burden rests upon defendant, as a matter of defense, to show plaintiff's neglect and failure to comply therewith. Appellant insists the burden rests upon plaintiff, who, in the absence of such fact being established, is not entitled to recover. In support of such contention he cites a number of cases, some of which fully support his position. See Wooley v. Bell, 33 Tex. Civ. App. 399, 76 S. W. 797; Bower v. Smith, 8 Ga. 74; Murray v. Williams, 121 Ga. 63, 48 S. E. 686; Cooper v. Griffin, 13 Ind. App. 212, 40 N. E. 710; Westbrook v. Nelson, 64 Kan. 436, 67 Pac. 884; Lanzer v. Unterberg, 9 Misc. Rep. 210, 29 N. Y. Supp. 683. These cases, where directly in point, proceed upon the theory that, since the statute makes it a misdemeanor to practice the calling without first procuring the required license or certificate, it devolves upon plaintiff to show, before he can recover, that he has complied with the provisions thereof. In some of them, however, the facts are distinguishable from those in the case at bar in that the statute in express terms prohibited any recovery, unless the required certificate had been obtained. While in this case the statute makes it unlawful to practice architecture without a certificate, it does not in terms require the issuance thereof as a condition of recovery. Since the statute declares the practice of architecture without the issuance of the required certificate to be a misdemeanor, we must, in order to sustain appellant's contention, assume that plaintiff is guilty of the commission of a crime. On the contrary, we are of the opinion that a presumption of innocence arises; hence, where noncompliance with the statute would constitute a criminal offense, we must, unless the contrary be shown, indulge in the presumption that plaintiff has complied therewith. In the case of Chicago v. Wood, 24 Ill. App. 40, the court, in discussing a like question, said:

> "The reason why the license will be presumed where there is no evidence to the contrary rests upon the principle that when an act is required, by positive law, to be done, the omission of which would be a misdemeanor, the law presumes that it has been done, and therefore the party relying on the omission must make some proof of it, though it be a negative."

To the same effect are Williams v. People, 20 Ill. App. 92; McPherson v. Cheadell, 24 Wend. (N. Y.) 15; Jo Daviess County v. Staples, 108 Ill. App. 539; Lacy v. Kossuth County, 106 Iowa, 16, 75 N. W. 689; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479; Webster v. Lamb, 15 S. D. 292, 89 N. W. 473; Acme Mercantile Agency v. Rochford, 10 S. D. 203, 72 N. W. 466, 66 Am. St. Rep. 714. The statute does not make the obtaining of the certificate a condition precedent to the right of recovery, and we cannot assent to the proposition that, in order to maintain the action, plaintiff must first allege and prove that he is not guilty of the commission of a crime. We are therefore of the opinion that, in an action brought by one practicing architecture to recover for services rendered, it is not necessary to allege and prove compliance with the act regulating the practice of architecture, but that noncompliance therewith is a matter of defense to be pleaded and proved by defendant in the action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appellant also insists that the action was prematurely brought. No such issue was raised by the pleadings, nor can we say, upon the vague and uncertain testimony of defendant, that there was any proof justifying the contention. The point is without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 337

PEOPLE v. PERRY. (Cr. 250.)

(District Court of Appeal, Third District, California. Sept. 2, 1914.)

1. Criminal Law (§ 1166½*) — Appeal — Harmless Error — Examination of Jurors.

The exclusion of questions asked a juror on his voir dire examination, if error, was not prejudicial, where accused accepted such juror, though he had not exhausted his peremptory challenges.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3123; Dec. Dig. § 1166½.*]

2. Criminal Law (§ 1169*)—Error—Cure by Instructions to Disregard.

On a trial for selling intoxicating liquor in no-license territory, where the testimony in support of the charge well justified a verdict of guilty, the error, if any, in admitting evidence of other sales was cured by striking it out and instructing the jury to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

3. Intoxicating Liquors (§ 205*) — Indictment and Information—Description of No-License Territory.

Though where infractions of the local option law are charged it would be better to describe the unit within which they have occurred by name or number, an information charging a sale of intoxicating liquor "in no-license territory, to wit, in K. township," was sufficient, and the allegation that K. township was in a particular supervisorial district might be treated as surplusage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. § 205.*]

4. Indictment and Information (§ 161*) — Amendment.

Under Pen. Code, § 1008, as amended by St. 1911, p. 436, providing that an indictment or information may be amended by the district attorney without leave of court before the defendant pleads, and thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant, but that an indictment cannot be amended to change the offense charged nor an information to charge an offense not shown by the evidence taken at the preliminary examination, it was not error to permit the district attorney at the trial to amend an information charging a sale of intoxicating liquor in K. township, situated in the third supervisorial district, to allege that such township was situated in the Fifth supervisorial district, even if an allegation as to the district was proper or necessary; as such description was not an essential constituent of the crime, the gist or gravamen of which is the selling of liquor within the limits of no-license territory.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516–523; Dec. Dig. § 161.*]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

H. N. Perry was convicted of selling intoxicating liquor in no-license territory, and he appeals. Affirmed.

W. K. Hays, of Chico, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Convicted of the crime of selling intoxicating liquor in the fifth supervisorial district of Butte county, said district having been at a date prior to that of the commission of the alleged crime made by the electors thereof no-license territory under the local option law, the defendant brings this appeal to this court from the judgment, claiming to be entitled to a reversal on the grounds: (1) That the court erred in its rulings disallowing answers to certain questions propounded by counsel for the defendant to certain jurors on their voir dire examination; (2) that the court erred in allowing testimony of sales of intoxicating liquor by the defendant, other than that alleged in the information; (3) that error was committed by permitting the district attorney to amend the information in a certain respect, to be hereafter more particularly explained.

[1] 1. It is wholly unnecessary to reproduce here the questions to which answers by the jurors were interdicted under the rulings of the court, as it is clear that the action of the court in that regard was without prejudice, even if it may well be conceded that to some of said questions answers could have with legal propriety been allowed. The only record here upon this point applies solely to the case of Juror George A. Martin. It shows that the defendant exhausted but seven of the peremptory challenges to which he was entitled (section 1070, Pen. Code), and it further shows, at least presumptively, that Juror Martin was satisfactory to the defendant, as he was accepted and constituted one of the panel which tried the cause. People v. Schafer, 161 Cal. 573, 576, 119 Pac. 920, 921; Scragg v. Sallee, 140 Pac. 706.

[2] 2. The charge in the information is that the defendant did, on the 25th day of September, 1913, "sell intoxicating liquor, to wit, whisky, a spirituous liquor, to H. A. Breedlove, in no-license territory, to wit, in Kimshew township, county of Butte," etc. The court, over objection by the defendant, permitted the district attorney to prove by other witnesses than Breedlove that they had,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at various times prior to the date of the commission of the offense stated in the information, purchased intoxicating liquor from the defendant. Thereafter the attorney for the defendant moved to strike out that testimony. The court granted the motion, and instructed the jury to entirely disregard it in considering the question of the guilt or innocence of the defendant.

We are not prepared, nor is it necessary, to pass upon the question whether this is of that class of cases of which the case of the People v. Whalen, 154 Cal. 476, 38 Pac. 194, is an example, and in which proof of other similar acts by the defendant is admissible for the purpose of showing that the specific act charged was not the result of mere accident or a mere adventitious circumstance, and that it was done deliberately and with the intent to violate the law; for we think that, inasmuch as the testimony produced by the people in support of the charge well justified the verdict, the action of the court in striking from the record the testimony referred to and in instructing the jury to wholly disregard it in their consideration of the case, cured the error, if error it was, in admitting it. The jury are to be presumed to have heeded and obeyed that, as well as the other instructions of the court.

[3, 4] 3. The information, in its original draft, alleged that the defendant sold the liquor named therein "in no-license territory, to wit, in Kimshew township, county of Butte, state of California, said Kimshew township being situate in the Third supervisorial district of said county." Before the prosecution had finished its case in chief, and therefore before the defendant had opened his defense, the evidence introduced by the people disclosed that Kimshew township is situated in the Fifth, instead of the Third, supervisorial district of said county, as alleged, and, upon this fact being thus developed, the district attorney moved the court for permission to amend the information in that regard, and the motion was granted.

It would, no doubt, be the better practice, where infractions of the local option law are charged, to describe the unit within which they have occurred by name or number, as the case may be, so as to particularly identify it, but we think that where the information, merely following the language of the act, charges that the illicit sale was made in "no-license territory," that ought to be a sufficient statement of the offense to inform the defendant of the particular offense against which he is thus required to defend.

The general rule in criminal pleading is that the charge sought to be laid therein is sufficiently set forth if it be alleged in the language of the statute defining the crime. There are, of course, some qualifications or exceptions to that rule. Still, in this case, we can conceive of no sound reason why the general rule above stated would not be applicable. If, for example, an information should state that the illicit sale of intoxicants had taken place "in the town of A. which said town is situated within no-license territory," it would seem that such statement of the offense would not only be substantially in the language of the statute, but sufficient to apprise the defendant of all that it would be essential for him to be informed of in order to enable him to prepare himself to defend against the charge; viz., the fact of the sale and the fact that such sale took place within the boundary lines of a dry unit.

We conclude, therefore, that in this case the information, having declared that the act charged was committed in "no-license territory," and then designated by name the particular township of said territory where said act took place, was sufficient in all respects to inform the defendant of the particular offense for which he was to be put upon his trial, which is all that is required in any criminal pleading, and that therefore the mere matter of the description of the "no-license" territory may be treated as surplusage. The question, then, so far as the character of the alleged "no-license territory" is concerned—that is, whether it is or is not in point of fact, a dry unit—resolves itself into one of proof, the burden of which rests, of course, upon the people.

In principle, the proposition thus declared is cogently analogous to that stated in the case of Ex parte Anixter, 166 Cal. 762, 765, 138 Pac. 353, where, first declaring that neither the soliciting of orders nor the making of agreements within no-license territory for the sale of intoxicants to be delivered outside such territory was an act falling within the inhibitions of the local option law, the court held that the fact that the liquors to which such solicitations or agreements related were to be delivered within a dry unit need not be alleged in the complaint or the information, inasmuch as it would be incumbent upon the people to prove that fact and that their failure to do so would completely exonerate the defendant.

But, in any event, it cannot be perceived how the substantial rights of the defendant could have been prejudiced by the amendment of the information as shown.

Amendments of criminal pleadings, to a certain extent, are authorized by section 1008 of the Penal Code, as amended by the Legislature of 1911 (Stats. 1911, p. 436), which, in part, provides:

> "An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

As shown, the information charges that the act of selling the intoxicants was committed "in no-license territory, to wit, Kimshew township, county of Butte," etc. These allegations were, of course, essential to the statement of the offense. Now, then, if it be proper or necessary for the information to specifically describe by name or otherwise the particular "no-license territory," can it be said that for that reason such description becomes an essential constituent of the crime? Clearly not. While it might be important to specifically designate or describe the particular dry unit within which the act of selling was committed, it cannot, manifestly, be said that such designation or description is any part or element of the crime or is essential to the statement of the gist or gravamen of the charge, which is, obviously, the act of selling within the limits of no-license territory.

Clearly, the mere making of a correction in the description or in the name of the no-license territory cannot have the effect of charging an offense different from that originally charged, or of inserting in the information any new or additional allegations of fact requiring the defendant to prepare for any further or different defense against the charge than that required of him before such amendment or correction was made.

The defendant at the trial had the full benefit of his plea of not guilty to the information and as ample opportunity to meet the charge after the amendment as he could have had prior thereto. His substantial rights could not have been affected or impaired in the slightest measure by an amendment of the information which could not and did not change the nature of the charge against him.

We have discovered no substantial reason calling for a reversal of the judgment, and it is, therefore, affirmed.

We concur: CHIPMAN, P. J.; BURNNETT, J.

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25 Cal. App. 366

MIDWAY FIVE OIL CO. v. CITIZENS' NAT. BANK OF LOS ANGELES.

(Civ. 1573.)

(District Court of Appeal, Second District, California. Sept. 4, 1914. Rehearing Denied by Supreme Court Nov. 2, 1914.)

1. GARNISHMENT (§ 88*) — ACTION AGAINST GARNISHEE—PLEADING.

Where a complaint against a garnishee alleged that the summons and writ of attachment were duly issued, that thereafter on a specified date plaintiff caused the writ of attachment to be served, and that the writ was on that day duly served on defendant corporation, such averment sufficiently alleged the facts as to the service of the writ; defendant's answer merely denying that at the time of the service of the writ of attachment on it, mentioned in the complaint, it had in its possession moneys subject to check by it or the order of the debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 160–166; Dec. Dig. § 88.*]

2. GARNISHMENT (§ 54*)—CERTIFIED CHECK—ESTOPPEL OF BANK.

Where a bank intrusted with the collection of a note accepted in payment a certified check from the maker instead of cash, it was estopped, as against the claim of the debtor, to deny that it had collected a debt for his credit, and, having been served with garnishment process, was chargeable for the amount of the collection less the debtor's indebtedness to it.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 105–107, 109, 112; Dec. Dig. § 54.*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Midway Five Oil Company against the Citizens' National Bank of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Horace S. Wilson and W. W. Middlecoff, both of Los Angeles, for appellant. S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, for respondent.

JAMES, J. This appeal is taken from a judgment entered in favor of the defendant and respondent, and is presented on the judgment roll alone.

From the facts found by the trial judge, it appears that one Henningsen was indebted to plaintiff in the sum of $1,595.49; that in September, 1911, an action was commenced by the appellant herein against the said Henningsen to secure a judgment on account of that indebtedness, and that on the 4th day of January, 1913, judgment was duly entered for the amount stated, and thereafter execution was regularly issued; that after the commencement of the action referred to, and before the entry of judgment, a writ of attachment was regularly issued and served upon the respondent herein; that respondent made answer to the garnishment, returning to the sheriff that it was not indebted to, nor was it holding any properties or moneys of, the said Henningsen. From the facts further found it appears that in August, 1911, Henningsen had owing to him from one Martin a sum of money amounting to $3,700, evidenced by a promissory note; that this note was then in possession of respondent, and Henningsen instructed respondent to collect the amount due from Martin on the note and deliver certain certificates of stock to Martin in connection with the same transaction; that respondent did deliver the stock to Martin and accepted in payment a certified check drawn upon the First National Bank of Pasadena payable to the order of Martin; that the said check was collected by respondent bank in the due course of business from the First National Bank of Pasadena. It was while this certified check was in the hands of respondent bank that the garnishment process was served. After collecting the amount represented by the certified check, respondent applied of the proceeds thereof the sum of $2,146.34 immediately in extinguishment of an indebtedness owing by Henningsen to it, and thereafter it honored an overdraft drawn by Henningsen in the sum of $1,000 and charged the same against the balance of the credit made in Henningsen's favor upon the collection of the certified check, leaving on open account a credit balance of $553.66, which was afterwards paid over to Henningsen.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It is contended that the complaint did not state facts sufficient to state a cause of action, in that the allegation showing the facts as to the service of the writ of attachment was not complete. We think the complaint did, in the absence of a special demurrer, state sufficient facts to sustain a cause of action on behalf of appellant. It was alleged: "That summons and writ of attachment were duly issued; that thereafter, on the said date, the plaintiff caused the said writ of attachment to be served, and said writ of attachment was on said date duly served upon said defendant banking corporation." In the answer of respondent there was no denial of this allegation; that portion of the answer referring thereto being worded as follows:

> "Defendant denies that at the time of the service upon it of the writ of attachment in the complaint mentioned it had in its hands, or in its possession, moneys subject to check by or order of R. M. Henningsen. * * *"

[2] The chief point relied upon by respondent to sustain the judgment of the court as entered is that it did not appear from the findings of the court that at the time of the service of the process of garnishment respondent had in its hands or under its control any money or property belonging to Henningsen, or that it was indebted to him in any amount. This contention, we think, cannot be sustained. It appears from the facts as found that Henningsen directed the respondent bank to deliver the certificates of stock and satisfy a debt owing to him by Martin when it should receive the amount of money represented in Martin's promissory note. The bank then, when it accepted the certified check, accepted the same as cash, and it would have been estopped, as against the claim of Henningsen, to deny that it had collected the debt for his credit. It seems to be the rule that where, under circumstances otherwise as represented by the facts here presented, an agent or trustee receives an evidence of indebtedness on account of its principal instead of money by the express authority of its principal, then it might properly answer, as did this bank, that it was not indebted to the principal in any amount. In this case, however, as has been pointed out, respondent at its own risk accepted as cash the certified check, and it must be held to have immediately become indebted to Henningsen in the amount which that check represented. As sustaining this view are the cases of Hancock v. Colyer, 99 Mass. 187, 96 Am. Dec. 730; Knight v. Bowley, 117 Mass. 551. There is no contention but that the bank had the right to offset against the proceeds of the certified check any matured indebtedness owing to it by Henningsen, but it appears that the last amount of overdraft—to wit, the sum of $1,000—had not accrued at the time of the service of the garnishment. Its liability to appellant was therefore the sum of $1,553.66.

The judgment is reversed, with direction to the trial court to enter, upon its findings of fact as made, judgment in favor of appellant in the sum of $1,553.66, and that appellant have its costs incurred upon this appeal.

We concur: CONREY, P. J.; SHAW, J.

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25 Cal. App. 384

NOURSE v. CITY OF LOS ANGELES et al.

(Civ. 1575.)

(District Court of Appeal, Second District, California. Sept. 8, 1914. Rehearing Denied by Supreme Court Nov. 7, 1914.)

1. Waters and Water Courses (§ 201*) — Municipal Waterworks—Discrimination.

Where a city maintains a water system for the purpose of supplying its inhabitants, it acts, not in its sovereign capacity, but as a private corporation, and like a private corporation is bound to furnish water without discrimination.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

2. Waters and Water Courses (§ 203*) — Municipal Waterworks—Regulations.

Where the ordinance fixing the rules for supplying inhabitants of a city with water from the city water system authorized the collection of all rates except meter rates in advance, and required a deposit to cover meter rates, a further provision that all water rates shall be charged against the property on which it was furnished and against the owner, and that no change of ownership or occupation shall have any effect, is unreasonable, and a second occupant of property, not personally in arrears for any water rates can demand that he be furnished water without payment of arrears incurred by his predecessor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Petition by Charles O. Nourse for a writ of mandate against the City of Los Angeles. From a judgment denying the writ, petitioner appeals. Reversed and remanded, with directions to issue writ.

Paul Nourse, of Los Angeles (John Beman, of Los Angeles, of counsel), for appellant. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondents.

SHAW, J. This is an appeal from a judgment of the trial court denying an application for a peremptory writ of mandate commanding the board of public service commissioners of the city of Los Angeles to furnish petitioner a supply of water for use at the premises designated as No. 147 West Avenue 31 in the city of Los Angeles.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

At all the times in question the city of Los Angeles owned and operated a water system, by means of which water was supplied to said city and its inhabitants, and with the pipes and mains of which system the said premises of petitioner were connected. Among other rules and regulations established by ordinance for the supplying of water to the inhabitants of the city, was a provision as follows:

> "All water rates shall be charged against the property on which it is furnished, and against the owner thereof, and if for any cause any sums owing therefor become delinquent, the water shall be cut off, and in no case shall it be turned on to the same property until all such delinquencies shall have been paid in full. No change of ownership or occupation shall affect the application of this section."

On October 27, 1913, petitioner made demand upon respondents for a supply of water for use upon said premises, to be delivered through the pipes connecting same with the said water system, and in making the demand he complied with all the rules and regulations established therefor, save and except that he refused to pay respondents the sum of $1.50, conceded to be due for water theretofore supplied for use upon said premises by a former occupant thereof. The sole question here involved is the validity of the provision above set forth, by reason of which respondents seek to exact payment of this arrearage due for water used upon the premises by the former occupant thereof as a condition of furnishing petitioner the supply of water so demanded.

[1] Under its charter the city has assumed the duty of operating a water system for the purpose of supplying water to its inhabitants. In the performance of this duty it acts, not in its sovereign capacity, but in the capacity of a private corporation engaged in like business. Appeal of Brumm (Pa.) 12 Atl. 855; Linne v. Bredes, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238; Wyman, Public Service Corp., vol. 1, p. 187. Like a private corporation, it is the duty of the city to furnish without discrimination to all its inhabitants who apply therefor a supply of water upon such applicants complying with such reasonable rules and regulations as it may lawfully establish for the conduct of the business.

[2] The question is whether or not the provision upon the authority of which respondents base their refusal to supply the water is, in the absence of any statute authorizing the same, a reasonable regulation. Respondents have directed our attention to a number of cases wherein provisions similar to the one under discussion have been upheld. From an examination thereof it appears that in all the cases cited there existed a statute upon the authority of which the provision was enacted. See Howe v. City of Orange, 70 N. J. Eq. 648, 62 Atl. 777; Appeal of Brumm, supra; City of Atlanta v. Burton, 90 Ga. 486, 16 S. E. 214. Where such right is conferred by statute or the organic law of the city, it can, of course, be asserted and enforced by ordinance embodying such rules and regulations. The city charter contains nothing touching the subject, and the general statutes of the state are silent in conferring such power. This being the case, the authority to enact the provision under discussion, if it exists at all, is by virtue of the general incidental power of the municipality. The provisions of ordinances enacted under such implied power must be reasonably necessary to carry out the express powers conferred, and not inconsistent with the laws or policy of the state. Ex parte Green, 94 Cal. 387, 29 Pac. 783; Egan v. City of San Francisco, 165 Cal. 576, 133 Pac. 294. The ordinance fixing the rules and regulations provides that:

> "All rates, except meter rates, are due and payable in advance, and meter rates are due and payable at the end of the month, excepting that a deposit may be required thereon in an amount not exceeding the estimated quantity of water consumed."

It appears the water was supplied to the former occupant of the premises in question by meter, and therefore the rates were not due until the expiration of the month. But under the provision just quoted the city could have exacted a deposit in an amount equal to the estimated value of the quantity of water to be supplied, thus fully protecting itself against loss. It is therefore an unnecessary regulation, and as applied to petitioner, unreasonable in that, while he is not in arrears for any water furnished to him or supplied to another upon his order, it is nevertheless insisted that he pay the debt of another as a prerequisite condition to the city performing its duty to supply water to all its inhabitants without discrimination, and for a like reason is discriminatory against petitioner. While respondents do not seek directly to enforce payment of the charge against the property, they do, in withholding a legal right and by thus destroying the use of the property as a habitation, indirectly seek to compel petitioner to pay such charge. In addition to the authorities cited by respondents, wherein the validity of the provision here attacked was upheld by reason of statutory authority, they have cited the cases of Jones v. Mayor, 109 Tenn. 550, 72 S. W. 985, and Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439. These cases are clearly distinguished from that at bar by reason of the fact that the applicant for water was himself in arrears and had made default in payment for water which had been theretofore supplied to him. Our conclusion is that the regulation in question is unreasonable in that, without statutory authority therefor, it makes one person liable for the debts of another and contravenes the duty assumed by the city to serve all its inhabitants without discrimination. This view is sustained by overwhelming authority. See Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432; Linne v. Bredes, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238; City of Houston v. Lockwood Inv. Co. (Tex. Civ. App.) 144 S. W. 685; Harbison v. Knoxville Water Co. (Tenn. Ch.) 53 S. W. 995, 56 L. R. A. 316, 76 Am. St. Rep. 682.

The judgment is reversed, and the trial court instructed to render judgment awarding petitioner a peremptory writ of mandate as prayed for.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 342

PEOPLE v. HAIL. (Cr. 247.)

(District Court of Appeal, Third District, California. Sept. 2, 1914.)

1. Criminal Law (§ 1060*)—Appeal—Objection Below—Argument of Counsel.

Improper argument of the district attorney, presented by a record showing objection preserved, may be reviewed on appeal, where the trial court has refused to heed the objection, though no other ruling was invoked below as to such argument.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1060.*]

2. Criminal Law (§ 1171*) — Appeal — Ground for Reversal — Argument of Counsel.

A statement by the district attorney in his argument that, should the jury acquit accused, they would be afraid to go out on the street and meet their fellow men, required a reversal of a conviction of manslaughter, where the evidence left in doubt the question of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

3. Criminal Law (§ 700*)—Conduct of Prosecuting Attorney—Nature of Duties.

A public prosecutor represents all the people, including a person being prosecuted for crime, and should see that such person is not deprived of his life, liberty, or property without due process of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 700.*]

4. Criminal Law (§ 719*)—Argument of Counsel.

A prosecuting attorney should in his argument remain strictly within the record, and not attempt to evolve any theory or to import into the case any features not reasonably justified by the proofs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

F. G. Hail was convicted of manslaughter, and appeals. Reversed and remanded.

Jas. M. Hanley, of San Francisco, and L. N. Peter and W. W. Kellogg, both of Quincy, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant, having been convicted of the crime of manslaughter under an information filed in the superior court of Plumas county charging him with the crime of murder, alleged to have been committed at Quincy, in said county, on the 16th day of August, 1913, prosecutes these appeals from the judgment and the order denying him a new trial.

The assignments of error are numerous, and may be stated in orderly sequence as follows: (1) That the evidence does not support the verdict; (2) that the court erred in certain rulings whereby certain evidence was admitted and certain evidence excluded; (3) that the district attorney, during the trial of the cause and in his argument to the jury, was guilty of misconduct seriously prejudicing the substantial rights of the accused; (4) that, in its charge, the court misdirected the jury in matters of law; (5) newly discovered evidence, etc., etc.

In view of the conclusion we have reached that the judgment must be set aside on the ground of substantial prejudice suffered by the defendant by reason of certain remarks by the district attorney in his argument to the jury, it will be unnecessary to notice the other assignments. A consideration of the point which we conceive demands a reversal of the judgment and the order will, however, necessitate a somewhat extended review of the evidence. The voluminousness of the evidence adduced at the trial, and which, in its entirety, constitutes a part of the record on these appeals, may at once be apprehended when it is stated that 45 witnesses were called, gave testimony and most of them subjected to exhaustive cross-examination. It would, therefore, be impossible, in the examination of the evidence, to consider and review in this opinion in full detail the testimony of each of the witnesses. Indeed, since there appears to be, upon the face of the testimony, little or no material conflict therein, with perhaps an exception or two upon certain points, to which it will be our duty to direct attention, it is deemed necessary only to present here an accurate synoptical statement of the facts which logically follow from the evidence, now and then, as in our judgment the necessity of this decision may require, briefly quoting certain testimony.

The defendant, at the time of the homicide, was 62 years of age, and a journalist by profession, having been, up to the time of the unfortunate affair of which this case is the outgrowth, continuously engaged, for a period exceeding 30 years, in the business of publishing and editing newspapers in Plumas county.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The deceased, John H. Boyle, was a lawyer by profession, and was, and had been for several years prior and up to the time of his death, engaged in prosecuting the practice thereof at Quincy, the county seat of said county. He was, at the time mentioned, about 35 years of age, in stature measured 5 feet 9¾ inches, and in robust health.

It appears that, approximately a year prior to the date of the homicide, the deceased had made an application to the Masonic lodge of Quincy to become a member thereof, and that, upon considering and voting upon said application, said lodge rejected it, and thus denied the deceased the privilege of becoming affiliated therewith. The result of the action of said lodge upon his application was, quite naturally, a sore disappointment to Boyle, and it seems provoked in him an intense feeling of hostility and resentment against all the members of said lodge in general and in particular against the individual, whoever he might be, whose vote upon the application had resulted in its rejection. According to the undisputed evidence, he, on indiscriminate occasions, bitterly denounced the members of the lodge collectively, referring to them in language scurrilous and opprobrious in the extreme. He let it be understood in no uncertain language that he would in some manner avenge the wrong which he conceived had been committed against him by the denial to him of the privilege of entering into membership of the Masonic fraternity, if he could succeed in discovering the identity of the member of the local lodge of that order who had cast the "blackball" against his application. He appears to have started an investigation looking to the disclosure of the identity of the individual who thus had prevented his acceptance into the lodge, and kept up a relentless prosecution of it until he had obtained information, sufficient to him, upon which to base the belief that the defendant was the party who had cast the vote fatal to his hope of becoming a member of the lodge. Whether he had any tangible ground upon which to found his belief or suspicion, or whether he had obtained satisfactory evidence that the defendant was the party who cast the "blackball" on his application, it is very evident that he in good faith believed that the accused cast the vote which obstructed his admission into the lodge; for it appears that, for a period of approximately nine months prior to his fatal meeting with the defendant, he repeatedly accused the latter of having been responsible for the rejection of his application, and had repeatedly referred to him in the most abusive and violent language, and threatened to get even, or, as some of the witnesses put it, declared that he would "get him." Shortly after he had been rejected as an applicant to membership of the lodge, the deceased met the defendant, and at once entered upon a discussion of the fact of his rejection, asking the latter if he was present at the lodge meeting at which his (deceased's) petition was considered and acted upon. The defendant replied that he was at said meeting; whereupon the deceased denounced the man who "blackballed" him as a "son of a bitch," and added, in great anger and vehemence, "that he would continue to hunt the son of a bitch that blackballed him, and when he found him he would get him."

Later—about six weeks or two months previously to the date of the tragedy—the deceased again saw and met the defendant, this time in the corridor of the courthouse. Of this meeting the defendant testified: "Mr. Boyle came rapidly behind me and accosted me, leaning his elbow on the post or railing, and, looking straight at me, in a menacing manner, said: 'Mr. Hail, will you deny to me that you cast that blackball against me?'" To which Hail answered: "John, I will neither deny it nor affirm it, as I have already told you." And thereupon Hail hastily left the deceased and went up the stairs of the courthouse.

For some time prior to the day on which the fatal shooting occurred, Hail had at various times been told by different parties that the deceased had reached the conclusion that he (Hail) had cast the "blackball" against the former; that the deceased was constantly abusing the defendant in severe and scurrilous terms and that he had made threats against Hail.

We are now brought to the day of the homicide, some of the immediate circumstances of which will be the better understood by the following preliminary explanation: It appears that, during the course of the agitation over the rejection of the petition of the deceased to become a member of the Masonic lodge, an article, anonymously signed, was published in the News, a newspaper published at Greenville, in Plumas county. It further appears that, subsequently to the publication of said article, a certain editorial was printed in the National-Bulletin, a newspaper published and edited by the defendant at Quincy. There is nothing in the record from which the character and the specific subject-matter of said articles can definitely be ascertained or determined. It is, however, fairly and reasonably inferable from the whole record and the references in the testimony to said articles that the one printed in the News contained an acrimonious discussion of the action of the Masonic lodge in rejecting the petition of the deceased, and perhaps an insinuation that the defendant was responsible for said action, and a severe arraignment of him therefor, and that the article published in the National-Bulletin was a reply thereto, and, while not referring by name to the author of the article appearing in the News (doubtless for the reason that his identity was not certainly known to the defendant), severely (it is to be apprehended) anathematized the latter and his article. At all events, it is clearly manifest from the testimony that the News article was exceedingly offensive to the defendant and that the latter's article greatly offended and was resented by the deceased, he having been persuaded, at least in some measure, that the strictures contained in said last-mentioned article, whatever they might have been, were aimed at him. With this explanation, we will return to the day of the tragedy. Between half past 7 and 8 o'clock of the evening of August 16, 1913, the defendant and one Edward Huskinson were holding a conversation near the outer edge of the sidewalk, in front of what is known as the "Capitol Saloon," located on Main street, in Quincy; the defendant, it appears, standing on the ground, or not quite upon the sidewalk, but near the curbing. They had thus been engaged for a very brief period of time ("probably a minute, maybe two," so Huskinson thought), when the deceased put in an appearance, and, approaching the spot where the two men were standing, and with "a little wild, a little, glitter in his eye, under subdued excitement," addressed the defendant saying: "Mr. Hail, I would like to see you a minute." Hail, thereupon, and without making a reply to the deceased, immediately "turned around and hastily stepped up on the sidewalk and started uptown past the barber shop. Mr. Boyle turned and followed; headed him off in front of the barber shop." Huskinson testified that, at that juncture, he "started across the sidewalk towards the Capitol (saloon). Just as I got to the swinging doors," he continued, "I thought I heard something like a slap and immediately followed by the words, 'You son of a bitch.' I turned around and saw Mr. Boyle backing down the sidewalk and Mr. Hail following him. Mr. Hail had an open pocketknife in his hand and as Mr. Boyle backed off the sidewalk, I jumped in between them. I said, 'For Christ sake, Johnny, cut this out,' or, 'Let's have none of this.' At that I looked at his hand and found there was nothing in that, but his hands were clasped—clinched. Then I turned around and Mr. Hail was gone. I asked Mr. Boyle, 'What has become of Hail?' He says, 'He has gone after his gun—by G——d, I will be here when he comes back.'" Huskinson and Boyle, after the departure of Hail, stepped up on the sidewalk, and Huskinson asked Boyle what he had done. The latter replied that he had asked Hail "if he meant that article" for him, that Hail returned an affirmative answer, and that he (Boyle) thereupon slapped Hail's face.

Hail's version of the first meeting between the deceased and himself is as follows: That he was on his way to the Masonic hall carrying with him a written invitation from the board of education to the Masonic lodge to conduct the ceremonies of laying the corner stone of a new high school building in Quincy, the construction of which was then in progress; that he met Huskinson at the point above mentioned, and paused to tell him of said invitation, and, while so engaged, "Boyle came up and took a position on the sidewalk between Huskinson and myself. With a jerk of the head and a fierce, menacing expression on his face, he said: 'Mr. Hail, I would like to speak to you a minute as soon as you are through with Mr. Huskinson.' I made no reply, and started to go down the street past the Grand Central Hotel and post office to the Masonic building. Mr. Boyle followed me, and, as I was about to step up on the sidewalk, he accosted me again, and said, 'Parties tell me that article in the paper meant me.' I made no reply other than to say, 'That is up to you, John.' As quick as I got the words 'That is up to you, John,' out of my mouth, he struck me a heavy blow on the left side of my head and ear with his right hand, accompanying the blow with the words, 'You son of a bitch.' He also called me a black bastard. I jumped up on the sidewalk, told him he was a dirty coward, and moved westward past a post and a tree or trees. I knew he was a young man, 35 years of age, active and powerful, and that I was an old man of 62 and in a weakened condition. I therefore knew that I had no show with him in a physical contest. As I passed westward of the post and tree or trees, I quickly took from my pocket a small penknife and opened it. I did this, not for the purpose of assaulting Mr. Boyle, but for the purpose of warding off and preventing him from making an attack upon my life, as he had previously threatened. * * * During the latter part of this trouble Mr. Huskinson was on the sidewalk at my right, by words and acts trying to stop the trouble. Mr. Huskinson's efforts gave me an opportunity to escape from a disgraceful street brawl, and possibly prevented another assault upon my life, and I did so."

After the departure of Hail from the scene of the assault above described, Huskinson remained for a while with Boyle and undertook to persuade him to drop the matter and to leave that part of the street. Huskinson's expostulations were unavailing, and, saying to the deceased, "Well, Johnny, if you ain't going, I am; for Heaven's sake don't have any trouble," he walked into the Capitol saloon.

With the exception of a child just past the age of eight years, Albert Vance by name, who said that he saw Boyle slap Hail a severe blow and the latter with a knife in his hand attempting to stab the former, although the two men, he said, were never close to each other after Boyle struck Hail, the only witnesses to the first altercation between the defendant and the deceased were Huskinson, Boyle, and Hail. There was no material variance between the testimony of Huskinson and that of Hail relating to the circumstances of the original actual hostile meeting of the parties, and it is hence manifest that the testimony of these witnesses detailing said circumstances stands in the record undisputed. Thus the proposition is obvious that the deceased was the original aggressor or the first to precipitate actual hostilities.

It now remains to be seen what the evidence discloses relative to the subsequent events which finally led to the fatal shooting. As seen, the defendant left the scene of the first difficulty immediately after Huskinson stepped in and stopped the further progress of the altercation. The testimony shows, and, in fact, the defendant declared it to be true on the witness stand, that, forthwith upon the cessation of the first trouble, he started for and went to his office. What he did there and of his movements thereafter up to and including the time of the shooting may best be told in his own language, inasmuch as his is the only testimony disclosed by the record bearing upon certain incidents occurring after the original difficulty and immediately connected with the final chapter of the tragedy. He testified:

"I entered the office and went back to the editorial room, turning on the electric light with my hand and handkerchief, and examined my head and ear to see if they were bloody. I found no blood. I then reached down into a drawer of my desk and took therefrom a pistol and put it in my right front pants pocket, for the purpose of defending myself against an assault by him should he make it again that evening in accordance with threats previously made. I left my office and resumed my journey to the Masonic lodge. I was going to the Masonic lodge for the specific purpose already referred to—that of delivering the resolution adopted by the board of education to the secretary of the lodge. Near the west line of Mr. Stone's jewelry store I observed Mrs. B. Schneider coming across the street from the Plumas House. She hailed me she said to have a talk with me. I told her I was in a hurry at that time and could not do so, but that I would be glad to do so on a future occasion. She signified her assent and I resumed my journey to the Masonic lodge. The Masonic lodge, while I think the rule is 7:30, in the summer months, it seldom meets before 8 o'clock—usually about that time. I was hurrying to get there before lodge opened and deliver this document to the secretary. Q. What course did you pursue along the street after talking to Mrs. Barney Schneider? A. I went along the sidewalk on the north side of Main street. Q. What is your usual course and what had been your accustomed course in going to the Masonic lodge? A. To go down by the way of the National Bulletin office and Main street. (This course would require the defendant to pass the point where the deceased made his first assault upon Hail.) Q. After leaving Mrs. Schneider, going along Main street, did you know whether or not John Boyle, the deceased, would be upon the street that night? A. I didn't know positively that he would be on the street; yet I was afraid that he might be."

The defendant continued:

"I did not expect to meet him, for the reasons I have indicated, but of course I did not know but I might meet him, especially as to reach the Masonic lodge I was compelled to go near his residence, which is next door. When I reached a point near the east line of the Ford & Lee Company's grocery store, I glanced up ahead of me and saw Mr. Boyle partially crouched and hidden behind a post near the scene of the former trouble. Mr. Boyle had his right leg thrown back and his right hand at his hip pocket. I changed my course of travel from the center of the sidewalk to one near the walls of the building on the opposite side of the sidewalk from where Mr. Boyle stood. When I got to a point probably a couple feet west of him he suddenly sprang from his position behind the post on to me and with some epithet struck me a heavy blow on the left side of the head with his fist. The effect of the blow was to daze me. When I found myself recovering from the condition mentioned I found Mr. Boyle clinching with me and myself endeavoring to draw my pistol. It was at that time that I heard two shots fired in rapid succession. At least it so seemed to me. I was confident Mr. Boyle had fired for the purpose of taking my life, as threatened. The second shot entered my left leg, badly shattering it. * * * I sank back to the sidewalk. I thought Mr. Boyle had fired the shots. During the time that I was sinking on the sidewalk, and immediately after, I fired three shots. When I first saw him (Boyle) when I sank he was over me on his hands and knees or all fours. After the third shot that I fired while sinking to the sidewalk, or immediately after reaching it, was fired, Mr. Boyle, whom I saw, as before stated, just above me, turned over, his left hand, so to speak, seemingly using it as a pivot, turned over to my left and to the east on the sidewalk on his back. As soon as the shooting ceased a crowd gathered, and among them I observed Constable Mosely, County Surveyor Barbee, my son, Herbert F. Hail, Dr. Walsh, and Dr. Bolton. * * * I said to my son, Herbert, 'I hope he wasn't badly hurt.' I also said to him, 'He,' meaning Mr. Boyle, 'had struck me on the head and broken my leg.'"

No witness, other than the defendant himself, was produced who knew or pretended to know just how the second encounter was started, or who started it. Unless, therefore, there are in the case physical facts which clearly run counter to his story of how and by whom the second and fatal difficulty was begun, the defendant's testimony upon the following points appears in the record undisputed: That, when the defendant retraced his steps from his office to the point where the original difficulty and the shooting transpired, he was on his way to the Masonic lodge; (2) that, although he thought it might be probable that he would again meet the deceased that night, he did not know, as he was on his way to the lodge, that Boyle was still at the scene of the first trouble; (3) that, as he approached the point where the first assault was made, and when within a few feet thereof, he saw Boyle in a crouching position behind a tree, with his right leg thrown back and his right hand upon his hip pocket; (4) that, upon seeing Boyle in that position, the defendant changed his course on the sidewalk, leaving the center thereof and moving to the walls of the building, or on the opposite side of the sidewalk from where Boyle was standing, and thus attempted to pass the deceased; (5) that, when the defendant was about two feet west of and from the deceased, and in the act of passing him, the latter suddenly sprang out and upon Hail and struck him a severe blow with his hand on the left side of the head, which blow caused the defendant to become dazed; (6) that, in the scuffle, Hail was wounded severely in the left leg above the ankle by a shot discharged from his own weapon. There is, however, an apparent conflict in the evidence, so far as circumstances are concerned, upon the question whether Boyle was shot by Hail before or after the latter fell back upon the sidewalk.

The theory of the prosecution at the trial was, as is their position here, that Hail, having gone to his office for the express purpose of arming himself, returned to the scene of the original altercation with the hope of again meeting Boyle and with the intention of avenging the assault made by the latter upon him; that the two men met; that Hail drew his revolver and shot Boyle before any act of violence by Boyle, and that the latter then attempted to wrest the weapon from Hail's possession; that, in the struggle that followed, Hail fired the shots that inflicted the mortal wounds in the body of Boyle and accidentally wounded himself in the leg.

There is, as already suggested, some testimony, very slight, however, which bears the appearance of supporting that theory. That two shots were discharged, and that, after an interval of approximately a second, three more were fired in rapid succession, appears to be well established. Some of the witnesses for the prosecution seem to have been quite positive that all of the five shots were discharged while the two men were yet upon their feet and engaged in a struggle. The witness Brown, for the people, testified that he heard two shots, turned around to see where they came from, and that he saw Boyle "make a grab for a gun." He said further that, prior to seeing Boyle "grab for the gun," the latter did not have hold of Hail. Dr. Stewart testified that, just before the shooting, he saw Hail walking faster than his usual gait from the direction of his office to the point where the shooting occurred; that within a short interval of time thereafter he heard two shots, looked in the direction of the place where the firing took place, and that he saw a struggle going on between two men. He said that, immediately prior to the shooting, he saw no altercation or struggle in progress between the parties.

It will be observed that neither Brown nor Stewart says or makes any pretense of knowing what was going on between the two men just before they heard the first two shots; that is, they did not know, and did not say, whether a struggle between the two men preceded the firing of those shots. It is, however, clear, from the testimony of said witnesses, and for that matter, from that of all the witnesses introduced by both sides that saw any part of the combat, that the deceased, if wounded by one of the first two shots, did not then receive a mortal wound. Dr. Walsh, the autoptical surgeon, testified that he found three distinct wounds in the body of the deceased, two of which were necessarily fatal, and from the effect of either of which death would almost instantaneously follow. The first of these wounds described by him, besides producing damage to other parts of the upper body, lacerated and destroyed the subclavian vessels—both the vein and the artery. The doctor explained that:

> "The subclavian artery and vein are feeders from the aorta, and just pass directly over under the collar bone, and go to form the blood supply to the upper extremity. They are large vessels, and a fatal hemorrhage would take place from either—from their injury—in a very few seconds." He said that a person thus wounded would likely die within 15 seconds after receiving the wound "and would probably be unconscious in half that time."

He said, in other words, that after the destruction of the subclavian blood vessels the person so injured would not be able to make a conscious movement; any movement of the body after that would be spasmodic. The second wound, in the order in which the doctor described them, while serious, was not necessarily fatal. The third "entered in the center of the breast bone, there passed a little downward and to the left, and came out right at the edge of the shoulder blade on the left side of the back, and then passed through the heart. In the last-mentioned wound there was no hemorrhage, the heart being bloodless, from which circumstance the doctor concluded and expressed the opinion that death was caused by the wound first above referred to.

From the doctor's testimony these facts necessarily follow: (1) That the death of Boyle was practically instantaneous with the infliction of the wound which destroyed the subclavian vessels; (2) that the shot which penetrated the heart was received after life was extinct, for it is an obvious proposition that, if the deceased had still been alive when he received the shot in the heart, there would have been evidence of more or less hemorrhage in that wound; (3) that the struggle between the two men, whether they were upon their feet or down on the sidewalk, must have immediately ceased when Boyle received the wound whose effect was to destroy the subclavian artery and vein.

The next inquiry which may well be made is: Were the defendant and the deceased down on the sidewalk when the mortal wound was inflicted? There were, it is conceded, but five shots discharged from Hail's weapon, and that of these one entered the leg of Hail, three the body of Boyle, and one "went wild," or in other words, struck neither Boyle nor Hail. That the bullet which entered Hail's leg was discharged from the pistol while it was yet in the pocket of his trousers seems to have been satisfactorily confirmed by the fact that said pocket was shown to have a hole in it, not unlike one which might have been produced by a bullet fired through the pocket, and evidently not caused by wear, since the pantaloons were comparatively new, and worn by Hail on only a few occasions before the tragedy. And, inasmuch as it appears that the effect of the wound suffered by the defendant was so to shatter the bones of his limb below the ankle as to render it impossible for him to stand upon it, he must have immediately, on receiving said wound, sunk back upon the sidewalk, and from this it would seem that he was struck by the second shot, and that two shots were discharged while the weapon was still in his pocket.

The theory following from the foregoing view of the testimony is that two shots were discharged in the pocket of Hail's pantaloons before he was able to draw the weapon therefrom, and that the three shots which entered the body of Boyle were discharged while the two men were in a struggle down on the sidewalk. Moreover, this theory is supported by the testimony of a number of the witnesses for the defense; they having asservated that, after the first two shots were fired, they saw Hail and Boyle fall to the sidewalk, the latter falling on top of the former, and that, after they had thus fallen, three shots were fired in quick succession, with the result that Boyle fell off of Hail and on his back on the sidewalk. Thus it appears that the physical facts themselves coincide with and support the story of the tragedy as told by the defendant. In other words, the physical facts are not inconsistent with or contradictory to the testimony of Hail, either as to how and by whom the second trouble was started or as to how the shooting occurred. On the contrary, as stated, they seem to bear out and support his testimony as to how and at what point of time the shots were fired, while, as seen, there is absolutely no testimony contradicting his statement that Boyle started the second trouble in the manner described by him. And he was not impeached.

Under the circumstances as disclosed, no one will dispute the right of Hail, after the first assault, to have armed and thus have prepared himself to defend his person against what he had reasonable grounds for believing might be another violent and perhaps a more serious assault upon his person at the hands of his implacable enemy, between whom and himself a mere fistic contest would have been unequal or one-sided and favorable to the deceased, because of the superiority of the latter in physical vigor and agility over the defendant, who was aged and still suffered, so he testified, from the effects of an injury to his head sustained by a fall some years before. No one will dispute the legal right of Hail to go out upon the public streets and his right to have returned by the route leading past the scene of the original difficulty to go to the Masonic lodge, of which he was a member, and to which he had been charged to carry a special message that evening, it being the regular meeting night of the lodge. It will be conceded that the story of the defendant of the second and fatal meeting, if true, disclosed a clear case of self-defense.

With the law and the only testimony showing, or tending to show, how and by whom the trouble between the parties at the second and fatal meeting was started thus stated, the question arises: Did the jury arbitrarily reject the defendant's testimony, or, examining it under the tests whereby the credit of human testimony must and can only be determined, did they question its verity, and so exclude it as a factor or element determinative of the question of guilt or innocence? It will be admitted that, with the exception of the fact of the homicide itself and the circumstance that the defendant resumed his way to the Masonic lodge over a course leading past the scene of the first assault, there is absolutely no affirmative testimony in the record tending to establish the crime of murder. And, if the jury rejected the testimony of the defendant, then manifestly, there was left in the record no testimony disclosing the circumstances of the beginning of the second difficulty, and therefore, obviously, none to show that the homicide was the result of a sudden quarrel or heat of passion—the elements of voluntary manslaughter—of which the defendant was convicted.

Thus we have examined, analyzed, and considered the testimony, not because we feel justified in declaring that the evidence does not, as a matter of law, support the verdict, but to demonstrate that, while the evidence may be said to be technically, and only technically, sufficient to uphold the jury's conclusion, there appears to exist a doubt of the gravest character of the guilt of the accused of any crime, and thus to illustrate the seriousness of the point, vigorously urged against the validity of the verdict, involving the charge that the district attorney, in his argument to the jury, unwarrantably used language whereby the defendant was deprived of a fair and impartial trial. Thus we are brought to the consideration of the point just mentioned.

[1] Preliminarily it is objected by the Attorney General that the point involving the asserted misconduct of the district attorney cannot be reviewed either on an appeal from the judgment or the appeal from the order denying a new trial, except where it is made to appear that by some ruling respecting the alleged misconduct the court has made an error which could be made the ground of a motion for a new trial. As sustaining this position, the Attorney General cites the cases of People v. Amer, 151 Cal. 303, 90 Pac. 698, and People v. Amer, 8 Cal. App. 137, 96 Pac. 401.

In the first-mentioned case it is said:

> "In view of the fact that the misconduct of the district attorney has so often been held to constitute a sufficient ground for reversal of the judgment, it may be that it has become a settled rule that the question of misconduct of the district attorney will be considered upon an appeal from the judgment, when presented by a proper record, and the points saved for review by exception."

In the second case referred to it is said that:

> "There is no authority whatever in the statute for holding that such misconduct of the district attorney, aside from any ruling of the court in reference thereto, can be properly reviewed on appeal from the judgment, unless it is a ground for a motion for a new trial."

It is further said in that case that, "if any other rule has been established, it must be by virtue of judicial legislation." In this case, however, the court refused to take any heed of the objection of the attorney for the defendant to the remarks of the district attorney constituting the alleged misconduct of that officer in his address to the jury, and in this we think the court committed an error which could properly be made the basis of a motion for a new trial. We are of the opinion, therefore, that the question of the misconduct of the district attorney, exception to such misconduct having been reserved and presented here by a proper record, may be reviewed on the appeal from the judgment. See People v. Pang Sui Lin, 15 Cal. App. 263, 114 Pac. 582.

[2] In the course of his argument to the jury, the district attorney said:

> "Men have been acquitted who have committed cold-blooded murder; and if you were to acquit this man under the testimony here, you would be allowing a cold-blooded murderer with human gore yet dripping upon his hands to go unwhipped of justice. Gentlemen, you cannot do it, you will not do it. Should you do it you would be afraid to go out on the street and meet your fellow men."

Counsel for the defendant, immediately upon the utterance of said language, assigned it as error, and moved the court to instruct the jury to disregard it. As before stated, the court, in effect, refused, or, at any rate, omitted to do so, saying: "I don't understand it; to me it doesn't mean anything; proceed."

That the effect of the statement that the jurors, in the event that they acquitted the defendant, would be afraid to go out upon the public streets and meet their fellow men was to intimidate or influence them to return a verdict of conviction, regardless of their views as to the effect of the evidence, cannot for a moment be doubted. Whether the language referred to was used in good faith or for the purpose of influencing a verdict is immaterial. The vice and damaging effect of the utterance upon the rights of the accused remained. In a case where evidence of guilt was overwhelming or conclusive, we might justly say that the language was not prejudicial in its effect upon the legal rights of the defendant, although the use of such language would in such case be none the less reprehensible. But this is, as we have shown, not such a case.

Both the defendant and the deceased were professional men; the one a journalist, actively engaged in following his profession; the other a lawyer, actively prosecuting the practice of his profession. They were, therefore, prominent and conspicuous characters in the county of Plumas and in its civic and social affairs. Both had resided in that county for many years, and, we have the right to assume, were respected citizens thereof. In the very nature of things, therefore, the tragedy must have aroused great excitement among the people of said county and have provoked a high state of public feeling. Doubtless, as is invariably so in such cases, where the actors are prominent and well known, the people of the community took sides, and were pronounced in their partisanship on the one side or the other. This condition of the public mind we cannot and do not take judicial notice of, but from common experience we know that it will arise and exist on occasions such as the one responsible for this case in a comparatively small community, in point of population, where everybody has more or less personal acquaintance with everybody else. Hence in such a case, where, as here, there is a manifest paucity of evidence tending to establish the guilt of the defendant, language such as the district attorney used in this case in his address to the jury must have had, and should be held to have had, the effect of denying to the accused that fair and impartial trial before a jury of his fellow men guaranteed by the law to every person put upon his trial for his life or his liberty. The language complained of amounts, substantially, to a direct declaration to the jury that, if they did not convict the defendant, they would lose the respect and confidence of their friends and neighbors. Thus the question of the honesty and the integrity of the jury was injected into the case. In other words, the jurors themselves were put upon trial by the district attorney, and whether they could bravely meet their fellow citizens and face them with clear consciences was made by that official to depend upon whether they found the defendant guilty.

[3, 4] A public prosecutor represents all the people, of whom every person accused of violating public law is none the less one because he is so accused. He represents the majesty of the law, which stands for the protection of every citizen against the taking of his life, his liberty, or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means. That official should always do his sworn duty, of course, but he should always do it fairly and justly, and not permit the great power with which

he is clothed to be converted into an instrument of persecution. He should, as indeed any lawyer should, in his address to a jury, remain strictly within the record, and not attempt to evolve any theory or to import into the case any features not fairly and reasonably justified by the proofs.

In this case the district attorney's address to the jury fairly reeked with violent abuse of the defendant and other declarations not warranted by the evidence or fairly within the bounds of the record or any theory reasonably deducible therefrom. He repeatedly characterized the defendant as a cold-blooded murderer, and often misstated the law of the case. He accused the defendant of having caused the hole to be made in his pantaloons pocket, where he carried his pistol, after the homicide occurred, when, as a matter of fact, there was not a scintilla of evidence to warrant the accusation. He made insinuations as to the contents and character of the article published in the defendant's newspaper, after the court had excluded it from the record. No exceptions were made by the defense to any of the declarations thus adverted to, but we here refer to them merely as indicating the general manifestly unfair attitude of the district attorney toward the accused and as disclosing a determination on his part to secure a conviction. Whether, as before suggested, that officer was actuated in his argument by a firm conviction of the guilt of the defendant or was thus carried away from the record by permitting his zeal to usurp the place of his better judgment, as is too often true with public prosecutors, we cannot say, nor is it necessary to inquire; since the palpable effect of his language upon the jury—the language to which exception was reserved—is the end of the inquiry here.

The cases are replete with severe arraignments of prosecuting officers for unfairness in the presentation of cases against persons accused of crime, and there have been very justly recorded many reversals for misconduct no more obnoxious than that complained of in the case at bar. The number of such cases is so large that it would greatly extend the length of this opinion—now more extended than had been desired—to attempt to notice all of them. We shall examine a few of them, however.

In the case of People v. Bowers, 79 Cal. 415, 21 Pac. 752, the language used in animadverting upon the conduct of the district attorney for referring in his argument to the jury to matters dehors the record has peculiar application to the present case. The court, after an examination of the evidence, said:

> "We do not feel like saying, under these circumstances, that, as a matter of law, the jury could not be satisfied beyond a reasonable doubt of the guilt of the defendant, but it is evident that the case was one of great difficulty, and required unusual circumspection and the utmost coolness and impartiality in its consideration. * * * In view of all these circumstances, certain occurrences at the trial have a significance which in a different kind of a case we should hesitate to attribute to them. Unfortunately the judge allowed himself rather frequently to question the witnesses, always in the interest of the prosecution, and often by putting questions which were leading and suggestive. We think the jury would be sure to get the impression that the judge thought the defendant guilty. Still more objectionable was the conduct of the prosecuting attorney. It is true, the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were well calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom."

In People v. Ah Len, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103, the Supreme Court, in reversing the judgment upon the ground that the prosecuting attorney in his address to the jury imported into the case matters which were not brought there by proof, said:

> "It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party."

The court in that case also approvingly quotes the following language, most pertinent and forceful in its application to this case, from the case of Tucker v. Henniker, 41 N. H. 319:

> "When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is denied. It may be said, in answer to these views, that the statements of counsel are not evidence that the court is bound to so instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true; yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them. * * * It is unreasonable to believe the jury will entirely disregard them. * * * They may think they have done so, and still be led involuntarily to shape their verdict under their influence."

In the case of the People v. Mull, 167 N. Y. 247, 60 N. E. 629, the New York Court of Appeals not only reversed the cause because of unwarranted statements by the district attorney in his address to the jury, but severely animadverted upon what seems to be a growing practice with prosecuting attorneys to travel beyond the records of criminal cases in their arguments to secure conviction. In that case, the district attorney, in his argument, among other equally reprehensible statements, said:

> "And if there is a man that sits in those chairs that is willing to brand himself with suspicion by saying that Archie Mull did not commit this crime, my judgment of his character is not * * * correct. * * * Don't let it be said of you that, from all the integrity and virtue and respectability of this great county, 12 men cannot be gotten together who will do justice. A failure to convict in this case,

where there is no defense, and where there is no doubt, cannot fail to create again another epidemic of murder in this county. It cannot fail to bring within our borders hordes of desperadoes and criminals, who rely upon the puerile inefficiency and weakness of jurors here, and will select this as a safe field in which to operate. The consequences of your failure to convict in this case, in my judgment, cannot be weighed or gauged or measured at all. How could a more brutal, wanton, and pathetic tragedy be committed than this? * * * It seems to me to have been the purpose of the Almighty, in His stern and inscrutable justice, to have saved the life of this boy, to tell you who perpetrated this fiendish and unholy deed. But for the miraculous and almost divine rescue of this eyewitness from the very jaws of death, there might be a failure of justice; but a failure by you now to convict and punish the murderer would seem to me to be a mimicry and mockery against God."

The court, addressing itself to those statements by the district attorney, made inter alia, the following pointed observations:

"The trial by jury aims to secure popular justice. * * * The rules respecting the admission of evidence suffice to protect the defendant from prejudice by irrelevant and hearsay testimony, and declarations unsupported by evidence. It is the right of the people, no less than of the accused, to address the jury upon every matter legitimately bearing upon the case. The general rule is that each party must keep within the evidence. But the evidence may be examined, collated, sifted, and treated in his own way. Whatever of argument, suggestion, or inference can be constructed or deduced from it in support of guilt, upon the one hand, or of inconsistency, confusion, doubt, and uncertainty, in support of innocence, upon the other, is permissible, and may be presented with ingenuity, persuasion, vehemence, fervor, and effectiveness. * * * But it is nevertheless true that the verdict should be impartial, and be pronounced upon the evidence and according to the evidence. It follows that the address of counsel must be upon the evidence and according to the evidence. It is greatly to be feared that the remarks of the district attorney, in view of the former disagreement of the jury, and the positive, though unproven, assertions of the district attorney during the episode upon bribery, intimidated the jury. Why should a failure to convict excite widespread indignation? And upon whom should it fall? What juror was willing to be thought callous to public opinion, the respect of his fellow citizens, reckless of his oath, heedless of the welfare of his family, willing to brand himself with suspicion, unwilling to do justice, and willing to acquit such a murderer, whose guilt had been made clear by the testimony of an eyewitness, seemingly saved from death by a miraculous and almost divine rescue, according to the purpose of the Almighty, in order to prevent a failure of justice? Clearly we ought not to allow a verdict to stand, to the securing of which such methods and influences were thought by the public prosecutor to be necessary. If it be said that in the case before us there is no reasonable doubt of the defendant's guilt, it should be remembered that it is not for the courts, but for the jury, to say this by their free and impartial verdict; and we cannot know that they have said it, when we do know that they were told by the district attorney, and his statement was enforced by his previous declarations of attempts at bribery and his precautions against their success, that their own good repute was in jeopardy, and could only be saved by convicting the defendant."

Thus we have presented excerpts from a few of the cases upon the proposition under review, not for the reason that it is not clear in principle that reversals should be ordered where public prosecutors resort to the practice of bringing into their cases under the guise of argument or otherwise matters wholly outside the records and which are obviously calculated to influence juries, either consciously or unconsciously, in arriving at verdicts of guilty, contrary to the evidence and the law, but to show how such practice is uniformly condemned in strong language by the higher courts.

There are innumerable other cases in which similar views are expressed and like conclusions reached, and the practice referred to severely and justly condemned. It is not necessary here to review those cases, but among them the following will be found to be cogently applicable to the case at bar and instructive upon the question in hand: People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495; People v. Butler, 8 Cal. 435; Vickers v. United States, 1 Okl. Cr. 452, 98 Pac. 467, 473; State v. Kaufmann, 22 S. D. 433, 118 N. W. 337; State v. Underwood, 77 N. C. 502; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149; People v. Devine, 95 Cal. 231, 30 Pac. 378; People v. Chew Bock Hue, 141 Pac. 950; People v. Fleming, 166 Cal. 357, 136 Pac. 291; People v. Tufts, 167 Cal. 266, 139 Pac. 78.

Our conclusion is that, with the defendant's guilt very doubtful under the evidence, the remarks of the district attorney above quoted were most damaging to the legal rights of the accused, that thereby he was deprived of a fair and impartial trial, and that the result reached by the jury, if permitted to stand under the circumstances, would involve a miscarriage of justice.

The judgment and order are reversed, and the cause remanded.

168 Cal. 618

McKENZIE v. RAY. (Sac. 2097.)

(Supreme Court of California. Oct. 13, 1914. Rehearing Denied Nov. 10, 1914.)

1. PLEADING (§ 182*)—DENIALS—ADMISSION—SCOPE OF.

Where defendant set up a written receipt as a bar to the action, and plaintiff admitted its execution and validity by failure to file a verified denial, as required by Code Civ. Proc. § 448, plaintiff may still contradict or explain the receipt by written or parol testimony at trial, but in case of failure he is bound by what the receipt purported to mean.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 387, 388; Dec. Dig. § 182.*]

2. PAYMENT (§ 74*)—PRESUMPTIONS.

The presumption that a debt evidenced by a negotiable instrument is unpaid, arising from the production of the instrument by the payee, is rebutted by receipts in full for all claims due to the payee which were admitted by the payee's failure to deny their genuineness or validity.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 138, 139, 226–231; Dec. Dig. § 74.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. PAYMENT (§ 76*)—QUESTION FOR COURT OR JURY.

Where the validity of the receipts set up to defeat an action was not questioned, nor was it attempted to explain their terms, the question of the scope of the receipts is for the court.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 240–248; Dec. Dig. § 76.*]

4. PAYMENT (§ 74*)—RECEIPTS—EFFECT.

A receipt in full of all demands, unexplained and uncontradicted, will defeat an action on a negotiable instrument given before the date of the receipt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 138, 139, 226–231; Dec. Dig. § 74.*]

5. TRIAL (§ 139*)—PROVINCE OF JURY—PEREMPTORY INSTRUCTIONS.

Where a verdict for plaintiff would be set aside for want of evidence to support it, the court should grant a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341, 365; Dec. Dig. § 139.*]

Department 2. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by Colin McKenzie as executor of Nettie Montague Patton, deceased, against Ellen Ray, executrix of Don Ray, deceased. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

W. A. Gett, of Sacramento, for appellant. Denson, Cooley & Denson, of San Francisco, and C. A. Elliott, of Sacramento, for respondent.

MELVIN, J. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. The suit was upon a written instrument, which was in the following terms:

"$4496

"No. Galt, Cal. March 1st, 1894.

"Received from Alexander Montague Forty-four hundred and ninety-six 18-100 dollars. Payable on return of this certificate properly indorsed.

"$4496.18. Whitaker & Ray."

It was admitted by the defendant that the writing in question had been executed according to its purport, but the answer set up full payment of the obligation which had been evidenced by the said instrument, and in that behalf pleaded two certain receipts, which were as follows:

"Galt, Cal., July 23, 1903.

"Received from Whitaker & Ray, Thirty-three hundred and eighty-two 89-100 Dollars, being amount due Dr. Alex Montague at time of his death.

"Nettie Montague ex

"Executrix of the Will of Alex Montague, deceased.

"$3382.89-100."

"Galt, Cal., July 23, 1903.

"Received from Whitaker & Ray, Twenty-two hundred & six 63-100 Dollars, being settlement in full of A-C of A. Montague, deceased, and my account to date.

"Nettie Montague ex

"Executrix of the Will of Alex Montague, deceased.

"$2206.63."

Plaintiff did not by affidavit or otherwise deny the genuineness or due execution of these receipts. A jury was impaneled, and at the close of plaintiff's testimony in chief defendant's motion for nonsuit was granted.

The facts as established, partly by proof and partly by admissions of defendant, were as follows: The firm of Whitaker & Ray executed and delivered to Dr. Alexander Montague the document, dated March 1, 1894, upon which this suit is founded. This writing is called by appellant a "certificate of deposit" and by respondent a "receipt." To distinguish it from the receipts set out in the answer we shall call it "Exhibit A." Mr. Whitaker died in April, 1894, leaving Mr. Ray as the sole surviving partner. Dr. Montague died testate in 1902. His widow, Nettie Montague, was duly appointed executrix of his will. In 1903 she married Mr. Patton, and in 1904 the residue of Dr. Montague's estate was distributed to her. She died testate in the month of December, 1907, and in January, 1909, Mr. McKenzie became her executor. Mr. Ray died in April, 1910, and his wife was appointed executrix of his will in the following month. On July 26, 1910, a claim, based on Exhibit A was presented to the executrix of Don Ray's estate, and as it was rejected by her, this suit was commenced. At the trial, after introducing Exhibit A in evidence and examining a number of witnesses for the purpose of showing that Whitaker & Ray were acting as bankers in issuing that instrument to Dr. Montague, plaintiff rested, whereupon, the appropriate motion having been made, the nonsuit was granted.

Plaintiff makes the following contentions: (1) The nonsuit was improperly granted because the production of the instrument by the party claiming to be the creditor makes a prima facie case of nonpayment. (2) Exhibit A is a certificate of deposit, and therefore the statute of limitations does not run against it. Code Civ. Proc. § 348. (3) The demand is not barred under the doctrine of laches because the banking concern which has had the use of the money may not assert "injury through delay," which is the basis of all claims of laches.

Respondent defends the court's action in granting the nonsuit on the grounds that: (1) The action was barred by the statute of limitations; as there was no proof that Whitaker & Ray were bankers. (2) The demand sued on was stale. (3) The debt sued on was paid and discharged, and that fact stood as proven at the close of plaintiff's case.

[1-3] As we are satisfied that the last contention is correct it will not be necessary to discuss the others.

Appellant's position in brief is this: Usually the burden of proving nonpayment of a debt evidenced by a negotiable instrument would be on the party suing thereon, but in the case of a negotiable instrument produced from the possession of the party to whom it is payable there is a presumption of nonpayment which throws the burden of evidence on the party claiming payment. This burden is not met in the present case, says appellant, by the production of the receipts, even though they be in full of all demands. A receipt, he insists, is too general if it does not mention the particular writing whose possession raised the presumption of nonpayment. He relies principally upon Light v. Stevens, 159 Cal. 290, 113 Pac. 659, and Estes v. Ballard, 22 Cal. App. 345, 134 Pac. 361, but the case at bar is easily distinguishable from them. In the first-mentioned case it was held that the possession of the note sued upon was prima facie evidence of its nonpayment which was not met by mere proof that the person whose name was signed to it had paid to his creditor more than the amount of the note, without a showing that the money was paid on account of the particular obligation in suit. In Estes v. Ballard, the rule expressed in People v. Milner, 122 Cal. 179, 54 Pac. 833, is again announced, namely, that a presumption is evidence, and that it is evidence which may outweigh the positive testimony of witnesses against it. But as was also said in the Milner Case, "against a proved fact, or a fact admitted, a disputable presumption has no weight."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the case at bar the two receipts which were set up by the answer were very broad in their terms and covered *all* amounts "due Dr. Alex Montague at time of his death," and "settlement *in full* of A-C of A. Montague, deceased." It is provided by section 448 of the Code of Civil Procedure that:

> "When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant."

Plaintiff failed to file the affidavit of denial required by this section, and he thereby admitted the execution and genuineness of the receipt. It was still open to him on the trial to contradict or explain the receipts by written or parol testimony. Having failed to do this, he is bound by what the receipts purport on their faces to mean (Carpenter v. Shinners, 108 Cal. 362, 41 Pac. 473; Brooks v. Johnson, 122 Cal. 569, 55 Pac. 423; Newsom v. Woollacott, 5 Cal. App. 723, 91 Pac. 347), and their substance is the acknowledgment of the payment of *all* moneys owing from Whitaker & Ray to Dr. Montague's estate. In this respect the case differs radically from Light v. Stevens, supra. In that case the proof of payment of certain sums of money was not held sufficient to overcome the presumption arising from the possession by the payee of the note in suit, but in this case the genuineness and due execution of two receipts is admitted, and these receipts purport to show a settlement of all debts between the parties at a date subsequent to the execution of the instrument on which the action is based. That plaintiff's admission overcomes the presumption arising from the possession of Exhibit A is plain under the very rule invoked by appellant by the citation of Estes v. Ballard, because against "a fact admitted a disputable presumption has no weight."

The receipts being unquestioned by plaintiff, it is for the court to construe them and to determine their meaning and effect. The documents admittedly genuine and executed in due form stand as exponents of the facts therein recited, "to be construed by the court, and the conclusions of law are to be deduced therefrom." Carpenter v. Shinners, supra. It is the duty of the court and not of the jury to determine the effect of the agreement between the parties. Luckhart v. Ogden, 30 Cal. 556; Ellis v. Crawford, 39 Cal. 527; Reed v. Swift, 45 Cal. 255; 9 Cyc. 784.

[4] The court properly decided the question regarding the effect of a receipt in full. While neither an ordinary receipt nor a receipt in full is conclusive against all attack, if uncontradicted and unexplained it stands as conclusive. 30 Cyc. 1224; note 30 on p. 1225. A receipt in full of all demands, if unexplained and uncontradicted, will defeat an action on a promissory note given before the date of the receipt. Cunningham v. Batchelder, 32 Me. 316. Such a receipt, in the absence of evidence of fraud, mistake, or nonpayment is a complete bar to the action. Virdin v. Stockbridge, 74 Md. 481, 22 Atl. 70; De Arnaud v. United States, 151 U. S. 483, 14 Sup. Ct. 374, 38 L. Ed. 244; Jones on Evidence (2d Ed.) pars. 491 and 492.

[5] The effect of the receipts under the admissions of the plaintiff and the correct construction placed upon the documents by the court being a complete bar to the action on the original writing (Exhibit A), the court very properly granted the motion for a nonsuit. With a jury present the judge ought to grant a nonsuit if a verdict in plaintiff's favor should be set aside for want of evidence to support it. Estate of Dole, 147 Cal. 193, 81 Pac. 534; Downing v. Murray, 113 Cal. 463, 45 Pac. 869. We cannot see how a judge could have failed to set aside a verdict for plaintiff if the case had been submitted and the jury had returned such a verdict. Plaintiff's proof amounted to a showing of the possession of that which purported upon its face to be a written evidence of a debt owed by defendant's decedent, but this was coupled with an admission that the debt had been subsequently paid.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

168 Cal. 637

SAN DIEGO REALTY CO. v. HILL et al.

(L. A. 3352.)

(Supreme Court of California. Oct. 13, 1914. Rehearing Denied Nov. 10, 1914.)

1. CONTINUANCE (§ 12*)—DEATH OF PARTY—POSTPONEMENT.

In an action to foreclose a mortgage given by defendant's grantor, where no deficiency judgment was sought, defendant is not, where plaintiff dismissed as to his grantor, entitled to a postponement because of his grantor's death pending the action, defendant having succeeded to all the rights and title of such grantor.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 40, 42, 49, 50, 52; Dec. Dig. § 12.*]

2. LIMITATION OF ACTIONS (§ 195*)—DEFENSE—NATURE OF.

The plea of limitations is an affirmative defense which must be established by the party asserting it, hence in an action to foreclose a mortgage given by a nonresident, defendant, his grantee, who set up limitations, is bound to contradict the recitals in the mortgage and other conveyance showing his grantor's nonresidence, which prevented the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711–716; Dec. Dig. § 195.*]

3. LIMITATION OF ACTIONS (§ 87*)—RUNNING OF STATUTE—NONRESIDENCE.

Despite the two-year limitation prescribed by Code Civ. Proc. § 339, on actions upon written instruments executed out of the state, limitations upon an action to foreclose a mortgage given by a nonresident do not begin to run under the direct provisions of section 351, until he comes within the state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 456–462; Dec. Dig. § 87.*]

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the San Diego Realty Company against Luther M. Hill, John P. Klein and others. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

Mills & O'Farrell, of San Diego, for appellant. Sam Ferry Smith, of San Diego, for respondent.

SHAW, J. From a judgment in favor of the plaintiff, foreclosing a mortgage, the defendant Klein appeals.

The complaint set forth the execution and contents of the mortgage, and of the notes the payment of which is secured thereby, and prays for judgment of foreclosure, in the ordinary form. It further alleges, on information and belief, that the defendant Luther M. Hill never resided in the state of California. The mortgage and notes were executed by Hill to O. J. Stough, who assigned them to plaintiff. John P. Klein subsequently became the owner of the land described in the mortgage. It is alleged in the complaint that neither of the subsequent holders of the title under Hill have ever resided within the state of California since the execution of the mortgage.

The answer of Klein denied the execution of the mortgage and notes sued on and the assignment thereof to plaintiff. It also denied the allegation that Hill had never resided in the state of California. As an affirmative defense it attempted to aver that the action was barred by the statute of limitations. It did not set forth this defense as provided in the Code, by averring that the action was barred by the particular section relied on, but merely alleged that the cause of action "did accrue or arise above four years before the said complaint was filed in this court."

[1] The point first urged for a reversal is that the court erred in denying a motion for a continuance made by the appellant, Klein, on the ground that the mortgagor, Luther M. Hill, was dead. The court overruled the motion, and thereupon plaintiff dismissed the suit as against Hill. Inasmuch as it appears that Hill had conveyed the property subsequent to the mortgage, that Klein now claims solely as successor of Hill, and that the decree provides for no deficiency judgment, but merely for a foreclosure and sale of the mortgaged property, we can see no error in this ruling. Hill was not a necessary party to the action, and his death, whether before or after the beginning of the action, did not require any postponement of the trial after the plaintiff voluntarily dismissed as to him.

[2] It is further claimed that the evidence was not sufficient to justify the finding that the defendant Hill never resided in the state. This claim cannot be sustained. The mortgage sued on was introduced in evidence. It recited the fact that Hill resided in Chicago, Ill. There was also introduced in evidence the deed of conveyance executed by Hill to one Stringer on November 27, 1894, conveying to Stringer the property here in controversy. This deed recites that Hill was "of Chicago, Illinois," at that time. The record further shows that Klein derived his title by mesne conveyances from Stringer. This mortgage and this conveyance by Hill, who was Klein's predecessor in interest, and under which Klein holds such title as he has, are evidence, as against Klein, of the facts recited therein in connection with the conveyance, and are sufficient to support the finding. The plea of the statute of limitations is an affirmative defense which the defendant was required to establish by proof disproving the recitals. No attempt was made upon the trial to controvert the fact of Hill's residence in Chicago, nor was any evidence introduced to show that he ever resided in the state of California.

[3] The mortgage was executed on May 29, 1894, and the three notes secured thereby fell due, respectively, on May 29, 1895, May 29, 1896, and May 29, 1897. Section 339 provides that an action founded on a written instrument executed out of the state must be

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

begun within two years from the time the cause of action accrued, but section 351 further provides that if when an action accrues against a person he is out of the state, the action may be begun within the term prescribed after his return to the state. As the parties defendant to this action never at any time resided within the state, it follows that the bar of the statute has not run. The pleadings admit that all of the defendants other than Hill have, at all times, resided out of the state. No finding was necessary as to these defendants. Nevertheless the court made a finding to that effect. It is not necessary to inquire whether any evidence to support this finding was introduced or not. The admission in the pleadings was sufficient without any finding upon the subject, and the insertion of a finding does not vitiate the judgment.

These are the only points made in support of the appeal. We think it is entirely without merit.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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168 Cal. 632

BLAIR v. BROWNSTONE OIL & REFINING CO. et al. (L. A. 3662.)

(Supreme Court of California. Oct. 13, 1914.)

1. Appeal and Error (§ 1008*)—Appellate Court—Findings of Fact.

The making of findings of fact is within the exclusive jurisdiction of the trial court; the District Court of Appeal having no authority to make findings of its own.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. § 1008.*]

2. Appeal and Error (§ 348*)—Mode of Appeal—Review—Findings.

Where an appeal was taken in the form prescribed by Code Civ. Proc. § 941b, and it did not appear that any notice of the entry of judgment had been served on plaintiff as required by Code Civ. Proc. § 939, the sufficiency of the evidence to sustain the court's findings of fact was reviewable, though the appeal was taken more than 60 days after the entry of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

3. Corporations (§ 426*)—Contracts—Cancellation by Secretary and Manager—Ratification—Knowledge of Directors—Failure to Act as Board.

Where a corporation's secretary and field manager attempted to cancel a contract between plaintiff and the corporation, and after the settlement, and before plaintiff sought to repudiate it, the secretary and one of the directors notified all the members of the board but one, their failure to do anything with reference to the cancellation agreement did not amount to a ratification of the cancellation, which could only be accomplished by a formal act of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

4. Appeal and Error (§ 1169*)—Disposition of Cause—Affirmance—Ratification—Estoppel.

There being a well-defined distinction between ratification of an agreement canceling a contract between plaintiff and a corporation and facts constituting an estoppel of the parties to deny the validity of the cancellation agreement, where a finding of ratification was not supported by the proof, the judgment could not be affirmed because of facts tending to establish an estoppel in pais not found by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531–4539; Dec. Dig. § 1169.*]

In Bank. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by Charles H. Blair against the Brownstone Oil & Refining Company and another. Judgment for defendants, and plaintiff appeals. This judgment was affirmed by the District Court of Appeal and a rehearing granted in the Supreme Court. Reversed.

See, also, 21 Cal. App. 676, 132 Pac. 605.

William H. Fuller and Chas. E. Putnam, both of Los Angeles, for appellant. Leonard B. Slosson, of Los Angeles, and George E. Farrand, of Ventura, for respondents.

MELVIN, J. This case went twice to the District Court of Appeal. On the first appeal (17 Cal. App. 472, 120 Pac. 41) that court approved the finding of the superior court that Blair had been prevented from completing the contract to deepen one of the oil wells of the defendant corporation by reason of the latter's failure to furnish the necessary materials for the proper prosecution of the work as provided in said agreement. The judgment was reversed, however, because there was no finding to the effect that the corporation had authorized the cancellation of the contract, although there was sufficient evidence to support a finding that plaintiff had given such authorization. The language of the District Court of Appeal in deciding this point we quote below:

"The court further found that plaintiff and defendant, in September, 1909, compromised and settled between themselves all claims or demands of any nature existing between them, and did then and there each release the other from any and all claims and demands growing out of the work done by plaintiff under the said contract, and by mutual agreement canceled and destroyed said contract, together with another made between said parties upon the same date. Defendant was a corporation, and the contract made was in writing. It appears from the evidence that several months after plaintiff had ceased work upon the well he called upon the secretary of the defendant company, and, according to the testimony of the secretary, said that he did not want the contract in question, nor another contract made for the drilling of a new well, brought up against him upon a claim for damages. The secretary said: 'What do you want me to do?' to which plaintiff replied: 'I want the contract destroyed.' The secretary then said: 'The contract is not here, Mr. Blair; I have not got it, but I can get it.' 'Well,' said the plaintiff, 'you can destroy the signatures and send it to me.' Later the secretary sent one copy of the contract, which was executed in duplicate, to plaintiff with the name of the president of the company cut off. Section 1699 of the Civil Code provides: 'The destruction or cancellation of a written contract, or of the signatures of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all of the parties consenting to the act.' Under the provisions of this section, the evidence quoted would justify the finding complained of, were it not for the fact that the record is silent, in that it fails to show any authority, either express or implied, on the part of the secretary to thus release plaintiff from his obligations under the terms of the contract, if he had, in fact, without defendant's fault, failed to comply with the terms thereof. The act of the secretary was wholly without any authority on the part of the board of directors of the corporation. Nor is it made to appear from the record that the corporation had any notice of the secretary's act or proposed rescission of the contract, and no facts are shown from which a ratification thereof would follow. The effect of the attempted rescission and release was to make a new contract between the parties, and, conceding that plaintiff made the proposal, it does not appear that the corporation ever assented thereto."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon a second trial the superior court again found that plaintiff was prevented from doing the work by reason of the failure of defendant to furnish the proper tools for the deepening of the well, and likewise found that the sum of $1.634.65 became due from defendant to plaintiff as damages on the 22d day of February, 1909. There was a further finding that the parties to the action did, on or about the 1st of October, 1909, compromise and settle between themselves all claims or demands of any nature then existing, and by mutual consent did destroy and cancel the contract upon which the complaint in this action was based, and "that said agreement of compromise and settlement was made on behalf of said defendant by its secretary, and immediately thereafter and prior to the commencement of this action and prior to any demand or claim made on said defendant by plaintiff, said defendant ratified and confirmed said agreement of compromise and settlement." Judgment was accordingly entered in favor of defendant, and plaintiff appealed to the District Court of Appeal from said judgment and from an order denying his motion for a new trial. That court approved the finding that damages in the sum of $1,634.65 became due from defendant to plaintiff on February 22, 1909 (the amount prayed for having been somewhat greater), but held that the plaintiff had been induced to enter into the alleged contract of compromise under the mistaken belief that, as defendant's president had been without authorization to sign the original written agreement between plaintiff and the corporation, that contract was invalid; the representatives of the Brownstone Oil Company having concealed from plaintiff the fact that, while there had been no previous authorization of the president's act, there had been a ratification of the said contract by defendant's board of directors. The District Court of Appeal accordingly decided that there had been no consideration for the cancellation of the contract in suit, that the finding of a valid obliteration of that agreement was without support, and ordered the trial court to enter judgment in favor of plaintiff for $1,634.65, with interest thereon from February 22, 1909. A motion for a hearing in this court was granted because we discovered no findings in the record sufficient to support the ordered judgment. There was absolutely no finding by the trial court either that the defendant, fraudulently or otherwise, concealed the alleged ratification of the original contract from Blair or that the latter was ignorant of such ratification.

[1] The District Court of Appeal had no authority to make findings of its own upon that subject. The making of findings of fact is within the exclusive province of the trial court. Kellogg v. King, 114 Cal. 389, 46 Pac. 166, 55 Am. St. Rep. 74.

We have, therefore, examined the finding of the superior court with reference to the contract of compromise.

[2] The appeal was taken more than 60 days after the entry of judgment, and respondent contends that therefore the sufficiency of the findings to support the said judgment may not be considered, citing section 939 of the Code of Civil Procedure. The appeal was taken, however, under the provisions of section 941b of the Code of Civil Procedure, and it does not appear that any notice of the entry of judgment had been served on the plaintiff. Consequently it is proper for us to examine the contention that the evidence does not sustain the findings. Fraser v. Sheldon, 164 Cal. 168, 128 Pac. 33.

[3] The settlement which the court found to have been made was effected by the plaintiff, Blair, with Herbert Mills, the secretary, and Earl Carr, the field manager of the Brownstone Oil and Refining Company. It was in evidence that the business of the corporation was transacted by the secretary and the manager. At that time the directors of the corporation were Earl Carr, P. S. Carr, J. S. McCloskey, O. J. Stowe, and J. A. Donlon. After the settlement was accomplished, and before plaintiff sought to repudiate it, Mills, according to his testimony, told directors Donlon and Stowe that such arrangement had been made with Blair, and Earl Carr testified that he had similarly notified P. S. Carr and J. A. Donlon. It will thus be seen that a majority of the board of directors knew of the arrangement between Blair and their secretary and their manager relative to the destruction of the written agreement. The mere failure of the directors to do anything with reference to the agreement between Blair and their officers by which it was sought to cancel the contract between the corporation and Blair did not amount to a ratification of that agreement of cancellation. A ratification of the cancellation of the

original written contract could only be accomplished by a formal act of the board of directors. Section 2310, Civ. Code. The record fails to show any such formal act, and, therefore the judgment must be reversed for the same reason that the District Court of Appeal reversed it on the first appeal.

[4] It might perhaps be argued that there was a mutual estoppel of Blair and the defendant to deny the execution of the contract of cancellation. But there is no finding of such estoppel, and where, as here, there has been a finding of ratification not supported by the proof, this court may not affirm the judgment, if the facts tend to establish an estoppel in pais not found by the court. There is a well-defined distinction between ratification of an agreement and facts constituting an estoppel of the parties thereto to deny its validity. Blood v. La Serena L. & W. Co., 113 Cal. 222, 41 Pac. 1017, 45 Pac. 252.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J; SLOSS, J.; SHAW, J.

(168 Cal. 624)

DOAK GAS ENGINE CO. v. FRASER.

(Sac. 2091.)

(Supreme Court of California. Oct. 13, 1914.)

1. Appeal and Error (§ 690*)—Reservation of Grounds of Review.

A party could not complain of the alleged exclusion of evidence, where the record showed that no evidence was offered other than that admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2897–2899, 2902–2904, 2906, 2908; Dec. Dig. § 690.*]

2. Sales (§ 288*)—Warranty—Waiver by Acceptance.

Where a purchaser of machinery takes it and tests it, finds certain defects, which, upon his demand, the seller remedies to his satisfaction, and the buyer then accepts the machinery and executes a note for the purchase price, he waives such defects and cannot set them up in defense of a suit on the note; the warranty being applicable only to defects afterward appearing or to those which were not thus discovered and waived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817–823; Dec. Dig. § 288.*]

3. Sales (§ 181*)—Actions—Evidence—Admissibility.

Where a purchaser of a marine gas engine employed a naval architect and engineer to see that the engine was properly installed in his launch, and that it complied with the contract, in an action for the purchase price, defended on the ground that the engine was defective, such engineer's written recommendation that the engine be accepted, made after he had tested it, was admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–491; Dec. Dig. § 181.*]

4. Appeal and Error (§ 1050*)—Harmless Error—Admission of Evidence.

In an action for the purchase price of a gas engine, defended on the ground that it was defective, the admission of a written recommendation of an engineer, employed by the purchaser to test the engine, that it be accepted, if error, was harmless, where there was no proof of defects other than those which had been remedied to the purchaser's satisfaction prior to the execution of a note for the purchase price and the acceptance of the engine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the Doak Gas Engine Company against J. R. Fraser. From a judgment for plaintiff, defendant appeals. Affirmed.

T. T. C. Gregory and G. Clark, both of San Francisco, for appellant. M. R. Jones, of Martinez, for respondent.

SHAW, J. The appeal here presented was taken from the judgment within 60 days after its entry. The evidence is set forth in a bill of exceptions.

Plaintiff's complaint was in two counts. The first count was upon a promissory note, executed by defendant to plaintiff, on September 2, 1910, payable one year after date, for $1,750. The second count was for goods sold and labor done by plaintiff, to and for the defendant, of the alleged value of $520.75. Upon the second count the court allowed the plaintiff only $109.20. No objection is here made to that part of the judgment.

The execution and nonpayment of the note were admitted in the answer. The main defense was upon a counterclaim. The note was given in consideration of the balance due upon a contract for the purchase and installation of a 75 horse power Doak marine gas engine, with propeller and shaft, sold by plaintiff to the defendant, to be installed by the plaintiff on the defendant's freight launch Skimmer. The counterclaim alleged that it was a part of the contract of sale that the engine, propeller, and shaft should be suitable for the purpose of propelling the launch, and that they were to be installed by the plaintiff in a workmanlike manner, so that they would propel said launch; that the same were installed in an unskillful manner so as to weigh down the launch, reduce her utility, and make her navigation more dangerous and her operation unsafe, except in unusually calm weather, and in such a manner that they were not capable of propelling the launch in her work so that she could make regular runs, whereby, it is alleged, the defendant was damaged in the sum of $1,500. The court found that the allegations of the counterclaim, in regard to the unskillful installation of the engine, propeller, and shaft and the alleged consequences thereof were untrue. It is not contended that the evidence was insufficient to support these findings. The principal claim of the defendant is that the court below did not allow him to give evidence to show the defective condition of the engine.

The evidence showed that, after some negotiations between the plaintiff and the defendant, in which the defendant consulted Mr. Dickie, a competent naval architect and engineer employed by him in the matter, the defendant purchased the engine, propeller, and shaft from the plaintiff and executed the contract mentioned in the counterclaim, paying $1,000 down, and agreeing to pay $1,750 at a later date. It was further shown that the defendant employed Mr. Dickie to see that the work of installing the engine was properly done, and that the engine had the power required by said contract; that the work was done to the satisfaction of Mr. Dickie; that the engine was then tested by running the launch therewith a mile, in the presence of the defendant and Mr. Dickie; that Mr. Dickie thereupon found the engine satisfactory and gave a writing to the defendant recommending that the engine be accepted. Some time during this trial or immediately after, the bearings of the engine became heated, and this was called to the defendant's attention. After the test he took possession of the launch and ran it for about two weeks, at the end of which time it was discovered that there was some trouble with the babbitt metal in the journal bearings and, upon the defendant's demand, the plaintiff replaced it with new babbitt metal. The test was made and the launch and engines delivered to the defendant on June 25, 1910. The rebabbitting was done on and prior to July 30th. From that time until September 2, 1910, the defendant continued to use the launch and engine, during which time some additional trouble occurred with the engine, and at that time he signed and delivered to the plaintiff a writing accepting the engine, subject to the conditions of the contract and executed the note sued on. The evidence as to these facts was not contradicted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Counsel say that "at the outset the lower court closed the door to all proof as to defective construction" in support of the allegations of the counterclaim. The record shows, however, that proof was made of the defects above related, and that no proof was offered of any other defects. Before he accepted the engine the defects above mentioned had been removed or adjusted to his satisfaction, and thereupon he accepted the engine and gave his note for the balance of the price. This is a complete answer to the objection that the court closed the door to further proof. No further evidence was offered.

Plaintiff offered no evidence to prove the allegations that the engine was installed in an unskillful manner, or that it was so installed as to weigh down the launch, or reduce her utility, or make her navigation more dangerous except in calm weather, or render the engine incapable of propelling the launch or disabling the launch from making regular trips. These constituted the breaches of contract alleged in the counterclaim.

[2] Where a person purchasing machinery takes it and tests it, finds in it certain defects, and upon his demand the seller then remedies the defects to the satisfaction of the buyer and the buyer then accepts the machinery and executes the note for the price, he cannot, in defense to a suit on the note, set up such defects as a breach of the contract of warranty in the contract of sale. Those defects will be deemed to have been waived. The warranty, if any there was, will then be applicable only to defects afterward appearing or to those which were not thus discovered and waived.

[3, 4] There was no error in admitting the writing of Dickie recommending the acceptance of the engine. Dickie was employed by the defendant to make the test and the writing was given at the time of the test, with defendant's full knowledge, and no objection was made by him. Furthermore, he did not then accept the engine, but waited until he had made a further trial and had had certain defects remedied. Even if the writing had been incompetent, it could not have been prejudicial, in the absence of any offer to prove additional defects.

No other objections are urged to the action of the court below.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

168 Cal. 664

G. GANAHL LUMBER CO. et al. v. WEINSVEIG. (L. A. 3350.)

(Supreme Court of California. Oct. 15, 1914. Rehearing Denied Nov. 13, 1914.)

1. APPEAL AND ERROR (§ 122*)—APPEAL FROM PART OF JUDGMENT.

Under Code Civ. Proc. § 940, providing that an appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a similar notice, a party may appeal from a specific part of a judgment, and such appeal ordinarily brings up for review only the part appealed from, leaving all other parts of the judgment in full force, and confers upon the appellate court no jurisdiction to review any part of the judgment except the part to which the appeal is directed; and an order of reversal, though general in its terms, will be construed to apply only to the part brought up for review, but these rules do not apply where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part affects the other parts or involves a consideration of the whole.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 60, 866–874; Dec. Dig. § 122.*]

2. APPEAL AND ERROR (§ 1212*)—NEW TRIAL —SCOPE OF ISSUES.

Where, in an action to enforce liens for debts due from a building contractor, who had abandoned his contract, against the owner of the building, judgment was entered, determining that the G. Co., the F. Co., and P. were not entitled to liens, that a fund deposited in court should be distributed among the other claimants, and that the defendant should recover his costs from the unsuccessful claimants, whereupon the unsuccessful claimants appealed from "that portion of the judgment in behalf of defendant W. and against plaintiffs G. Co., F. Co., and P.," and upon the appeal a new trial was granted, upon such new trial the appealing claimants could not litigate their right to such fund, which by the former judgment had been distributed to the other claimants, since the claimants occupied positions adverse to each other, and the judgment, awarding the fund to certain claimants to the exclusion of others, was in their favor, and was not appealed from; but the new trial was not limited, as claimed, to the question of costs, and the claimants might litigate the owners' liability in excess of the fund distributed by the former judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. § 1212.*]

3. MECHANICS' LIENS (§ 3*)—STATUTORY PROVISIONS—VALIDITY.

Code Civ. Proc. § 1200, providing that if a contractor fails to perform his contract, or abandons it before completion, the portion of the contract price applicable to the liens of persons other than the contractor shall be the value of the work and materials already done and furnished, deducting payments then due and actually paid, invades no constitutional rights of the owners, even though the amount found to be due, added to the cost of completing the building by the owner, exceeds the contract price, as the cost of completion is incurred after the abandonment of the contract upon which the relative rights of the owners and the lien claimants depend, and is a matter with which the claimants have nothing to do.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. MECHANICS' LIENS (§ 281*)—SUITS TO ENFORCE—SUFFICIENCY OF EVIDENCE.

In an action to enforce liens for debts due from a building contractor, who had abandoned the contract, where the contract price was $10,249, and expert witnesses testified for plaintiffs that the work done and materials furnished prior to the abandonment amounted to 67 or 68 per cent. of the total labor and materials required for the complete building, while a witness for the owner fixed the proportion at 60 per cent., a finding that the amount applicable to liens was $6,591.15 was supported by the evidence.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

5. MECHANICS' LIENS (§ 254*)—EXTENT OF OWNERS' LIABILITY—DEDUCTION FOR DAMAGES FROM CONTRACTOR'S BREACH.

Where a building contractor abandoned the contract, damages for loss of rents occasioned through the contractor's failure to finish the building within the time agreed could not be deducted from the fund available to lienors.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 447, 448; Dec. Dig. § 254.*]

Department 1. Appeal from Superior Court, Los Angeles County; M. T. Dooling, Judge.

Actions by the G. Ganahl Lumber Company, the Frick-Fleming Hardware Company, and others, against M. Weinsveig, which were consolidated. From a judgment in favor of the plaintiffs named for insufficient relief, and from orders denying motions for new trial, the plaintiffs named and the defendant appeal. Affirmed.

See, also, 16 Cal. App. 687, 117 Pac. 954.

G. C. De Garmo and Wm. T. Blakely, both of Los Angeles, for plaintiffs. J. L. Murphey, J. W. Ballard, A. M. Norton, John H. Foley, and Lloyd W. Moultrie, all of Los Angeles, for defendant.

SLOSS, J. G. Ganahl Lumber Company, Frick-Fleming Hardware Company, O. F. Pealer, and five others instituted actions to foreclose mechanics' liens upon a lot and building owned by the defendant Weinsveig. The building had been partially constructed under a contract between Weinsveig, as owner, and one Reeve, as contractor. Reeve abandoned his contract, and the building was completed by Weinsveig. The actions were consolidated. The judgment of the court was that three of the lien claimants, to wit, G. Ganahl Lumber Company, Frick-Fleming Hardware Company, and Pealer were not, and that the other five claimants were, entitled to liens, that the liens of said five be transferred from the real property to a fund of $1,847.05 theretofore deposited in court by the owner, and that said fund be distributed, in proportions fixed by the decree, among the successful claimants. The three who were denied liens were given judgments against the contractor, and the owner, Weinsveig, was given judgment against them for his costs. These three plaintiffs thereupon appealed "from that portion of the judgment * * * in behalf of defendant Weinsveig and against plaintiffs G. Ganahl Lumber Company, Frick-Fleming Hardware Company, and O. F. Pealer." The appeal was transferred to the District Court of Appeal for the Second Appellate District, and that court reversed the judgment, on the ground that a finding relative to the completion of the building was not sustained by the evidence. G. Ganahl Lumber Co. v. Weinsveig, 16 Cal. App. 687, 117 Pac. 954.

The cause came on for trial again upon amended pleadings. The owner, Weinsveig, set up, in addition to other matters, the former judgment and the notice of appeal therefrom, limited as above set forth. He alleged that, pending the appeal, the money deposited in court had been distributed among the five successful plaintiffs pursuant to the judgment, and that the judgment had been satisfied by said plaintiffs. The court, upon the second trial, found in favor of these allegations. From them it reached the conclusion that, inasmuch as no appeal had been taken by G. Ganahl Lumber Company, Frick-Fleming Hardware Company, or Pealer, from the judgment in favor of other lien claimants, the part of the judgment distributing the fund of $1,847.05 among such other claimants had become final, and the parties appealing from the original decree could litigate (in addition to their liability for costs) only their right to hold the owner for the difference between said $1,847.05 and the amount for which he might, on a second trial, be found to be liable. Since the case was one in which the contractor had abandoned his contract, the amount applicable to liens was a portion of the contract price, to be computed according to the method defined in section 1200 of the Code of Civil Procedure. At the second trial that amount was determined to be $2,836.89, or $989.84 more than the sum which, by the first judgment, had been ordered distributed among the five successful claimants. This excess, the court concluded, was all that the three plaintiffs who had appealed from the original judgment were entitled to look to. Finding that they had established their right to liens, it apportioned this amount of $989.84 among them in the ratio of their respective claims, and entered a decree of foreclosure in their favor for the sums thus found due to them on account of their liens. From this judgment the plaintiffs G. Ganahl Lumber Company and Frick-Fleming Hardware Company appeal. The defendant Weinsveig also appeals from the judgment. All of said parties appeal, further, from an order denying their respective motions for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] The only question raised on the appeal of the plaintiffs is whether the court below was right in limiting their claims against the owner to the difference between the total amount found applicable to liens and the amount awarded by the first judgment to other lien claimants. The appellants contend that, by the reversal on the first appeal, the first judgment was set aside in its entirety, and the cause set free for a new trial of all the issues. This position requires an examination of the scope and effect of the former notice of appeal. That notice, as has been stated, was not directed to the whole judgment, but only to "that portion" thereof "in behalf of defendant Weinsveig and against" the three plaintiffs there appealing. It is now well settled in this state that a party may appeal from a specific part of a judgment. Code Civ. Proc. § 940; Early v. Mannix, 15 Cal. 149; Luck v. Luck, 83 Cal. 574, 23 Pac. 1035; Whalen v. Smith, 163 Cal. 360, 125 Pac. 904, Ann. Cas. 1913E, 1319. Ordinarily such appeal will bring up for review only the part appealed from, leaving all other parts of the judgment in full force. Early v. Mannix, supra. Such partial appeal confers upon the appellate court no jurisdiction to review any part of the judgment except the part to which the appeal is directed (In re Burdick, 112 Cal. 387, 44 Pac. 734), and an order of reversal, although general in its terms, will be construed to apply only to the part which was brought up for review. Whalen v. Smith, supra. These rules do not apply "where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part * * * affects the other parts or involves a consideration of the whole, and is really an appeal from the whole." Whalen v. Smith, supra.

The present case falls, we think, within the general rule, and not within the exception. The three plaintiffs appealing directed their notice of appeal solely to so much of the judgment as was in favor of the owner and against them. They did not assail those parts of the judgment giving relief to other lien claimants. The various foreclosure actions having been consolidated, all of the claimants were seeking to enforce their claims out of a limited fund, the amount of which was determined by the terms of the contract, read in connection with the provisions of section 1200 of the Code of Civil Procedure. In the consolidated suit all of the plaintiffs were actors (Kennedy v. Dusenbery, 116 Cal. 124, 47 Pac. 1008), and, unless the fund should turn out to be sufficient to meet all claims, each was occupying a position adverse to all of the others. The success of any one would deplete the fund to which every other claimant must look. A judgment which awarded that fund to certain claimants to the exclusion of others was, therefore, not only a judgment in favor of the successful claimants against the owner, but it was also a judgment in favor of such claimants (as well as in favor of the owner), against those who were denied participation in the fund. The first judgment determined, in effect: (1) That the five nonappealing plaintiffs were entitled to liens for their claims; (2) that those claims should be satisfied, as far as possible, out of the fund of $1,847.05 deposited in court; (3) that the three appealing plaintiffs should not share in this fund; (4) that this sum was the limit of the owner's liability to lienors; (5) that the appealing plaintiffs were not entitled to liens or to any relief against the owner; and (6) that the owner recover costs against the plaintiffs last named. Parts 1, 2, and 3 were in favor of the successful lien claimants and against the appealing plaintiffs. Parts 4, 5, and 6 were in favor of the owner and against said plaintiffs. The latter three, and they alone, were covered by the notice of appeal. The Court of Appeal was, accordingly, limited to a review of those parts of the judgment. Since the appellants, on the former appeal, made no attack on the adjudications that other claimants had liens and that the sum of $1,847.05 should be applied exclusively to the payment of those liens, the judgment, in these respects, was not presented to the appellate court for review, and was not affected by the reversal. On the other hand, the adjudications that the owner's liability did not exceed $1,847.05, and that plaintiffs were not, as against him, entitled to liens, were appealed from, and were vacated by the judgment on appeal. On the second trial, the court below rightly held that the plaintiffs had lost their right to resort to the fund which had, by the former judgment, been distributed to other claimants, but that they might litigate their right to liens, and enforce such liens against any amount found due from the owner in excess of the $1,847.05 ordered distributed by the former judgment.

These considerations dispose of the appeals by plaintiffs. They likewise meet the defendant owner's contention that the only matter left open for adjudication after the first appeal and the order of reversal thereon was the judgment in favor of the owner for costs. Some further points are raised by the defendant Weinsveig in support of his appeal.

[3] It is urged that the rule of section 1200 is an invasion of the constitutional rights of the owner, at least in a case where the application of the section results in the payment by the owner of a total sum in excess of the contract price. We have heretofore held that the section does not deprive lien claimants of any protection guaranteed them by the Constitution. Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152; Hoffmann-Marks Co. v. Deming, 154 Cal. 138, 97 Pac. 155. In the Deming Case the question of the owner's right to complain of the provision was suggested, but was not involved in such manner as to require, or indeed to justify, a decision. The point is now squarely presented. We are, however, satisfied that there is no merit in the owner's contention. It is true that, under the mechanic's lien law in force at the time of the transactions under consideration, the liens could not, in the case of a valid contract, extend beyond the balance of the contract price properly due from the owner to the contractor. Butler v. Ng Chung, 160 Cal. 438, 117 Pac. 512, Ann. Cas. 1913A, 940; Kellogg v. Howes, 81 Cal. 179, 22 Pac. 509, 6 L. R. A. 588; Stimson Mill Co. v. Braun, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 80 Am. St. Rep. 116. But this is precisely the theory upon which section 1200 is framed: The contract having been abandoned, the entire contract price is not earned by the contractor, and the whole of it cannot be applied to the satisfaction of claims against the contractor. The performance of the contract has come to an end. The rights of those who claim under the contractor must be fixed with reference to the relation between him and the owner at the time of the abandonment. The proportion of the contract price then earned, less payments already made, represents the fund due to the contractor, and therefore applicable to the payment of claims against him. This proportion is, under section 1200, "estimated by the standard of the whole contract price." Thus the right of the owner to have his liability measured by the contract price is fully protected. If the contract had been completed, the entire price, less payments, would have been applicable to liens. If one-half or one-third of the total work has been done, one-half or one-third of the total price, less payments, is set apart for lienors. This is entirely just and fair, not only to the claimants (Hoffman-Marks Co. v. Spires, supra), but to the owner as well. The cost actually incurred thereafter by the owner in completing the building is a false quantity in this inquiry. It is not a part of the contract price earned by the contractor, and for that reason is not applicable to liens for goods or labor furnished to him. If that cost, added to the amount found due, under section 1200, turns out to exceed the original contract price, there will, to be sure, be a loss to the owner. On the other hand, he may be a gainer by completing the building for an amount which, added to the value of the abandoned work, will be less than the total contract price. His loss or gain, as the case may be, will be due to his failure or success in doing the work left undone by the contractor as cheaply as the latter had agreed to do it. With this item of cost the lien claimants have nothing to do. It is incurred after the contract, upon which the relative rights of the lien claimants and the owner depend, has been abandoned.

The sufficiency of the evidence to sustain various findings is questioned by the owner. Thus it is claimed that the finding that the building was completed on March 1, 1908, is contrary to the evidence. The actual date of completion, as the owner argues, was March 7th. The importance of this point lies in the fact that the two appealing plaintiffs filed their claims of lien on the 2d day of March, or before the completion of the building, if the appellant owner be correct in his view of the evidence. While there is much to support his contention in this regard, we think the record does contain enough testimony the other way to have justified the trial court in its finding that the building was substantially completed on March 1st, leaving undone at that date only "trivial imperfections." The testimony of the architect, while not very definite, was open to this construction, and the trial court so accepted it, as it had the right to do.

[4] The attack on the finding of the amount applicable to liens, upon abandonment by the contractor, cannot be upheld. The court found the value of the work and materials already done and furnished, estimated "as near as may be by the standard of the whole contract price," to be $6,591.15. The whole contract price was $10,249. Two expert witnesses called by plaintiffs testified that in their opinion the work done and materials furnished up to the abandonment amounted to 67 or 68 per cent. of the total labor and materials required for the complete building. A witness for the owner fixed the proportion at 60 per cent. The value of the work and materials, as fixed by the court,

was a trifle over 60 per cent. of the total contract price. This was fully authorized by the testimony to which we have referred. The amount paid by the owner to the contractor ($3,754.26) was not in dispute, and the difference between $6,591.15 and $3,754.26, or $2,836.89, was properly determined to be the amount which, under the terms of section 1200, was applicable to the payment of liens.

[5] From the sum payable to lien claimants the owner sought to deduct $300, claimed as damages for loss of rents occasioned through the failure of the contractor to finish the building within the time agreed. This item cannot be deducted from the fund available to lienors where the contractor has abandoned his contract. Marshall v. Vallejo Bank, 163 Cal. 469, 126 Pac. 146.

There are no other points of sufficient consequence to merit attention.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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168 Cal. 671

YOUNG v. MATTHEW TURNER CO.

(S. F. 6322.)

(Supreme Court of California. Oct. 16, 1914. Rehearing Denied Nov. 13, 1914.)

1. Specific Performance (§ 102*)—Contract to Sell Personal Property.

Where plaintiff sued on a contract by which he sold to T. an interest in a vessel, and T. bound himself and his heirs to give plaintiff the privilege to repurchase such interest whenever he should intend to sell, or after his death, alleging that T. thereafter assigned the interest to defendant corporation with notice, and that after T.'s death plaintiff demanded of defendant a conveyance of such interest, but his demand was refused, whereupon plaintiff prayed for judgment that defendant execute a proper conveyance of such interest, and, defendant pendente lite having sold the interest to another, plaintiff filed a supplemental complaint praying a money judgment, the suit was essentially one for specific performance within the rule that if there was no original obligation on defendant's part to convey, there was no liability for conversion.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 318, 319; Dec. Dig. § 102.*]

2. Pleading (§ 279*)—"Supplemental Complaint"—Purpose—New Cause of Action.

Plaintiff may not set up a new and distinct cause of action by a "supplemental complaint," the function of which is to plead facts material to the case occurring after the filing of the former complaint, leaving the former pleading intact, as provided by Code Civ. Proc. § 464.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 836–841; Dec. Dig. § 279.*

For other definitions, see Words and Phrases, First and Second Series, Supplemental Complaint.]

3. Specific Performance (§ 116½*)—Executory Contract—Pleading.

A complaint for specific performance of an executory contract is not sufficient without an allegation of fact showing that the consideration provided for in the contract sought to be enforced is not inadequate, and that the contract is just and reasonable to defendant as provided by Civ. Code, § 3391.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 375; Dec. Dig. § 116½.*]

4. Specific Performance (§ 114*)—Pleading—Complaint.

A complaint for specific performance of an executory contract to sell personal property must allege facts showing that damages will not afford adequate relief, to overcome the presumption to the contrary created by Civ. Code, § 3387.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

5. Specific Performance (§ 114*) — Contract — Presumptions — Consideration—Pleading.

Civ. Code, §§ 1614, 1615, providing that a writing is presumptive evidence of a contract, and that the burden of showing want of consideration is on the person seeking to avoid it, do not apply as a matter of pleading. in a suit for specific performance of a contract to sell personal property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

6. Replevin (§ 8*)—Nature of Interest—Option.

Where plaintiff had a mere option to repurchase a fractional interest in a vessel, he had no sufficient property right as would entitle him to maintain replevin.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45–68; Dec. Dig. § 8.*]

7. Specific Performance (§ 116½*)—Contract—Pleading.

Where plaintiff sued for specific performance of an option contract to sell a fractional interest in a vessel and by supplemental complaint recited that the interest had been sold pendente lite for a specified sum, and that no part thereof had been paid to plaintiff, but did not allege that he had been damaged in that or any other amount, the action could not be sustained as one to recover damages for breach of contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 375; Dec. Dig. § 116½.*]

8. Trusts (§ 91*) — Constructive Trust — Personal Property.

Where plaintiff sold a fractional interest in a vessel to T. and T. executed an option contract to resell such interest to plaintiff, and later transferred it to defendant with notice, defendant did not hold the interest as a constructive trustee, so that, on defendant's sale of the interest to another, its liability to plaintiff at most was for damages for breach of contract.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 139; Dec. Dig. § 91.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; N. D. Arnot, Judge.

Suit by James L. Young against the Matthew Turner Company. Judgment for plaintiff, and defendant appeals. Reversed.

Goodfellow, Eells & Orrick, of San Francisco, for appellant. Coogan & O'Connor, of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MELVIN, J. Defendant appeals from a judgment for $2,531.25. No testimony was offered by either party, the judgment resting upon the complaint, the answer, and cross-complaint. In the complaint, filed November 3, 1909, it is alleged that on August 1, 1894, Matthew Turner and plaintiff's agent entered into a certain contract whereby plaintiff sold to said Turner the nine-sixteenths interest in the brig Galilee for $13,500, and by which also Turner bound himself and his heirs to give the privilege of purchase to said Young whenever he should intend to sell the said interest or after his death, "the conditions of such sale or purchase being a reduction of $2,250 per annum" on the price of $13,500. It is averred that the said instrument was recorded in August, 1901; that on the 10th day of February, 1909, Matthew Turner sold and assigned said nine-sixteenths interest in the brig to the defendant corporation; that prior to and at the time of such sale and assignment defendant well knew of the execution, existence, and terms of the agreement between Young and Turner; that Matthew Turner died on February 10, 1909; that on May 14, 1909, plaintiff Young demanded of the corporation defendant a conveyance of the said nine-sixteenths interest, but that such demand was refused. The prayer was for a judgment that defendant execute a proper conveyance to plaintiff of said interest.

The answer admitted the execution of the contract between Young and Turner, but alleged that $13,500 was, at the time of making said agreement, the full value of the interest sold, "and that it was the intention and contemplation of the parties that the privilege of purchase should be exercised by the plaintiff, if at all, within a reasonable time, and that such reasonable time had long since expired before the death of Matthew Turner." The answer contained the following averment:

> "And defendant says that the plaintiff never has obligated himself to purchase the said vessel upon any terms, and has never made any offer so to do, and that it would now be unreasonable, unjust, and inequitable that the plaintiff be allowed to recover the nine-sixteenths interest in the said vessel without the payment of any sum therefor; that the defendant did not render, nor did the said Matthew Turner receive a good or sufficient consideration for the making of the said contract, or for the performance thereof as now demanded by the plaintiff."

There was also a statement in the answer that Matthew Turner did not sell his interest in the brig to defendant, but that it was transferred to defendant for convenience, the corporation having been formed by Turner and all of the stock having been issued to him. Finally the answer pleaded the laches of Young in delaying so long to assert his rights, if any, under the contract and set up the alleged bar of the statute of limitations. Sections 337 (subd. 1) and 343, Code Civ. Proc.

In April, 1911, plaintiff filed a supplemental complaint in which it was alleged on information and belief that on or about March 28, 1911, defendant sold the nine-sixteenths interest in the brig Galilee for $2,531.25, no part of which had been paid to plaintiff. The prayer was for that sum of money with interest, and, the case having been submitted on the pleadings, the court gave judgment for said sum of $2,531.25 and interest.

Respondent's position is that this is not a suit for specific performance; that the consideration of the contract between Turner and the respondent may not be impeached by mere pleading because the burden of showing want of consideration is on the party seeking to avoid the instrument (section 1615, Civ. Code); that by section 1963 of the Code of Civil Procedure, the presumption stands that there was a good and sufficient consideration for the written instrument; that this not being an action in replevin, the principle announced in Cardinell v. Bennett, 52 Cal. 476, does not apply; that appellant stood in exactly the same position towards Young that Turner had occupied; that the defendant held the nine-sixteenths interest for plaintiff as trustee of a constructive trust; that the application of the principle of such constructive trust is not confined to real property; and that defendant is liable to plaintiff for the proceeds of the sale without the intervention of equity (citing section 3309 of the Civil Code in support of the last position).

[1] We think this is in its essence an action for specific performance. As originally drafted, the complaint asked for that relief and nothing else, and the prayer for a money judgment was only made necessary by the sale of the chattel. If there was no original obligation on the part of defendant to convey, there was no liability for the conversion of the interest in the vessel.

[2] It is the function of a supplemental complaint to set up facts material to the case occurring after the filing of the former complaint. Code Civ. Proc. § 464. It is not allowable to substitute a new and distinct cause of action by way of supplemental complaint. Brown v. Valley View Mining Co., 127 Cal. 632, 60 Pac. 424. Such a pleading leaves the former pleading intact. Giddings v. The 76 L. & W. Co., 109 Cal. 121, 41 Pac. 788; California F. & F. Co. v. Schiappa-Pietra, 151 Cal. 743, 91 Pac. 593. The supplemental complaint in this case related to a matter occurring after the commencement of the action, which concerned the remedy rather than the cause of action. The essence of the pleaded cause of action was plaintiff's right to enforce the transfer of the nine-sixteenths interest in the brig from defendant to plaintiff.

[3] No action for specific performance of an executory contract is ever sufficiently pleaded unless the pleader observes the provisions of section 3391 of the Civil Code.

This rule has been followed in this state for many years in a long line of decisions cited in the opinion in the recent case of Joyce v. Tomasini, 142 Pac. 67. In that opinion this language was used:

> "It is well established as a rule of pleading in such cases that the plaintiff, in order to allege a good cause of action, must set forth facts which show that the consideration provided for in the contract sought to be enforced is adequate, and that the contract is just and reasonable to the defendant. A complaint which fails to state such facts does not state a cause of action to enforce such contract."

[4] All of the cases cited in Joyce v. Tomasini, except one, relate to contracts to sell real estate. That one (Wait v. Kern River M. M. & D. Co., 157 Cal. 25, 106 Pac. 98) has reference to an agreement for the sale of personalty, and appellant contends that the rule must be more strictly applied, if possible, in such a case, than in those where contracts for the sale of real property are involved, because the pleader, in addition to setting up the facts essential under section 3391, Civil Code, must overcome the presumption of section 3387 that the breach of the agreement to transfer personal property can be relieved by pecuniary compensation. He is correct in such contention, as this court has frequently held. In the very late case of Gilfallan v. Gilfallan, 141 Pac. 623, this court held that although, generally speaking, the presumption arising by reason of section 3387 of the Civil Code will preclude a litigant from seeking specific performance of a contract for the sale of personal property, the presumption is disputable, and where facts are alleged showing that pecuniary compensation will not afford adequate relief, suit for specific performance is the proper form of action.

[5] Respondent cites sections 1614 and 1615 of the Civil Code to the effect that a writing is presumptive evidence of a contract, and that the burden of showing want of consideration sufficient to support a contract lies upon the persons seeking to invalidate or avoid it. In an action of this sort that presumption does not operate against a defendant as a matter of pleading, whatever force it may have as a matter of evidence. Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; Bruck v. Tucker, 42 Cal. 354; Lambert v. Haskell, 80 Cal. 613, 22 Pac. 327. The rule requiring a proper pleading for specific performance was not relaxed merely because the contract was a written one.

[6] If we treat the action as one at law for the recovery of specific property, we must conclude that plaintiff is without standing to maintain such a suit, because he had no property, either general or special, in the thing sought. Cardinell v. Bennett, 52 Cal. 477; Yukon River Steamboat Co. v. Gratto, 136 Cal. 538, 69 Pac. 252; Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080.

[7] Nor can we regard it as an action for damages for breach of contract because no damages are pleaded. The supplemental complaint merely recites the fact that the interest in the brig had been sold for a specified sum, and that no part thereof had been paid to plaintiff. There is no statement that this amount is claimed as damages, or that plaintiff was damaged by the transaction, and, if so, whether the damages equaled or exceeded the selling price.

[8] Defendant did not hold the interest in the brig as a trustee of a constructive trust. Plaintiff's contract was merely one of option which, under its terms, he was not required to exercise at any time unless he chose to do so. When Matthew Turner transferred the property to the defendant, Young had not sought to exercise that option. As it was personal property the most that may be said is that the defendant assumed the risk of liability for damages if it should fail to make a future transfer of the interest formerly owned by Turner in the event that Young should demand such transfer. No trust in the specific personal property could arise unless there were circumstances requiring the fulfillment of the option by the assignment of said property to plaintiff rather than the payment to him of his damages for the breach of the agreement. Plaintiff's argument upon the theory of a constructive trust is completely answered by that which we have said relative to the showing necessary to make a case for specific performance.

The only remedy that plaintiff had, if any, was damages for the breach of contract. Such remedy was not sought by his pleadings, and therefore no judgment should have been given in his favor.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

(168 Cal. 627)

HOFFMAN v. SOUTHERN PAC. CO.

(L. A. 3384.)

(Supreme Court of California. Oct. 13, 1914.)

1. Evidence (§ 244*) — Actions for Injuries—Declarations of Agent—Effect.

An agent of a railroad company, employed to flag trains approaching a tunnel from the south, though in charge of telephones to warn men working in the tunnel of the approach of such trains, is not authorized to bind the railroad company by declarations as to the time of trains coming from the north; and, in an action by one injured by a train coming from the north, evidence that the flagman had informed him that there was plenty of time for him to run a push car from the main track to a spur is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. § 244.*]

2. Appeal and Error (§ 1050*)—Review—Harmless Error.

In an action by one run down on a railroad track, the error in improperly admitting evidence of a declaration of the railroad company's employé as to the time of a train cannot be considered harmless, because there was sufficient evidence to have sustained a verdict for plaintiff on the last chance theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by August Hoffman against the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed and remanded.

J. W. McKinley and R. C. Gortner, both of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

SLOSS, J. The plaintiff recovered judgment for $10,000, damages for injuries sustained through the alleged negligence of the defendant. The defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff was in the employ of the Union Hardware & Metal Company at Los Angeles. Said company's business included the sale of explosives. In connection with that branch of its business, it maintained a magazine a short distance from the line of the defendant's railroad track, at a point near Tunnel Station, about 27 miles north of Los Angeles. A shipment of 25 boxes, each containing 50 pounds of dynamite, had, in course of transportation, been placed on the ground alongside the defendant's track. The Union Hardware & Metal Company directed the plaintiff to go to Tunnel Station and move the 25 boxes to the magazine.

The dynamite lay at a point on the track about 700 feet south of the station. Some 275 feet north of this point there was a switch connecting the main track with a spur leading to the magazine. Upon reaching Tunnel Station the plaintiff requested of one Glenn, an employé of defendant, permission to use a push car in moving the dynamite. Glenn assenting, Hoffman took the car, pushed it along the track to the place where the dynamite was, loaded the boxes on the car, and came back to the switch connecting with the spur. Finding the switch locked, he unloaded the dynamite, and was proceeding to lift the push car from the main to the spur track, intending to then reload it with the boxes, when a freight train of defendant, approaching from the north, struck the push car. The dynamite exploded, inflicting upon plaintiff the injuries which form the basis of this action.

[1] The appellant contends that the proximate cause of the collision was the negligent act of the plaintiff in placing the push car upon the main track. The dynamite could have been moved, it is argued, without the use of the car, or, granting the propriety of employing the car, all danger might and should have been obviated by putting the car on the spur or side track in the first instance and keeping it there. We shall not enter into a discussion of the sufficiency of the evidence to sustain the implied finding of the jury in plaintiff's favor on this point. But in this connection the ruling of the court permitting plaintiff to testify to a conversation with Glenn relative to the use of the push car upon the main track becomes important. Over the defendant's objection the plaintiff was allowed to testify that, while at the station, before commencing the work of moving, he had said to Glenn, "Will I have time to go down there on the main track and put the stuff on the hand car and get it off on the side track before the train comes?" and that Glenn had answered, "Yes." That this testimony had a serious and direct bearing upon the issue of plaintiff's negligence, as well as upon that of defendant's negligence, is very plain. It tended to show that plaintiff was led to place himself in a position of danger by the affirmative act of defendant's agent.

Was this testimony competent? The defendant objected to it on the ground that Glenn had not been shown to have authority from the defendant corporation to make any such statement, and that he could not, therefore, bind the corporation by what he said. The objection should have been sustained. Some thousand feet or more north of Tunnel Station the railroad track ran through a tunnel, in which men were at work. The testimony of Glenn, which was undisputed on this point, was that his duties were to "keep time for the tunnel gang and flag trains—watchman." He was "flagging trains for the men working in the tunnel." There was also a watchman at the other end of the tunnel. The plaintiff's own testimony was that he had seen Glenn "flagging trains;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he worked around the station there; had papers there and different things. I didn't look to see what they were, but saw him in the station there. It is the only house there. He always attended the telephones when the trains were coming through." The telephones were used to warn the men in the tunnel. The testimony does not show that Glenn had or was required to have any knowledge concerning the movements of trains, beyond such knowledge as was necessary to enable him to give warning of approaching trains to workmen in the tunnel. His duties in this regard were limited to trains approaching the tunnel from the southerly end, after passing Tunnel Station. Trains coming from the north, such as the one which struck the push car in this case, would traverse the tunnel before reaching Glenn's station. Furthermore, Glenn, as he testified, had nothing to do with the movement of trains, except as he observed them coming from the south. He had no occasion to note, and was not advised, whether regular trains were on time, or whether there were extra trains running.

Under these circumstances, it seems clear that Glenn was not acting within the scope of his actual or his apparent authority in advising plaintiff that there would be time, before the arrival of any train, to put the dynamite on a push car on the main track and move it to the side track. The case is, if anything, a stronger one for the appellant than was Clark v. A., T. & S. F. Ry. Co., 164 Cal. 363, 128 Pac. 1032. There the plaintiff was injured in falling from the platform step of a fast-moving train. He was allowed to testify that the engineer had promised that he would slow up at a point where plaintiff desired to alight, and that he (plaintiff) had taken his position on the step in reliance upon this promise. The admission of the testimony was held to be error, in the absence of proof that the engineer was authorized by the defendant "to slow up trains for that purpose." So here, in the absence of proof that Glenn had authority to permit the occupancy of the main track by persons not connected with the operation of the road, or to give assurances that trains would not pass in either direction within a given time, the defendant could not be bound by his statements in this connection, and the plaintiff had no right to rely upon them as statements authorized by the defendant.

[2] The plaintiff relied upon the advice claimed to have been given by Glenn as evidence of negligence on the part of the defendant. An instruction embodying this view was given to the jury. The case was also presented on the theory of the "last clear chance." But, even if it be said that a verdict might have been sustained on the latter ground, this would not cure the error in admitting the evidence of the conversation between Glenn and plaintiff, since the verdict was general, and it cannot be determined whether the jury based it upon the ground of Glenn's assurance of safety or on a subsequent act of negligence.

An instruction dealing with the doctrine of "last clear chance" is criticized by appellant. The instruction is not as clear, in all respects, as it might be. It is apparent, however, from other instructions and from the briefs, that the true limits of the doctrine, as defined in many of our decisions, are fully understood by counsel, and we think there is no likelihood of a repetition, on another trial, of the objectionable part of the instruction referred to. We shall not, therefore, set it forth here.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

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25 Cal. App. 376

NEW YORK LIFE INS. CO. v. DALEY.

(Civ. 1522.)

(District Court of Appeal, Second District, California. Sept. 5, 1914. Rehearing Denied Oct. 5, 1914.)

1. Appeal and Error (§ 909*)—Review—Presumptions.

All presumptions being in favor of the regularity of a judgment, it must, on appeal from a nonsuit in an action by an insurer on premium notes, to which defendant's name was signed by insured, her attorney in fact, be presumed that, notwithstanding defendant was named as beneficiary, insured reserved the right to change beneficiaries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

2. Insurance (§ 586*)—Life Policies—Interest of Beneficiary.

Where a life policy reserves to insured the right to change the beneficiary upon written request, the designated beneficiary has a mere expectancy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.*]

3. Principal and Agent (§ 109*)—Power of Attorney—Scope—"Use and Benefit."

Defendant gave insured a power of attorney, to sign her name to negotiable instruments, and to act for her "use and benefit." Insured procured a policy on his own life, in which defendant was named as beneficiary, giving in payment for the first premium a note to which he signed defendant's name. *Held* that, as insured could change the beneficiary, the giving of the note was not for defendant's benefit, and no recovery could be had against her.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318–322, 360, 361, 365; Dec. Dig. § 109.*]

4. Principal and Agent (§ 109*)—Powers of Attorney—Construction.

A power of attorney, authorizing an agent to act for the use and benefit of defendant, to receive moneys due, and sign negotiable instruments, does not warrant the agent in signing defendant's name to a note given for the premium on a policy taken upon the agent's life.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318–322, 360, 361, 365; Dec. Dig. § 109.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. TRIAL (§ 388*)—FINDINGS—NECESSITY.
Where the record discloses the grounds upon which a motion for nonsuit was based, and the motion was properly granted, findings of fact were unnecessary.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908–911, 915; Dec. Dig. § 388.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the New York Life Insurance Company against Sarah M. Daley. From a judgment dismissing the action, plaintiff appeals. Affirmed.

A. C. Mouser, of San Diego, for appellant. Sam Ferry Smith, of San Diego, for respondent.

SHAW, J. This is an appeal from a judgment of dismissal of an action upon granting defendant's motion for a nonsuit.

The action is one to recover payment upon a promissory note alleged to have been made and delivered to plaintiff by defendant. It appears that in 1894 plaintiff issued to T. J. Daley, husband of defendant, a policy of life insurance, wherein defendant was named as beneficiary, payment of the premium upon which was made by a promissory note in the sum of $437, signed by T. J. Daley and Sarah M. Daley, the defendant, by T. J. Daley, her attorney in fact. Shortly after the execution of this note the insurance policy was canceled. Upon default being made in the payment of the note, the same was renewed; the renewal note being likewise signed by defendant, through T. J. Daley as her attorney in fact. The subject of this suit is a note thus given in renewal as evidence of the indebtedness.

[1-3] No question of estoppel or ratification is involved, for the reason that it appears defendant had no knowledge or notice of the giving of the original note, or any of the several notes given in renewal thereof. Nor does it appear that she had any vested interest in the policy of insurance issued upon the life of T. J. Daley. It does appear, however, that during the period extending from the time of the making and delivery of the note sued upon T. J. Daley held a general power of attorney executed by defendant. This instrument reads:

> "I, Sarah M. Daley, * * * do make, constitute, and appoint T. J. Daley * * * my true and lawful attorney, for me and in my name, place, and stead, and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, account, legacies, bequests, interests, dividends, annuities, and demands whatsoever as are now or shall hereafter become due, owing, payable, or belonging to me and have, use, and take all lawful ways and means in my name or otherwise for the recovery thereof by attachments, arrests, distress, or otherwise, and to compromise and agree for the same and acquittances or other sufficient discharges for the same, for me and in my name, to make, seal, and deliver, to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments, upon such terms and conditions and under such covenants as he shall think fit; also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, leases, and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidence of debt, releases, and satisfaction of mortgage, judgments, and other debts, and such other instruments in writing of whatsoever kind and nature as may be necessary or proper in the premises."

Since, in the performance of all the acts specified, the power conferred is in express terms restricted to those acts only which were for defendant's "use and benefit," it is impossible in any event to perceive how she could be held liable in the absence of a showing of such fact. We cannot assume, by reason of defendant being named as beneficiary in the policy, that she had a vested interest therein. Indeed, in the absence of a showing to the contrary (and there is none), we must, under the rule that every presumption is in favor of the regularity of the judgment, assume that the insured reserved the right of revocation and change as to the beneficiary so named. "Where a policy of life insurance reserves to the insured the right to change the beneficiary, upon written request therefor, the interest of the designated beneficiary prior to the death of the insured is that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured." McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242, and cases therein cited. This being true, it cannot be said the giving of the note purporting to obligate defendant was for her use and benefit.

[4] Moreover, the rule is that formal instruments conferring authority to bind another must be construed strictly in accordance with the plain import of the language of the document, and its interpretation cannot be extended by implication, so as to authorize acts beyond those specified, unless absolutely necessary to carry out the powers expressly delegated. Harris v. Johnston, 54 Minn. 182, 55 N. W. 970, 40 Am. St. Rep. 312; Johnston v. Wright, 6 Cal. 373; Golinsky v. Allison, 114 Cal. 458, 46 Pac. 295; Penfold v. Warner, 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591; Skirvin v. O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696. Aside from the fact that the act of T. J. Daley in signing the note was not for the use and benefit of defendant, it clearly appears from an examination of the instrument that it did not purport to confer upon him, as such attorney in fact, power to execute in defendant's name

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the note to plaintiff in payment of the premium due upon a policy of insurance issued upon the life of Daley.

[5] The record discloses the grounds upon which the motion for nonsuit was based, and since the motion was properly granted, findings of fact were unnecessary. Toulouse v. Pare et al., 103 Cal. 251, 37 Pac. 146; Reynolds v. Brumagim, 54 Cal. 254.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 433

CASSIDY v. NORTON, Judge. (Civ. 1286.)

(District Court of Appeal, Third District, California. Sept. 11, 1914. Rehearing Denied by Supreme Court Nov. 10, 1914.)

1. CERTIORARI (§ 5*)—REMEDY BY APPEAL—ERRONEOUS DECISION.

Where the defendant paid the fund in controversy into court and applied to have another substituted as defendant, accompanying the application with an affidavit setting forth every fact required for such substitution, under Code Civ. Proc. § 386, the court had jurisdiction to make the substitution, and its order cannot be reviewed by certiorari, even though the substituted defendant was not, in fact, the proper party to be substituted; the remedy being by appeal from the final judgment.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

2. PARTIES (§ 60*)—SUBSTITUTION—TIME.

Where a defendant, before answering, filed a proper application to have another substituted as defendant, which application was set for hearing after the time for defendant to answer would expire, the filing of the answer, which expressly reserved the motion to substitute, did not deprive the court of jurisdiction to make the substitution, under Code Civ. Proc. § 386, authorizing the defendant to apply for such substitution at any time before answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 96; Dec. Dig. § 60.*]

3. PARTIES (§ 51*)—ADDITIONAL PARTIES—NECESSARY PARTIES.

Where a bank against whom an action on attachment had been commenced paid the money into court and had the sheriff, who had levied upon the fund, substituted as defendant, it was proper for the court, on motion of the sheriff, to require other attachment and execution plaintiffs who claimed the fund to be joined as defendants, under Code Civ. Proc. § 389, providing that when a proper determination of a controversy cannot be had without the presence of other parties, the court must order them to be brought in.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77-82; Dec. Dig. § 51.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Certiorari by Elpha Cassidy against C. W. Norton, as judge of the superior court. Peremptory writ denied.

A. H. Carpenter and W. F. Lynch, both of Stockton, for petitioner. C. L. Neumiller and George A. Ditz, both of Stockton, for respondent.

BURNETT, J. Petitioner seeks to have annulled two certain orders made by the superior court of San Joaquin county. The application is grounded, of course, upon the contention that the court thereby exceeded its jurisdiction. An alternative writ of certiorari was issued by this court, and in the return of respondent we have a full record of the proceedings of the lower court.

The first of these orders was made upon the 4th day of May, 1914, and was an order of substitution in the case of Elpha Cassidy v. Commercial & Savings Bank and provided and adjudged:

> "That upon payment by the above-named defendant, Commercial & Savings Bank, a corporation, into the superior court of the state of California in and for the county of San Joaquin, to the clerk of said court of the sum of $1,250 in gold coin of the United States of America, Wm. H. Riecks, sheriff of the county of San Joaquin, be and he hereby is substituted as defendant in this action for and in the place of said Commercial & Savings Bank, and that said Commercial & Savings Bank, a corporation, be and it hereby is dismissed and discharged as defendant in this action and from all liability in or as to the matter in this action, or to said Wm. H. Riecks, said sheriff, or to him for or on account of levies of writs of attachment or execution."

The second order was made on the 15th day of June following, and provided that John T. Lewis, A. L. Farrington, and F. B. Hubbard be joined as parties defendant, and that plaintiff file a supplemental complaint joining said parties as defendants and requiring the service of the same upon them.

[1] Both of these orders are clearly authorized by the statute. Section 386 of the Code of Civil Procedure provides:

> "A defendant, against whom an action is pending, upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value to such person as the court may direct; and the court may, in its discretion, make the order."

Every fact thus required to be presented was set forth in an affidavit of defendant accompanying a notice to the adverse party of an application to the court for such order of substitution. We can perceive nothing that was omitted therefrom. Indeed, it seems to have been eminently proper that the defendant should be relieved of any responsibility in the premises on the payment of the money into court, as, by reason of adverse claims, it could not safely determine to whom the payment should be made. The bank laid no claim to the money, and, the sheriff having levied upon it a writ of attachment and of execution, it naturally sought to have him substituted. But whether the sheriff was, as a matter of fact, the proper party to be substituted, the showing required by the statute was made, and we think there can be no doubt that the court had the legal right—in other words, the jurisdiction—to make said order of substitution.

[2] The only pretense of objection to the power of the court in the premises grows out of the fact that an answer was filed by the original defendant before said order of substitution was made. But before said answer was filed said defendant filed in the court a written notice of motion for the substitution and also said affidavit setting forth the grounds for said motion and offered to pay into court the sum of money claimed by the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff. We consider said proceeding of the defendant as an "application" in the sense of the statute. The provision is that "at any time before answer" the defendants "may apply to the court" for an order of substitution. The defendant was not required to take the risk of being in default, not knowing, of course, whether the court would make the order of substitution. And since the application for such order was set for hearing at a day beyond the stipulated period for answering, the defendant very properly filed said pleading, expressly declaring that it did not waive "its motion for substitution of Wm. H. Riecks, sheriff of the county of San Joaquin, state of California, as defendant for and in its place and stead herein, or its notice of said motion served and filed heretofore on April 9, 1914, but insisting thereon." We think said defendant acted within the letter and spirit of the law, and no error was committed.

But, at any rate, the court had jurisdiction of the parties and of the subject-matter of the action, and it had the legal right to decide the question of substitution, and if its decision was erroneous, the error could not be corrected on certiorari, but must be reached by an appeal from the final judgment in the case. Hibernia S. & L. Society v. Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714.

We can discover even less reason for annulling the second order.

[3] The substituted defendant regularly moved the court for an order to substitute as sole defendants said Farrington, Hubbard and Lewis. In his affidavit in support of said motion he set out that at the instance of said Farrington and Hubbard, who were plaintiffs in an action against Frank E. McClellan and Minnie McClellan, affiant, as sheriff of the county of San Joaquin, had served a writ of attachment on all the moneys and credits of said defendants in said Commercial & Savings Bank, and also that he had served a writ of execution on said moneys and credits in an action wherein John T. Lewis had obtained judgment against said Frank E. McClellan and Minnie McClellan, and that thereafter the said Commercial & Savings Bank had paid into court the sum of $1,250, being all the money and credits that it claimed to have and belonging to the said Frank E. McClellan and Minnie McClellan.

In fine, it clearly appeared that the said Farrington, Hubbard and Lewis were claimants of said money, and were therefore necessary parties to the action, and that their participation was requisite to a final determination of the controversy as to whom the said money should be paid.

The condition was clearly one contemplated by section 389 of the Code of Civil Procedure, providing that:

> "When a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleading or a cross-complaint to be filed, and summons thereon to be issued and served."

The court seems to have acted entirely within the authorization of this statutory provision, and we can find neither irregularity nor excess of power in its proceeding.

We are satisfied that the question of jurisdiction, the only consideration herein involved, must be resolved against petitioner, and the order to show cause is discharged and the peremptory writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 459

PEOPLE v. VUKOJEVICH. (Cr. 334.)

(District Court of Appeal, Second District, California. Sept. 14, 1914.)

1. Criminal Law (§ 1124*)—New Trial—Denial—Review.

An appeal from an order denying a motion for a new trial will not be reviewed, where the grounds on which the motion was based are not in the record and the affidavits of alleged newly discovered evidence referred to in appellant's brief are not incorporated therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2939, 2946–2948; Dec. Dig. § 1124.*]

2. Criminal Law (§ 1159*)—Appeal—Evidence—Review.

Where, in a prosecution for homicide, the evidence was in substantial conflict, the weight of the evidence would not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. Homicide (§ 203*)—Evidence—Dying Declarations—"Sense of Impending Death."

To constitute proof that an alleged dying declaration was made "under a sense of impending death," it is not necessary that the declarant should have expressed in words the belief that he was about to die, but it is enough if it satisfactorily appears in any mode that the statements were made under a belief by the declarant that he could not recover.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430–437; Dec. Dig. § 203.*].

4. Homicide (§ 203*)—Evidence—Dying Declarations.

Where decedent was stabbed while in an altercation with defendant, the knife piercing the pulmonary artery, which wound was necessarily fatal in a few minutes, and decedent got up, staggered against a fence, and fell into the arms of a friend, to whom he stated that defendant had killed him, and death in fact ensued from one to two minutes after the infliction of the wound, the proof was sufficient to show that the declaration was made under a sense of impending death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430–437; Dec. Dig. § 203.*]

5. Homicide (§ 215*)—Evidence—Dying Declarations—Opinion—Conclusion.

Where decedent, after being fatally stabbed, fell in the the arms of a friend, stating defendant "has killed me" such statement, when offered as a dying declaration, was not objectionable as an expression of an opinion or conclusion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451–456; Dec. Dig. § 215.*]

6. CRIMINAL LAW (§ 655*)—TRIAL—CONDUCT OF JUDGE—TREATMENT OF WITNESSES.

A witness having used profanity in his testimony, the court admonished him and told him to "shut up" just a minute, and then directed him to go ahead and tell his story, but not to use any more profane language or he would get in jail. *Held*, not error, in the absence of any showing of prejudice, under the rule that the degree of courtesy to be exercised by the court toward a witness is not a subject for judicial review, unless it clearly appears that defendant's rights were prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520–1523, 1527, 1535; Dec. Dig. § 655.*]

7. CRIMINAL LAW (§ 1122*)—APPEAL — INSTRUCTIONS—REVIEW—RECORD.

Alleged refusal to give certain instructions requested by defendant is not reviewable, in the absence of anything in the record to show that any instructions were actually requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940–2945; Dec. Dig. § 1122.*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Mijo Vukojevich was convicted of manslaughter, and he appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant and two others were charged with the crime of murder. Upon a separate trial defendant was convicted of the crime of manslaughter. He appeals from the judgment and an order denying his motion for a new trial.

[1] A sufficient answer to the appeal from the order denying the motion for a new trial is that the grounds upon which the motion was based are not disclosed by the record; neither are the affidavits of newly discovered evidence, referred to in appellant's brief, incorporated therein. It devolves upon appellant to show the existence of error. In the absence of such affirmative showing this court, in accordance with the rule that all intendments are in favor of the regularity of the proceedings, will indulge the presumption that the ruling was correct.

All of the parties involved were Slavonians. It appears that on the afternoon of October 5, 1913, the attention of deceased, whose name was Charles Rezo, and several companions, all of whom were at the time in a house known at No. 114 Leroy street in Los Angeles, was attracted by the report of firearms at No. 118 on said street. Deceased left the house, followed by several others, going toward the house No. 118, at which time defendant, accompanied by several companions, all or most of them being armed with knives and pistols, met the party of deceased coming from No. 114, and a general fight, accompanied by much neighborhood excitement, ensued. In the affray Charles Rezo was almost instantly killed by a knife wound which pierced the pulmonary artery. According to the theory of the prosecution, this knife wound which caused the death of Rezo was inflicted by defendant, and it is apparent from the verdict rendered that the jury were satisfied as to the correctness of such theory.

[2] Counsel for defendant has filed a voluminous brief of nearly 100 pages, wherein he attacks the sufficiency of the evidence to justify the verdict. In his zeal in this behalf he not only quotes at great length the evidence pro and con given by the numerous witnesses, pointing out discrepancies therein which he insists render certain testimony given for the prosecution unworthy of credence and without weight, but, not content with so doing, produces what he claims to be the testimony of a witness given in another trial of one of the parties jointly charged with defendant, and by comparing it with the testimony of the same witness given in this case, attempts to show inconsistencies therein. If any question can be deemed settled law in this state it is that the appellate courts cannot and will not, where a substantial conflict of evidence exists, determine the credit which should be accorded witnesses, or attempt to weigh their testimony. It indeed appears useless to cite authorities in support of the proposition that under such circumstances no question of law is presented for review. In this case appellant, by pointing out the alleged discrepancies, concedes a substantial conflict in the evidence which, he says, renders it unsatisfactory. What is said in People v. Haydon, 18 Cal. App. 543, 123 Pac. 1102, 1114, is peculiarly appropriate in this case:

> "If, therefore, every case taken to the appellate courts were to be reversed because of discrepancies or contradictions in the testimony of witnesses without whose testimony a verdict of a jury or the findings of a court could not be sustained, there would indeed be few cases in which a reversal would not be compelled upon the ground of the insufficiency of the evidence to support such verdict or findings. * * * It is for this reason that our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved. * * * In consonance with the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ. Proc. § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates."

While the record fails to show that any witness actually saw defendant inflict the fatal wound, it does show that defendant with another had deceased down, at which time defendant, with a gun in one hand and a knife in the other, was on top of Rezo, striking him with the gun; that he was pulled off of Rezo, when the latter got up, staggered against a fence, and fell in the arms of a friend, to whom he stated that defendant had killed him, his death following immediately after making the statement. In addition to the testimony of two witnesses to such fact, there was other evidence and circumstances which clearly pointed to defendant's guilt. Indeed, it is difficult to perceive how the jury could have reached a verdict other than one pronouncing defendant guilty.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] The chief question of law presented is the admission in evidence of the declaration made by deceased to the effect that defendant killed him. Witness Soldo, after testifying to occurrences immediately preceding the death of Rezo, stated that the latter died one or two minutes after he (the witness) asked him what was the matter with him. Thereupon he was asked: "What did Rezo say to you?" Defendant's objection that a proper foundation was not laid for eliciting the evidence, in that it was not made to appear that Rezo knew he was dying, was overruled and the witness stated that deceased, while lying in his arms, replied that "Mike Vukojevich (the defendant) and Grgo Vukojevich have killed me." Appellant insists that it was not made to appear that the declaration was made "under a sense of impending death," in the absence of which showing the statement was inadmissible. Subdivision 4, § 1870, Code Civ. Proc. To constitute proof of such fact it was not necessary that deceased should have expressed in words the belief that he was about to die. Says Mr. Greenleaf, in regard to the mode of establishing the necessary fact:

> "It is enough, if it satisfactorily appears, in any mode, that they (the statements) were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, * * * or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." 1 Greenleaf on Evidence, § 158.

[4] The evidence of a physician called as a witness was that such a wound as that inflicted upon deceased must necessarily result in immediate death. The testimony showed that death ensued from one to two minutes after the infliction of the wound. The evident danger of such a wound, followed by its immediate fatal effect upon the victim, was a strong circumstance tending to show that he knew his condition. People v. Ybarra, 17 Cal. 169.

[5] The statement made immediately preceding dissolution that defendant had killed him was not the expression of an opinion, nor a conclusion (State v. Saunders, 14 Or. 300, 12 Pac. 441; State v. Gile, 8 Wash. 12, 35 Pac. 417), but was equivalent to saying that defendant had inflicted the fatal knife wound which caused his death, and the use of the words "has killed me" justified the inference that deceased was cognizant of his dying condition. The evidence of Soldo in this respect was corroborated by the testimony of Mato Rezo. In our opinion, no error was committed by permitting the statement so made by deceased to be introduced in evidence as his dying declaration.

[6] Appellant complains of alleged misconduct of the trial judge, which he insists was prejudicial to his case. This contention is based upon the following proceedings: One Ephifanos, called as a witness on behalf of the defense, testified that when the trouble started a number of men were playing pool in a billiard room which he conducted. In describing the manner in which these persons left their game, he exclaimed:

> "My God, they flew out and ran and leave the cue, all six tables flew. I say, what is going on?"
>
> "The Court: I don't want you to use that language again in this court. Don't use any profane language in this court.
>
> "The Witness: Excuse me, I don't mean—they gone out—
>
> "The Court: Shut up, just a minute now. That seems to be the only thing that you can understand. Go ahead and tell your story but don't use any more profane language or you will get in jail."

It is impossible to conceive how the rights of defendant could have been prejudiced by the court telling the witness to shut up, or threatening him with a jail sentence for the use of the language in which he indulged. The degree of courtesy to be exercised by the court toward a witness is not a subject for judicial review, unless it clearly appears that defendant's rights were prejudiced thereby (People v. Casselman, 10 Cal. App. 234, 101 Pac. 693); hence the language used toward the witness is no concern of defendant.

[7] It is claimed the court erred in refusing to give certain instructions requested by defendant. There is an absence of anything in the record showing that defendant requested the court to give any instructions; hence there is no merit in the contention. People v. Hettick, 126 Cal. 429, 58 Pac. 918.

Counsel for appellant has made excerpts from the instructions given, which, thus isolated, he claims were erroneous statements of law. Instructions must be considered as a whole, each part thereof in connection with the other, and as applied to the subject-matter thereof. Thus considered, the instructions given, covering upwards of 20 pages of the record, constitute a full, fair, and correct exposition of the law applicable to the facts established by the evidence. Our attention is directed to other alleged errors in rulings upon the admissibility of evidence offered. They are trivial in nature and, conceding such rulings to have been error, it is apparent that upon this record defendant could not have been prejudiced thereby.

We find no prejudicial error disclosed by the record, and the judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 422

GIUFFRE v. LAURICELLA et al.

(Civ. 1223.)

(District Court of Appeal, Third District, California. Sept. 10, 1914. Rehearing Denied by Supreme Court Nov. 9, 1914.)

1. JUDGMENT (§ 670*) — CONCLUSIVENESS — MATTERS ADJUDICATED—IDENTITY OF PARTIES.

In an action against a married woman by the father and mother of her deceased husband, the complaint alleged that the husband conveyed real property to her upon the express agreement that she would hold it in trust for him during his life, and upon his death hold one-half for herself and deed the other half to his father and mother; but that she had refused to convey such one-half interest to the father and mother. The answer alleged that the conveyance was an absolute conveyance of all the right and title of the husband without limitation, condition, or trust, and that the land was community property. The judgment recited the court's findings that such property was deeded to the wife upon such express agreement, and that thereby a constructive trust was created, and adjudged and decreed that the property was so conveyed; that the trust should be enforced; and that the wife should convey one-half of the property to the father and mother and retain the other half in her own name and right. *Held*, that such judgment was conclusive, in a subsequent action for partition by the wife against the father and mother, that she was the owner of only a one-half interest, and estopped her to claim one-half of the property by virtue of her community right and one-half of the other one-half by descent from the husband; there being no merit in the contentions that the judgment made no direct reference to the ownership of the property, and that the wife in the former action was sued only as trustee, and that her individual title was therefore not in issue or litigated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181, 1185; Dec. Dig. § 670.*]

2. JUDGMENT (§ 725*) — CONCLUSIVENESS — MATTERS CONCLUDED—"RES ADJUDICATA."

All matters in litigation which become the basis of a judgment are res judicata, and cannot be again presented as causes of action, or defenses, or considered or determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255–1257; Dec. Dig. § 725.*

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

3. HUSBAND AND WIFE (§ 266*)—COMMUNITY PROPERTY — CONVEYANCES — ESTOPPEL TO DENY VALIDITY OF TRUST.

Under Civ. Code, § 1402, providing that upon the death of a husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, where a husband, who was in poor health and intending to leave the country, and who desired to make some provision for his father and mother in case he did not return, instead of making a will giving them one-half of certain community property, conveyed the property to the wife on the express agreement that she would hold it in trust for him during his life and after his death convey a one-half interest to the father and mother, retaining the other half interest, she was estopped to assert that the deed was invalid, under section 172, providing that the husband cannot make a gift of community property or convey it without a valuable consideration, unless the wife, in writing, consent thereto, or to claim one-half of the property by virtue of her community right and one-half of the other half by descent from the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 560; Dec. Dig. § 266.*]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action for partition by Marina Giuffre against Giuseppe Lauricella and another. From the decree, and from an order denying a new trial, plaintiff appeals. Affirmed.

Geo. C. Sargent and J. F. Cavagnaro, both of San Francisco, for appellant. Jas. C. Sims and J. A. Spinetti, both of San Francisco, for respondents.

HART, J. This is an action in partition. The complaint alleges that the plaintiff is the owner of an undivided one-half interest in fee simple in a certain lot (specifically described in the complaint) situated on Tremont avenue, in the city of San Francisco, and that the defendants are each of them the owner of an undivided one-quarter interest in fee simple in said real property; that the plaintiff is the owner of an undivided three-quarters interest in fee simple in a certain lot (also specifically described in the complaint) situated on Oak street, in said city; and that the defendants are each of them the owner of an undivided one-eighth interest in fee simple in said last-mentioned lot. It is alleged that said two parcels of property cannot be divided in kind without great disadvantage and loss to the owners thereof, and that it is therefore to the best interests of all the parties to this action that both of said pieces of property be sold separately, and the proceeds divided among the parties to the action, etc.

The answer denies that the plaintiff is the owner of an undivided one-half interest in fee simple in the Tremont avenue property, denies that she is the owner of a three-quarters interest in the Oak street property, and alleges that the defendants are the owners of a three-quarters interest in fee simple in each of said pieces of property, and in support of these denials and allegations pleaded the judgment in a former action, in which Giuseppe Lauricella and Concetta Lauricella (respectively, father and mother of Domenico Lauricella) were plaintiffs and the plaintiff here, Marina Giuffre, was the defendant, and involving both the pieces of property described in the complaint.

The court found that the plaintiff was the owner of an undivided one-half interest in fee simple in each of the pieces of property mentioned in the complaint, and that the defendants are each of them the owner of an undivided one-quarter interest in each of said pieces of property, and entered an interlocutory decree accordingly, and furthermore therein ordered a sale of both pieces of said property and named a referee for that purpose. The plaintiff prosecutes these appeals from said decree and the order denying her a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The controversy here involves solely the Oak street property, and the objection to the findings and the decree is that, under the evidence and the record, the court should have found and adjudged that the plaintiff is the owner of a three-quarters rather than a one-half interest in fee simple in said property.

[1] The facts of the case are not disputed, and may be stated in the language of the brief of counsel for the defendants as follows:

> "Domenico and Marina Lauricella were married in 1900. On June 16, 1904, the Tremont avenue property was conveyed to Domenico Lauricella (the husband) by a bargain and sale deed. On February 7, 1906, the Oak street property was conveyed to Domenico Lauricella and Marina Lauricella by a bargain and sale deed. On July 11, 1906, a deed describing both of these pieces of property was executed by Domenico Lauricella to his wife, the appellant. It was a bargain and sale deed, expressed consideration of $10, and contained no terms indicating an intention to create a trust. Domenico Lauricella died on September 10, 1906, and Marina (his widow and the plaintiff) married Domenico Giuffre on October 3, 1909. On March 26, 1907, an action was commenced in the superior court of the city and county of San Francisco, state of California, by Giuseppe Lauricella and Concetta Lauricella (respondents herein) against Marina Lauricella (appellant herein), numbered 7324, to obtain a judgment that the deed of July 11, 1906, from Domenico Lauricella to Marina Lauricella was made to her in trust, to hold the property for her husband while living, and after his death to hold one-half absolutely and to convey the other half, share and share alike, to Giuseppe Lauricella and Concetta Lauricella. Judgment went in favor of Giuseppe Lauricella and Concetta Lauricella, which was affirmed by the Supreme Court upon appeal. 161 Cal. 61, 118 Pac. 430. Among the papers in that case is a satisfaction of the judgment, signed by plaintiffs' attorney, dated November 25, 1911. On November 15, 1911, pursuant to the judgment in Lauricella v. Lauricella, a deed was executed by Marina Lauricella to Giuseppe Lauricella and Concetta Lauricella, conveying to the grantees an undivided one-half of all the right, title, and interest received by her by operation of the deed of July 11, 1906."

The plaintiff introduced the following evidence, and thereupon rested her case: (1) Deed from one Westwood to Domenico Lauricella, dated June 16, 1904, conveying the Tremont street property to Domenico Lauricella. (2) Deed from McEwen Bros. to Domenico Lauricella and Marina Lauricella, dated February 7, 1906, conveying the Oak street property. (3) Deed from Domenico Lauricella to Marina Lauricella, dated July 11, 1906, conveying both said pieces of property. (4) Deed from Marina Lauricella to Giuseppe Lauricella and Concetta Lauricella, dated November 15, 1911.

The defendant then offered and the court received in evidence the judgment roll in the case of Giuseppe Lauricella and Concetta Lauricella v. Marina Lauricella, above referred to, after the plaintiff had objected to said evidence upon the following grounds:

> "(1) That said judgment was not binding upon plaintiff because the status of the title to the real property described in said action and in the action at bar came only collaterally into question; that any declaration in the findings and judgment in said judgment roll as to the character of the title was not necessary to a decision of the matters involved. (2) That defendant in said judgment roll was litigating in her capacity as trustee, and not as an individual. (3) That the parties to said action were not litigating for the same thing or under the same title; that the cause of action in Lauricella v. Lauricella and in the action at bar were not the same."

The former action involving the two parcels of property described in the complaint in the present action was one for the establishment and enforcement of a constructive trust; that is, for a decree declaring and adjudging the property here involved to be held in trust by Marina Lauricella (now Marina Giuffre) for the benefit of her husband, during his life, and, upon his death, one-half thereof to be conveyed in equal shares to the father and mother of the husband, and the other one-half to be retained by her, absolutely.

The complaint in said former action, after alleging the death of Domenico Lauricella, "alleges that Marina was his wife, and Giuseppe and Concetta his father and mother; that on the 15th day of August, 1906 (should be July 11, 1906), Domenico was the owner in fee of the Tremont avenue and Oak street properties; that it was all his separate property; that Domenico reposed great confidence in his wife, Marina, and, believing she would faithfully execute the trust, delivered to her, on August 15th, a deed of the Tremont avenue and Oak street properties, upon the express agreement that she would hold them in trust for Domenico during his life, and that upon his death she would hold one half for herself and deed the other half to Giuseppe and Concetta, in equal shares; that defendant accepted the deed to hold in trust, and without paying any consideration; that, since his (Domenico's) death, Giuseppe and Concetta had demanded a deed of one-half of the property, which had been refused; that Marina persisted in betraying the confidence of Domenico and in refusing to make such conveyance; that the deed, though absolute on its face, was intended to be in trust as aforesaid."

The answer to said complaint, besides containing certain denials, avers that Marina Lauricella was the owner of one-half of the Oak street property in virtue of her right of community.

The court's findings were in accord with the allegations of the complaint, except as to the Oak street property, and as to it the court found that that particular parcel of property was acquired during the married life of Domenico and Marina, and that it was therefore community property.

The position of the defendants is that the question of title to both pieces of the property described in the complaint was adjudicated in the case of Lauricella v. Lauricella, supra, and that therein it was adjudged that an undivided one-half interest in fee simple in each of said pieces of property was in the plaintiff in the present action and that an undivided one-fourth interest in each of said pieces of property was vested in each of the defendants in the former action, Giuseppe and Concetta Lauricella, and that consequently the judgment in said former action operates as an estoppel against any claim of the plaintiff of any further or greater interest in each of said parcels of property than that awarded to her by said judgment.

The plaintiff submits a variety of specific reasons for which, she contends, the judgment in the case of Lauricella v. Lauricella, supra, will not support the plea of res adjudicata in this action. The sum and substance of them all is that the same questions were not litigated in said action as are involved in the present action, and that the parties to the former action are not the same parties to this action. In other words, it is the contention that the plaintiff in the former action was sued in her capacity as trustee and not as an individual, and that her title to the Oak street property, as an individual, was not put in issue or litigated in said action. Another contention is that, while the findings in said action make some reference to the ownership of the property described in the complaint, the judgment is absolutely silent upon that proposition, and it is argued that inasmuch as an estoppel by judgment cannot be predicated upon a mere finding, but must rest wholly upon the judgment itself, there is no ground here for invoking, as a defense to the action, an estoppel by judgment.

From the foregoing and other propositions advanced for the purpose of showing that the title of the plaintiff to the property in dispute was not involved and litigated in the former action, it is contended that the plaintiff is entitled to assert here her full interests in the Oak street property, viz., an undivided one-half thereof by virtue of her right of community and one-half of the other undivided one-half, or altogether three fourths thereof; the latter fourth going to her by descent as of separate estate. Sections 1402 and 1386, subd. 2, Civ. Code; Lauricella v. Lauricella, supra.

An examination of the judgment roll in the case of Lauricella v. Lauricella will clearly disclose that the proposition which it rests on the plaintiff to establish in order to prevail in this action, viz., that the judgment in said action is not conclusive upon the question of the title to the property in dispute, and that said judgment cannot therefore operate as an estoppel against her right to claim any greater interest in said property than is therein and thereby adjudicated and awarded to her, cannot be sustained upon any conceivable view of the record before us. The judgment in said case reads, in part:

"* * * The court having filed its written findings of fact and conclusions of law, and having ordered that judgment be entered that the real property described in the deed of July 11, 1906, of Domenico Lauricella, deceased, to Marina Lauricella, the defendant herein, and set forth and described in paragraph 3 of plaintiffs' complaint on file herein, and set forth and described in said findings of fact filed herein, was deeded to said defendant by Domenico Lauricella, with the express promise, understanding, and agreement that said Marina Lauricella was to hold said real property in trust for her husband, Domenico Lauricella, while living, and after his death that she should hold one-half absolutely and should convey the other one-half, share and share alike, to the father and mother of said deceased, and that thereby a constructive trust was created, and having further ordered that the plaintiffs are entitled to judgment, and that said trust be enforced in favor of the plaintiffs, and that, in accordance with the terms of said trust, defendant convey one-half of said real property to Giuseppe Lauricella and Concetta Lauricella, respectively the father and mother of said deceased, in equal shares, and that the defendant Marina Lauricella retain the other one-half of said real property absolutely in her own name and in her own right, * * * it is ordered, adjudged, and decreed that the real property described as follows," describing the Tremont avenue property. "Also all that certain lot, piece or parcel of land * * * described as follows," describing the Oak street property, "was deeded to said defendant Marina Lauricella, by Dominico Lauricella, deceased, with the express understanding, promise, and agreement that said Marina Lauricella was to hold said property in trust for her husband, Domenico Lauricella, while living, and after his death, that she should hold one-half of said property absolutely, and should convey the other one-half, share and share alike, to the father and mother of said deceased, and that thereby a constructive trust was created. It is further ordered, adjudged, and decreed that said trust be enforced in favor of the plaintiffs, Giuseppe Lauricella and Concetta Lauricella, and that, in accordance with the terms of said trust, defendant, Marina Lauricella, convey one-half of said property to Giuseppe Lauricella and Concetta Lauricella, respectively the surviving father and mother of said deceased, in equal shares. It is further ordered, adjudged, and decreed that the defendant Marina Lauricella, retain the other one-half of said real property absolutely in her own name and in her own right."

That the object of said action, as disclosed by the averments of the complaint therein, was to have determined and adjudicated the respective interests of the parties thereto in the property described in said complaint is a proposition upon which there exists no possible ground for controversy.

It cannot be disputed that the complaint in the former action tendered an issue upon the question of the ownership of or title to the property, and that issue was joined upon that specific question is evidenced by the following allegation of the answer:

"* * * In that behalf, defendant alleges that said conveyance was an absolute conveyance of all the right, title, and interest of said Domenico Lauricella in all of said real property described in said complaint, without any limitation or condition or trust whatsoever."

As already shown, and, indeed, as is conceded, the findings followed the averments of the complaint, and it follows, therefore, that the court found that a trust in the property was created by Domenico, and that, agreeably to the terms of said trust, the title to one-half thereof was, upon his death, to be conveyed to his father and mother.

It is only necessary to compare the judgment with the issues made by the pleadings and with the findings to readily perceive that the former not only adjudicated every essential issue in the case, but that its scope is coextensive with the findings. In other words, it is clear that the effect of the judgment was to establish and adjudicate these facts: (1) That Domenico Lauricella was the owner of the property in dispute. (2) That he conveyed the same to his wife in trust for himself for life, with the remainder in fee to his father and mother and his widow, the former each to take one-fourth, and the widow to take one-half thereof, and that she accepted the trust. (3) That Marina repudiated said trust and claimed that, by the deed of conveyance from her husband to herself, the whole of the property and the title thereto was transferred to and vested in her, without any condition, limitation, or qualification whatsoever. (4) That, conformably to said adjudication, it was further ordered, decreed, and adjudged that Marina, in pursuance of the terms of said trust, as found by the court and established by the decree, convey to the father and mother of the deceased their respective interests in said property.

Thus it is to be observed that the respective interests of the parties to the present action in both parcels of property described in the complaint here were conclusively determined, established, and adjudicated in the former action.

[2] It is elementary, of course, that all matters in litigation which become the basis of a judgment are res adjudicata, and that to permit causes of action or defenses once presented, considered, and definitively determined to be again asserted in another or subsequent suit or action would be in violation of the principles underlying and supporting that salutary doctrine—a doctrine indispensably essential to any well-regulated system of jurisprudence—because the effect of its operation is to put an end to litigation, or to stop repeated trials of precisely the same question between the same parties.

In the present action, the plaintiff has attempted to reopen and renew the litigation of one of the several important questions which were conclusively determined against her and in favor of the defendants to the present suit in a former action. There is obviously no merit in the contention that because, so it is argued, the plaintiff here was sued in the other action in the capacity of a trustee and not as an individual, the parties to the former action are different from or not the same parties as those to the present action. In the former suit, the plaintiff was necessarily proceeded against both in her individual and in her representative capacity. As an individual, she claimed the entire property under the deed from her husband, and consequently denied that the parents of her deceased husband were entitled to a share thereof. It was for the purpose of establishing her capacity as a trustee with respect to the property and of enforcing the trust, and, to that end, to establish the groundlessness of her claim to all the property as an individual, that the former action was instituted. Whether the property was wholly and absolutely conveyed to her, or, as the complaint in the former action asserted, it was conveyed to her in trust for the purposes set forth in said complaint, rested wholly in parol, and the issues therein presented, considered, and finally adjudicated affected her as an individual as well as a trustee. Indeed, the sole issue submitted by her in resistance to the claims of the plaintiffs in that action involved the assertion by her of sole ownership in her of the entire property—an ownership which she claimed vested in her at the moment of the delivery of the deed to her by her husband and an ownership necessarily inconsistent with the trust theory upon which the plaintiffs in said action were required solely to rely to secure their shares of the property.

[3] But the whole question of the right of the plaintiff to the one-fourth interest in the community property (the Oak street real estate), which she is attempting to obtain through the medium of this action, was passed upon and determined against her by the Supreme Court on the appeal in the former action. Lauricella v. Lauricella, 161 Cal. 61, 118 Pac. 430, supra. There it was argued that, as by the terms of section 172 of the Civil Code the husband has no right to make a gift of community property or convey such property, without a valuable consideration, in the absence of the wife's consent thereto in writing, a constructive trust in the community cannot arise or be created through or by means of a voluntary deed by the husband conveying such property to the wife. Replying to that proposition, the Supreme Court, through Mr. Justice Shaw, said:

> "In this case this puts the wife in the position of claiming a quarter interest in this parcel under the husband's deed, because said deed is void. The husband having died childless, leaving his father and mother surviving, if this deed is void the law would vest in the wife three-fourths of this parcel, one-half in virtue of her community right and one-fourth by descent as of separate estate, while the remaining fourth would go to the father and mother. Civ. Code, § 1402; section 1386, subd. 2. She can claim the last-mentioned fourth only under this deed and, in view of the conclusions hereinbefore stated, only upon the ground that the deed is ineffectual to convey anything. If she accepts the grant at all, she must take it with the burden and upon the trust by means of which she received it. Her claim of the entire estate under the deed constitutes an effectual estoppel to prevent her from asserting in the same breath that

the deed is invalid as to one-fourth. White v. Stevenson, 144 Cal. 112, 77 Pac. 828. She is estopped by her conduct from claiming the other one-fourth interest as well. Although her husband had not power to make a gift of any part of the community property without her written consent, yet he had the power without her consent to make a will giving one-half of it to his father and mother. Civ. Code, § 1402. The facts are that Domenico was in poor health and was intending to depart for Italy in hope of recovery, and he desired to make some provision for his father and mother in case he did not return. He could at that time have made a will giving them one-half of this parcel. Instead of making the provision by that method, he chose to rely upon his wife and transferred it to her upon her promise to carry out his wishes by transferring it to them after his death. To this, with presumed knowledge of his power to do it by will, she agreed. It does not lie in her mouth to say now that if she had then refused to consent he would not have made the same provision by will. And having then, by her consent, prevented the making of the disposition by way of devise, she is clearly estopped, now when death has ended his powers, to say that the arrangement made with her consent shall not be carried out because it was not within his power then to carry it out in that mode without her consent in writing. Her allegation in her answer that it was acquired after the marriage, and therefore community property, authorizes the plaintiffs to rely on the estoppel in regard to that claim, without pleading it specially. Code Civ. Proc. § 462; White v. Stevenson, 144 Cal. 112, 77 Pac. 828; Fox v. Tay, 89 Cal. 344, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Moore v. Copp, 119 Cal. 432, 51 Pac. 630."

The foregoing language conclusively shows and determines, not only that the question of the right of the plaintiff to the additional one-fourth interest in the Oak street property which she is seeking to secure by means of this action was lost to her when she accepted the trust and its burdens and consequences, but it further shows that said question was presented, litigated, and adjudicated in the former action, and that the judgment in the latter action operates as an estoppel to the maintenance of the present action. Indeed, while we have thought it proper to give this record a somewhat extended consideration, we are nevertheless at a loss either to perceive or to conceive any theory upon which, under the circumstances as disclosed to us, the plaintiff could ever have hoped to maintain this action.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 464

PEOPLE v. POLICH. (Cr. 344.)

(District Court of Appeal, Second District, California. Sept. 15, 1914.)

1. Criminal Law (§ 1144*)—Appeal—Presumptions—Regularity of Sentence.

Under Pen. Code, § 1191, requiring judgment to be pronounced not less than two nor more than five days after the verdict of guilty, but authorizing the court to extend the time where the question of probation is considered, section 1202, providing that, if the judgment is not pronounced within the time specified, the defendant shall be entitled to a new trial, and section 1203, authorizing the court to inquire into the circumstances of aggravation or mitigation, and to require reports from the probation officers, where a defendant applied for probation four days after the verdict was rendered, and the application was denied and judgment pronounced seven days after the verdict, it will be presumed in support of the regularity of the court's action that the matter was referred to the probation officer for report, if such report were necessary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736–2764, 2766–2771, 2774–2781, 2901, 3016–3037; Dec. Dig. § 1144.*]

2. Criminal Law (§ 977*)—New Trial—Delay in Sentence—Necessity of Motion.

Even if the defendant were entitled to a new trial under those sections, the court still had jurisdiction of the case, and if the defendant made no application for a new trial on the ground of the delay the court might rightfully enter the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. § 977.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Steve Polich was convicted of robbery, and he appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant, having been convicted of the crime of robbery, appeals from the judgment and from an order denying his motion for a new trial.

The verdict was entered on March 27, 1914. The minutes of the court for March 31st, after showing the presentation of a motion for a new trial and the ruling thereon, state that an application for probation was entered for the defendant, "and the ruling thereon and the matter of pronouncing judgment herein are continued to April 3, 1914." On April 3d the defendant was in court with his counsel, the application of defendant was denied, and the court pronounced judgment against him.

[1] The only reason suggested for a reversal is that the judgment was not rendered or pronounced until seven days after the rendition of the verdict. This matter is controlled by sections 1191, 1202, and 1203 of the Penal Code. The general rule is that judgment must be pronounced not less than two nor more than five days after verdict; but it is further provided, among other things, that "the court may extend the time not more than twenty days in any case where the question of probation is considered, in accordance with section 1203 of this Code." It is true, as suggested by defendant's attorney, that the record does not affirmatively show that the court referred the matter of probation to the probation officer for a report or that any report was made. If this report

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was essential under the circumstances, it will be presumed that the court proceeded regularly in the matter, since the record shows nothing to the contrary.

[2] Furthermore, it does not appear that the defendant objected to the pronouncing of judgment on April 3d, or that he demanded a new trial upon the ground that the five days' limit had expired. "If judgment was not pronounced within the time limited, a new trial was made imperative if the defendant so desired; he became 'entitled' to it. * * * If the court should *refuse* a new trial and render judgment against the defendant after the authorized time has passed, its action would be erroneous and the judgment would be reversed on appeal, if an appeal should be taken." Rankin v. Superior Court, 157 Cal. 189, 192, 106 Pac. 718, 719. The foregoing decision is authority for the proposition that the court had jurisdiction of this case on April 3, 1914, and that it might rightfully enter the judgment, in the absence of a motion or demand for a new trial, based upon the claim of delay in rendering judgment.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

25 Cal. App. 437

BREEZE v. INTERNATIONAL BANKING CORPORATION et al. (Civ. 1231.)

(District Court of Appeal, Third District, California. Sept. 11, 1914.)

1. TRIAL (§ 398*)—FINDINGS—INCONSISTENCY BETWEEN FINDINGS OF PROBATIVE AND ULTIMATE FACTS.

Plaintiff and R. were law partners, and, in payment for services, were given by a client an order on a bank to which he was indebted to pay R. $7,500 and charge it to his account, holding as security therefor any collateral security held by the bank. R. pledged the order to the bank as security for his individual debt. Upon default in payment of the client's indebtedness, the bank sold the pledged securities to B., who paid the indebtedness and gave R. a note for the amount of the order, which note was held by the bank as security for R.'s debt. R., without notifying plaintiff of the giving of this note, represented that the client was insolvent, and induced plaintiff to sell his interest in the order for $500. The court found that the bank in such transactions dealt entirely with R., and did not consult plaintiff or give him any information respecting the transaction, though it knew of his interest; that the $500 was paid by the bank, but that it was advanced by R.'s father, and that the bank acted simply as R.'s agent; that the bank, when such payment was made, did not know that plaintiff had received no other consideration for the transfer of his interest; that plaintiff, after learning that B. paid the order, inquired of R. and the bank whether R. knew that he was going to pay the order before buying plaintiff's interest, and that both denied that he had such knowledge, but there was no finding that the bank deliberately made a false statement or that this statement was not in good faith. B.'s note was paid and the amount applied on R.'s indebtedness to the bank. *Held*, that there was nothing in these facts forcing the conclusion that the bank's part in the transaction was characterized by fraud, even conceding that B.'s offer to give his note for the amount of the order was communicated to the bank as well as R., and that the bank loaned R. the money paid for plaintiff's interest, and hence there was no inconsistency between the court's findings of the foregoing probative facts and its finding of the ultimate fact that the bank did not conspire with R. or any one else to induce plaintiff to sell his interest for a sum below its real value nor by representations procure him to assign his interest, or conceal any knowledge from him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 673; Dec. Dig. § 398.*]

2. TRIAL (§ 398*)—FINDINGS—INCONSISTENCY BETWEEN FINDINGS OF PROBATIVE AND ULTIMATE FACTS.

On an appeal on the judgment roll alone, without any bill of exceptions or other duly authenticated record of the evidence, unless it clearly appears that an ultimate fact found by the court is based upon or educed from the findings of probative facts, the probative facts found will not control, limit, or modify the finding of the ultimate fact, and the inconsistency between such findings will not justify a reversal of the judgment supported by the ultimate fact found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 673; Dec. Dig. § 398.*]

3. PARTNERSHIP (§ 160*)—MISAPPROPRIATION OF MONEY—NOTICE.

Where a member of a firm of attorneys pledged an order for the payment of money, belonging to the firm, as security for his individual debt to a bank, and upon payment of a note substituted for the order applied the proceeds upon such debt, such facts alone did not put the bank on inquiry or charge it with notice that such partner was appropriating the firm property to his individual purposes, without the consent of his partner, and its failure to prosecute an inquiry or advise the partner of the transactions was not fraud on its part, as one dealing with a partner respecting firm property may assume that the partner is acting with full authority from his copartners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 190–300; Dec. Dig. § 160.*]

4. APPEAL AND ERROR (§ 931*) — PRESUMPTIONS IN SUPPORT OF JUDGMENT.

On an appeal on the judgment roll alone, where the court found a fact contrary to the allegation of the complaint, it could not avail plaintiff that the denial of such allegation in the answer was in the form of a negative pregnant, and amounted to an admission, since presumptively such question was treated as in issue at the trial, and presumptively there was sufficient evidence to support the finding on that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

5. PARTNERSHIP (§ 218*)—ACTION BY PARTNER—TRIAL—QUESTIONS OF FACT.

Whether a false statement by a bank, after plaintiff had been induced, by the fraud of his copartner, to part with his interest in an order for the payment of money, which his copartner had pledged to the bank for an individual debt, that the copartner, when he purchased such interest, did not know that a purchaser of certain collateral securing the payment of such order and other debts would pay the order, possessed much or little weight on the charge of fraud against the bank was a question for the trial court.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 49, 426–428; Dec. Dig. § 218.*]

6. PARTNERSHIP (§ 144*)—MISAPPROPRIATION OF PROPERTY—BONA FIDE PURCHASER.

Where a partner pledged an order for the payment of money belonging to the firm to secure his individual debt to the bank, and after the substitution of a note for such order allowed the amount paid on the note to be applied on such debt, the cancellation of the pre-existing debt from him to the bank constituted a valuable consideration, preventing the other partner from following the money so applied and recovering it from the bank.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 234–239; Dec. Dig. § 144.*]

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Thomas H. Breeze against the International Banking Corporation and another. From a judgment in favor of the defendant named, plaintiff appeals. Affirmed.

Charles H. Fairall and Thomas H. Breeze, both of San Francisco, for appellant. Richard Bayne, of San Francisco, for respondent. Pillsbury, Madison & Sutro, of San Francisco, for defendant.

HART, J. The plaintiff instituted this action for the purpose of recovering from the defendants the sum of $3,250, together with interest from the 4th day of April, 1907. The trial court gave the plaintiff judgment in the sum of $3,741.26 against the defendant Robbins, but rendered judgment in favor of the bank. This appeal is prosecuted by the plaintiff on the judgment roll alone from that part of the judgment which was rendered and entered in favor of the bank.

The gist of the complaint, in brief and in substance, is that the defendants jointly entered into a fraudulent scheme whereby Robbins was enabled to and did defraud the plaintiff out of his share of a certain sum of money which was paid to the bank and Robbins upon a certain order executed in favor of and delivered to the plaintiff and Robbins as copartners; the details of which transaction to be hereinafter more particularly set out. The allegations of the complaint are met by denials by the defendants; they having filed separate answers.

[1] The ultimate question submitted by this appeal is whether the judgment in favor of the defendant bank is supported by the findings. The specific contention of the plaintiff is that the ultimate facts found by the court are inconsistent with, and therefore not supported by, certain probative facts likewise found. The questions thus propounded will require an extended statement of the facts as found by the court. They are: The plaintiff and the defendant Robbins are lawyers by profession, and up to the 10th day of June, 1907, were copartners in the practice of the law. On the 5th day of September, 1905, one H. C. Stilwell retained said Robbins & Breeze as his attorneys in certain pending litigation to which he was a party, and on said day, for the purpose of compensating them for their professional services, he made, executed, and delivered to Robbins & Breeze a certain order for the payment of the sum of $7,500, which was in the following words and figures:

"Sept. 5th, 1905.

"W. H. High, Esq., M'g'r. International Bkg. Corporation, San Francisco—Dear Sir: Please pay Lloyd M. Robbins seven thousand and five hundred ($7,500) dollars and charge same to my account and hold any securities that you may have in which I am interested, as security for the same. H. C. Stilwell."

On the day of the execution and delivery of said order to Robbins & Breeze, Robbins indorsed the same as follows:

"Pay to International Banking Corporation. Credit to a/c of Robbins & Breeze.

"Lloyd M. Robbins."

The findings then proceed:

"IV. At the time Stilwell made and delivered this order he was the owner of a certain promissory note made to his order by the American Magnesite Company, a corporation, which note had theretofore been by him pledged to the defendant International Banking Corporation (hereinafter styled the bank) to secure the payment of certain moneys which he then owed that defendant.

"V. At that time and at the time of the deposit of this order by Robbins, as hereinafter found, Robbins was indebted to the bank in the sum of $2,900.

"VI. Robbins, after so indorsing this order, deposited it with and pledged it to the bank, and the bank accepted it as collateral to secure the payment of the debt so owed by Robbins. At the time of such deposit the bank knew and had full notice that the plaintiff was the owner of a half interest in this order. The pledge of this order by Robbins was made wholly without the consent or knowledge of the plaintiff, and he never consented thereto, but nothing further was ever done by the bank or by any one else under or by virtue of said pledge of the said order.

"VII. The note of the American Magnesite Company to Stilwell had been pledged to the bank under an agreement whereby the bank was authorized, upon maturity and nonpayment of the debt due from Stilwell to the bank, to sell the note at private sale, and at the time of its sale, hereafter found, Stilwell had pledged to the bank, and the bank held, certain other securities owned by him, as further security for his indebtedness to the bank, subject also to the terms of that agreement.

"VIII. On the 4th day of April, 1907, the indebtedness due the bank from Stilwell was matured and unpaid, and on that date one A. B. Bowers made an offer to purchase the American Magnesite Company's note and the other securities so held by the bank as pledges, and to pay therefor a sum equal to the amount of the Stilwell indebtedness to the bank, and also to give his note payable to the order of Robbins, payable one year after date, without interest, for the sum of $7,500, in lieu of and in substitution for the said order theretofore made and delivered by Stilwell, as hereinbefore found. Such offer was then and there accepted by the bank and by Robbins, but was not at any time by either of them communicated to plaintiff, and he was wholly without knowledge thereof until the 19th day of October, 1909.

IX. Bowers thereupon, on the 4th day of April, 1907, gave his promissory note to the bank for the sum of $12,795.90, the amount of Stilwell's indebtedness to the bank, which note was by him paid on the 25th day of April, 1907, and gave his note payable to the order of Robbins, payable one year after date, without interest, for the sum of $7,500, and the bank thereupon sold to Bowers the American Magnesite Company's note and the other securities so by it held as pledgee.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"X. On the 6th day of April, 1907, Robbins represented to and told plaintiff that the bank had sold the American Magnesite Company's note and the other securities to Bowers for the amount of the indebtedness due from Stilwell to the bank, but Robbins did not at that time or at any other time tell or inform plaintiff that Bowers had given Robbins the promissory note, hereinbefore found to have been so given. Robbins at that time further represented to plaintiff that, by reason of such sale, Stilwell was practically insolvent and without present means or ability to pay his order, hereinbefore found to have been by him made and delivered. By means of such statements and representations Robbins induced plaintiff to, and plaintiff did, offer to sell all his right, title, and interest in and to said order to Robbins for the sum of $500.

"XI. On the 10th day of April, 1907, Robbins stated to plaintiff that he would accept such offer, and stated that he had no reason to believe that the order would be paid, but that he was willing to take a chance that it would be paid. Upon such representation, and relying wholly and implicitly thereon, and in total ignorance of the note which Bowers had given to Robbins, plaintiff agreed to assign his interest in the said order to Robbins, and upon the 11th day of April, 1907, Robbins paid plaintiff the sum of $500, and plaintiff assigned, set over, and transferred all his interest in the order to Robbins. Plaintiff, prior to said time, had made no sale, assignment, or transfer of his interest in said order to Robbins or to any one whomsoever.

"XII. Robbins' indebtedness to the bank on the 4th day of April, 1907, amounted to over $10,000, and continued in excess of such sum until the 25th day of April, 1907, when said note so given by Bowers to Robbins was paid, as hereinafter found.

"XIII. On the 25th day of April, 1907, Bowers offered to Robbins to pay the sum of $6,500 forthwith in full satisfaction of said note, which offer was thereupon accepted by Robbins, and thereupon Bowers paid the sum of $6,500 to the bank as pledgee of said note and on account of Robbins, in full satisfaction thereof, and the sum so paid was by the bank forthwith applied to the partial satisfaction and payment of Robbins' then existing indebtedness to the bank.

"XIV. On the 6th day of May, 1907, plaintiff for the first time discovered that the said order so made and delivered by Stilwell had been paid by Bowers, and plaintiff at once made inquiry both of Robbins and the bank whether or not Robbins knew that Bowers was going to pay the order, before plaintiff had so assigned, transferred, and delivered his interest in the order to Robbins, and both Robbins and the bank denied that Robbins knew that Bowers was going to pay the order, at the time when plaintiff made such assignment. Plaintiff made diligent search to discover whether Bowers had promised to pay the Stilwell order prior to the 10th day of April, 1907, and the said assignment by plaintiff to Robbins, but was unable to make discovery, and had no knowledge or notice of that fact or of the note so given by Bowers to Robbins until the 19th day of October, 1909. * * *

"XVI. The bank neither lent nor advanced the sum of $500 to Robbins, which Robbins paid to plaintiff as hereinbefore found, but the said sum of $500 was advanced by the father of Robbins, and the bank acted simply as the agent of Robbins in paying to Breeze the said sum of $500.

"XVII. Robbins did not inform the bank, prior to the 4th day of April, 1907, or at any time prior to the 11th day of April, 1907, that plaintiff had assigned his interest in said order to him (Robbins), or that he (Robbins) had purchased plaintiff's interest in said order. The bank believed and knew that plaintiff had an interest in said order until the 11th day of April, 1907, when plaintiff assigned and sold his interest.

"XVIII. The bank never at any time informed plaintiff of the giving of the note by Bowers to Robbins. The payment of the sum of $500 to plaintiff was made to plaintiff by Wm. H. High, the manager of the bank, for the account of Robbins, and the fact of the giving of the note by Bowers to Robbins, of the assignment by plaintiff of his interest in said order to Robbins, and of the payment of said note by Bowers were each and all fully known and understood by the bank at the time of the happening of each, and at no time did the bank make any inquiry or take any steps to learn whether or not plaintiff was aware of the existence of the note from Bowers to Robbins at the time when plaintiff made such assignment, and the bank had no knowledge, at any time prior to the 12th day of April, 1907, that, nor did it make any inquiry whether, Breeze had received a consideration in addition to the said sum of $500 paid by Robbins to Breeze, as hereinbefore found, nor did the bank have any knowledge, at any time prior to the 12th day of April, 1907, that, nor did it make any inquiry whether, Breeze did not know on or before the 11th day of April, 1907, that Bowers had given to Robbins his note, hereinbefore found to have been given.

"XIX. The bank never conspired or confederated together with Robbins or any one whomsoever to induce plaintiff to sell his interest in said order for a sum very much below its real value or for any sum, never by any representations nor in any manner procured or induced plaintiff to assign his interest therein, and, while it gave plaintiff no information of any of the facts hereinbefore found, it never by any act or statement concealed any knowledge from plaintiff."

[2] We are unable to discover any inconsistency between the alleged probative facts and the ultimate facts found by the court, and, even if there existed between them the inconsistency claimed by the plaintiff, we would still be at a loss to understand how that fact could support his appeal, since it is manifest that the ultimate facts were not based upon or deduced from the probative facts.

Where the trial court makes both probative and ultimate findings, and the one set is inconsistent with the other, the general rule is as it is declared in the case of Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740, as follows:

> "Findings of probative facts will not, in general, control, limit, or modify the finding of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode."

In Pio Pico v. Cuyas, 47 Cal. 174, 178, it is said:

> "It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for a new trial and statement of evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts which have no proper place in the findings."

See, also, Smith v. Acker, 52 Cal. 217; Frazier v. Crowell, 52 Cal. 399; Gill v. Driver, 90 Cal. 72, 27 Pac. 64; Rankin v. Newman, 107 Cal. 602, 40 Pac. 1024, 41 Pac. 304; Commercial Bank v. Redfield, 122 Cal. 405, 55 Pac. 160, 772; Brown v. Mut. Reserve Fund Life Ass'n, 137 Cal. 278, 70 Pac. 187.

It is only in those cases where it clearly appears that the ultimate fact found is based upon and educed from findings of probative facts, and it is plain that the latter do not justify or support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact, and so bereave the judgment of support. The enunciation and application of this rule is to be found in the cases of People v. Reed, 81 Cal. 70, 76, 22 Pac. 474, 475, 15 Am. St. Rep. 22, and Geer v. Sibley, 83 Cal. 1, 23 Pac. 220. In the Reed Case, which was an action to secure a judgment adjudging a certain strip of land in the city of San Jose to be a public street of said city, the position of the city being that it had been so dedicated by certain acts of the owners of said strip, the Supreme Court reversed the judgment because the ultimate fact of dedication was obviously predicated upon, but not supported by, certain probative facts previously found. The finding of the ultimate fact read in part:

> "That, by the acts, facts, and matters above found and recited, said premises referred to and described were by said several parties dedicated," etc.

The court said:

> "It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed."

In Geer v. Sibley, supra, precisely the same proposition arose, the trial court having founded its findings of the ultimate fact upon findings of probative facts showing that the defendant, rather than the plaintiff, was entitled to judgment; the latter having prevailed in the court below. See People v. McCue, 150 Cal. 198, 88 Pac. 899.

In the case at bar, the gravamen of the plaintiff's charge against the bank is that it and Robbins "willfully, maliciously, and with intent to defraud plaintiff conspired and confederated together to induce plaintiff to sell his interest in the order for a sum very much below its real value, by concealing from plaintiff all knowledge of the fact that Bowers had offered to pay said order, and to apply the money to be received from Bowers on account thereof to the payment of the debt due from Robbins to the bank."

The court found, as above shown, that the foregoing allegation was not true in any respect, and that, while the bank gave the plaintiff no information of any of the facts characterizing the several transactions affecting the order from Stilwell to the plaintiff and Robbins and the money finally realized thereon, "it never by any act or statement concealed any knowledge from plaintiff."

There is nothing perceivable in the probative facts found, as an examination of them will readily affirm, which shows that the bank entered into a fraudulent scheme or in any manner or measure connived with Robbins in the defrauding of the plaintiff of his just share of the money which constitutes the subject of this controversy. There is, in other words, no statement among the probative facts from which the conclusion is forced that the bank's part in the transactions relating to the Stilwell order and the money realized therefrom was characterized by fraud, or malversation of any character.

[3] There are but two propositions deducible from the probative facts found by the court from which any implication of bad faith on the part of the bank in the transactions concerning the Stilwell order could by any possibility arise, and they are: (1) The fact that, in said transactions, the bank dealt entirely and solely with Robbins; (2) that the bank at no time in or during the several negotiations involving said order consulted the plaintiff or gave him any information with respect to those transactions. But we know of no rule of law which required the bank, under the circumstances as disclosed by the findings, to inquire of the plaintiff whether Robbins' acts concerning said order and the money finally received thereon were sanctioned by him or not. The order and the money constituted the property of a copartnership of which Robbins was a member. He had the legal right to deal with the order and the money and to dispose of them even to the satisfaction of his individual indebtedness, if that course were sanctioned by the plaintiff. And there is nothing in the mere fact that he did so dispose of the order and the money that would be sufficient to generate in the bank even a suspicion, much less a substantial reason to believe, that thus he was acting in bad faith with his partner or attempting wrongfully to appropriate or divert the property to his own individual purposes, to the detriment of his partner. Of course we do not mean to say that one partner has the right to misappropriate the partnership property or funds, for he has no such right, and, where he does do so, the other partner has, as is well illustrated by this case, his redress against the defaulting member of the firm for the wrong so committed. But what we do say is (to repeat) that, where a partner is dealing with a third party respecting partnership money or property, the latter has the right to assume that such partner is acting in perfect good faith toward, and with

full authority from, his partner or partners with regard to the transaction, and that, because it may appear that the transaction, when consummated, will result solely to the benefit of the partner conducting it, constitutes no ground for the implication of fraud on the part of such partner upon the other partners in thus disposing of or handling the partnership assets. There is therefore, in this case, nothing in the mere transactions themselves relating to the Stilwell order which would tend to suggest to the bank fraudulent conduct of Robbins in said transactions toward the plaintiff, and hence there was no obligation cast upon the bank by the mere transactions themselves to prosecute an inquiry, before the consummation of the transactions, to ascertain whether they were authorized or sanctioned by the plaintiff, or, if carried out, they might or would work a fraud upon the partnership rights of the plaintiff.

But the fact is emphasized that the findings disclose that the bank communicated to Robbins alone the proposal of Bowers to take up the Stilwell order, furnishing the plaintiff with no information relating thereto; that the bank, so it is asserted, loaned Robbins the $500 with which he purchased the interest of the plaintiff in the Stilwell order; that the bank made false statements to the plaintiff concerning the payment by Bowers of the note given by him in exchange for the Stilwell order, after that transaction had been consummated, for the purpose of circumventing discovery by the plaintiff of the fraud of which said note was one of the consequences. These facts, it is vigorously urged, disclose that the bank had knowledge of the fraudulent character of the several transactions, and that they, reinforced by the fact of the unauthorized pledge of the Stilwell order to the bank as security for Robbins' individual indebtedness to it, are sufficient to destroy the force or impeach the legal integrity of the ultimate finding exonerating the bank from any fraudulent participation in the transactions culminating in the fraud upon the plaintiff.

As to the first of the propositions thus advanced, it is in the first place to be observed, as in effect we have before declared, that there was no legal or moral duty resting upon the bank to inform the plaintiff of the offer of Bowers to take up the Stilwell order as indicated. So far as the findings disclose the circumstances of that transaction, there is nothing therein indicating but that, so far as the bank had any knowledge on the subject at the time of Bowers' offer and its acceptance by Robbins and the bank, the plaintiff had been given information of and acquiesced in it. Indeed, so far as it appears to the contrary, at the time of the acceptance of Bowers' offer by Robbins, the bank was justified in assuming that that transaction was known and agreeable to the plaintiff; it having been accepted by his partner. In the second place, the court does not find (see finding 8, supra) that the bank communicated to Robbins the offer made by Bowers. What the court does find is, as will be noted, that Bowers made an offer to purchase from the bank the securities, including the Magnesite Company's note, pledged by Stilwell to the bank, and also to give his note for and in lieu of the Stilwell order to Robbins & Breeze, and that the bank and Robbins accepted the offer. Whether, as to the order, the offer was made both to Robbins, and the bank or to Robbins alone cannot be determined from the finding, but it may be assumed that, since the bank was interested in the order as a pledge to secure Robbins' indebtedness to it, the offer as to said order was made to the bank as well as to Robbins; still this fact alone constitutes no evidence of fraud, or if there was fraud at the bottom of Robbins' connection with the offer and its acceptance, so far as they concerned the order, that the bank knew of it or had any reason to believe the transaction to be so tainted. It is true that the finding declares that neither Robbins nor the bank at any time communicated to the plaintiff information concerning the offer and the acceptance thereof, but it obviously cannot be concluded from that fact that the bank, at the time of the execution of the transaction or when the offer was made, had knowledge or reason to believe that the plaintiff had not been fully apprised of the proposition by his partner, Robbins.

[4] The statement by the plaintiff that the bank loaned to Robbins the money wherewith he bought his interest in the Bowers note is not supported by the record. The finding as to that circumstance is, as will be perceived, that, while W. H. High, the manager of the bank, performed the physical act of delivering it to the plaintiff, said money was in point of fact loaned to Robbins by his father. But it is urged that said finding must be disregarded, for the reason, so it is asserted, that the denial by the bank in its answer that it loaned the money paid by Robbins for the plaintiff's interest in the note is so phrased as to carry with it an admission that the bank did make the loan of said money to Robbins; that is, that said denial involves a negative pregnant. Upon this appeal, however, it being on the judgment roll alone, that point cannot be of any avail to the plaintiff. Presumptively the question whether the bank did or did not advance the $500 or any part thereof to Robbins under any circumstances was treated as an issue at the trial, and presumptively there was sufficient evidence to support the finding upon that issue. Peck v. Noee, 154 Cal. 351, 354, 97 Pac. 865. But, even if it were true that the bank loaned the money to Robbins to be used for the purpose of buying Breeze's interest in the order, it is clear that that circumstance would not tend to show that the bank was thereby guilty of

fraud in the transaction, since there is no finding that the bank had knowledge of the purpose for which the money was to be used. But the court did expressly find that the bank had no knowledge at any time prior to the 12th day of April, 1907, that the plaintiff had not received from Robbins, for his interest in the order, a consideration in addition to the said sum of $500.

[5] The charge that the bank, after the purpose of the fraud had been accomplished, made false statements to the plaintiff with a view to forestalling and preventing discovery by him of the fraud is not borne out by the findings. The only finding bearing upon that proposition is finding No. 16, and therein the court finds, as will be observed, that the plaintiff, having for the first time on the 6th day of May, 1907, discovered that the Stilwell order had been paid by Bowers, at once made inquiry of both Robbins and the bank whether or not Robbins knew that Bowers was going to pay the order before the plaintiff had sold and assigned his interest in said order to Robbins, and that both Robbins and the bank denied that Robbins had knowledge of such fact before the time when plaintiff made such assignment. There is no statement to be found in the findings that the bank deliberately made a false statement to the plaintiff as to Robbins' knowledge of Bowers' intention to pay the Stilwell order or his note given in lieu thereof at or before the time that the plaintiff assigned his interest in said order to Robbins. For all that appears to the contrary from the findings, the bank might have in good faith believed that Robbins had no such knowledge at the particular time referred to. Besides, whether the bank did or did not make a false statement with regard to that matter involved a question of evidence, and whether the circumstance, even if true, possessed great or little or no significance in support of the charge of fraud against the bank, constituted a proposition, the solution of which was solely with the trial court.

While thus we have taken the pains to show that there is no real inconsistency between the probative and the ultimate facts found by the court, it has been an unnecessary task, since, as before stated, and as is plainly manifest from an examination of the findings, the ultimate fact is not drawn from the findings of probative facts or in any degree dependent upon them.

From the views of the findings above expressed, it results that, upon this appeal from the judgment upon the judgment roll alone, the finding that the bank had no hand or took no part in the fraudulent acts by means of which the plaintiff was wrongfully deprived of his interest in the Stilwell order can rest upon the presumption, which must be indulged when the appeal, as here, is not supported by a bill of exceptions or statement or other duly authenticated record of the evidence, that there was received into the record evidence sufficient to justify and support it.

[6] There is, however, another point made by the plaintiff of which brief notice only is required. It is contended by him that Robbins held the plaintiff's interest in the Stilwell order as a constructive trustee for the plaintiff, inasmuch as Robbins obtained said interest through fraud; that, this being so, the plaintiff is entitled to follow and recover from the bank the money received into its hands from the sale of the plaintiff's interest in the order, since, so the argument proceeds, the bank, notwithstanding that it might have been a purchaser thereof in good faith and without notice, was not a purchaser for value, inasmuch as it applied the money so obtained to the payment of a pre-existing indebtedness. The contention is that the satisfaction of a pre-existing indebtedness, owing to the vendee, does not constitute a valuable consideration. As upholding that contention, plaintiff cites a number of cases from other jurisdictions. Precisely what the cases referred to hold upon that proposition we need not here pause to inquire, for, whatever may be the rule elsewhere, it is firmly settled by our own decisions that the cancellation of an antecedent debt, due the vendee from the vendor, for the sale of property, does constitute a valuable consideration. See the following cases: Payne v. Bensley, 8 Cal. 266, 68 Am. Dec. 318; Robinson v. Smith, 14 Cal. 98; Naglee v. Lyman, 14 Cal. 454; Frey v. Clifford, 44 Cal. 342; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; Sackett v. Johnson, 54 Cal. 107; Gassen v. Hendrick, 74 Cal. 444, 446, 16 Pac. 242; Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Russ v. Muscupiabe, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

In Naglee v. Lyman, supra, the court, expressing its views through Mr. Justice Field, said:

> "All the authorities, however conflicting in other respects, concur in the rule that where there is change in the legal rights of the parties in relation to the antecedent debt, the creditor taking the collateral security is considered as a holder for value, and the paper not subject to equities existing between the original parties"

—that is to say, where the creditor so takes such security in ignorance of the existence of such equities.

All the other cases above cited to this point confirm and reaffirm the rule as it is thus stated.

Our conclusion is that the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 456

PEOPLE v. HOGE. (Cr. 337.)

(District Court of Appeal, Second District, California. Sept. 14, 1914.)

CRIMINAL LAW (§ 519*)—EVIDENCE—CONFESSIONS.

If a confession was voluntary, the fact that defendant was under arrest and in custody, and that the confession was made in answer to questions, does not render it inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. § 519.*]

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Otho J. Hoge was convicted of robbery, and he appeals. Affirmed.

Frank A. McDonald, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

CONREY, P. J. Appellant herein was convicted of the crime of robbery. He appeals from the judgment and from the order denying his motion for a new trial.

If the testimony hereinafter mentioned was properly admitted, that testimony, together with the other evidence in the case, is sufficient to support the verdict. The only question requiring attention on this appeal relates to the admissibility of an alleged confession by the defendant.

According to the testimony of witnesses for the prosecution, the defendant, on the 8th day of November, 1913, was under arrest at the city jail of the city of Los Angeles, charged with the offense in question. The defendant was taken to the office of the witness Flammer, the captain of detectives, and the alleged confession was made in the presence of Mr. Flammer and Police Officers Williams and Winn and the witness Wright, a shorthand reporter. The testimony shows that questions were asked of the defendant by Mr. Flammer, and that the defendant did not hesitate in answering the questions, and that no threats or promises were made to induce him to make those answers. The substance of the admissions made was that the defendant bought a revolver and gave it to one Kennedy, and arranged with Kennedy that Kennedy would come to a room occupied by the defendant and one Cibulski and rob Cibulski, at the same time pretending to take money from the defendant. Kennedy carried out this plan and obtained $50 from Cibulski.

Flammer further testified, as witness for the defendant, that before the reporter came into the office there had been a conversation of a few minutes between the defendant and the three officers; that in that conversation the defendant "admitted that he did frame up this hold-up and had it carried out, and then he answered those questions freely; it was an ordinary conversation," that in this first conversation the defendant answered the questions freely and did not hestitate. The witness Williams, as witness for the defendant, testified that the defendant said that "he wanted to tell us all about it."

The rule is well established that a confession extorted by threats or resulting from inducements held out by the officers of the law to a prisoner in their custody is not admissible in evidence; that when such a confession is offered in a criminal case it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing prima facie that it was freely and voluntarily made. People v. Soto, 49 Cal. 67. But the mere fact that the defendant is under arrest and in the custody of officers, and that the alleged confession is made in answer to questions, will not authorize the rejection of such confession, if it fairly and clearly appears that the statements of the defendant were of a voluntary nature. The case at bar stands in strong contrast with those of People v. Quan Gim Gow, 23 Cal. App. 507, 138 Pac. 918, People v. Borello, 161 Cal. 367, 119 Pac. 500, 37 L. R. A. (N. S.) 434, and People v. Loper, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193.

The judgment and order denying a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

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25 Cal. App. 451

HOPS v. POE. (Civ. 1311.)

(District Court of Appeal, Third District, California. Sept. 12, 1914.)

TIME (§ 4*)—COMPUTATION—"YEAR."

Local Option Law (St. 1911, p. 600) § 4, requires the certification by the clerk of a petition complying with the law for submission of a local option question to an election, and declares that, if the petition shall be certified, the governing body of the territory shall call an election to determine whether the sale of liquors shall be licensed therein or not. Section 6 provides that, if the petition shall be certified as sufficient within 6 months and not less than 40 days before the holding of the next general state or general municipal election within the territory, the question shall be then submitted; otherwise, a special election shall be held within not less than 30 nor more than 60 days after the petition has been certified as sufficient, provided that no election under the act shall be held within 2 years of any previous election held under the act within the same territory. *Held* that, while the term "year," when used in a statute, ordinarily means a period of 365 days, as provided by Pol. Code, § 3257, and would be so construed with reference to special local option elections held under such act, the meaning of the word is in all cases dependent on the subject-matter and the connection in which it is used, and it may mean a period of 12 months, a political year, or a period between two elections, a year of office, a school year, a fiscal year, or excise year, a year of age, or a theatrical season, and, as used in the statute authorizing the submission of such question at general elections, means the period elapsing between one general election and another; and hence the fact that such period lacked 2 days of being 2 years of 365 days each did not prevent the submission of the question on a petition otherwise filed in proper time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Time, Cent. Dig. § 4; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, First and Second Series, Year.]

Application for writ of mandamus by John Hops against A. W. Poe. Decree for petitioner.

Ben Berry, of Stockton, for petitioner. Will A. Dower, of San Andrea, for respondent.

BURNETT, J. This is an application for a writ of mandate to require respondent, who is the county clerk of Calaveras county, to file a petition for an election to determine whether the sale of alcoholic liquors shall be licensed in the Fifth supervisorial district of said county. There is no question raised as to the sufficiency of said petition or that it was executed with the formality required by the statute; but respondent claims that to file said petition at this time would require an election to be had on the proposition at the approaching general election on November 3d, and that this election would be illegal by reason of the fact that the same question was submitted at the last general election held November 5, 1912, less than 2 years prior to said November 3.

Section 4 of "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option" (Stats. 1911, p. 599) directs the clerk, within 10 days after filing such petition, if he is satisfied it is signed by the requisite number of qualified electors, to so certify in writing, and, furthermore said section provides:

> "If the petition shall be certified as sufficient, the legislative or governing body having jurisdiction over the territory described therein shall, within the time prescribed herein, call an election to be held in such territory to vote upon the question whether the sale of alcoholic liquors shall be licensed therein."

And section 6 provides:

> "If said petition shall be certified as sufficient within six months and not less than forty days before the holding of the next general state or general municipal election within the territory therein described, such question shall be submitted at said general state or general municipal election; otherwise a special election to vote upon the question shall be called to be held within not less than thirty nor more than sixty days after the petition has been certified as sufficient: Provided, that no election under this act shall be held within two years of any previous election held under this act within the same territory."

It thus appears that, if respondent had filed the petition as requested on July 29, 1914, it containing the requisite names, he would have been required to certify it within 10 days thereafter, and, said date being within 6 months and not less than 40 days before the holding of the next general election, it would follow from the statute that such question should be submitted at that time. The vital point in the contention of respondent is thus shown to be that the interval of time between the general election of 1912 and that of 1914 does not constitute the period of 2 years. Going one step further, he claims that since an election, if had upon the question on November 3d, would be illegal, it would be an idle and futile act for respondent to file said petition within said period specified as above.

It may be doubted whether the respondent, being a mere ministerial officer, is in a position to urge such defense to justify him in his refusal to file said petition; but the materiality of the defense, if sound, is conceded by petitioner, so we proceed to inquire whether there would be any infraction of the law if the supervisors should require the same question to be submitted again at the approaching general election.

It is to be observed that the statute contemplates that the question may be submitted at a general or a special election. In either event, the interval must be at least 2 years. This, of course, is to secure reasonable permanency and to avoid unnecessary expense. The policy of the law is plain and salutary. The statute should be construed so as to give effect to this manifest and wholesome purpose. If the question is submitted at a special election, no one, of course, would contend that the sense of the electors could again be taken on the proposition until 2 years of 365 days each had passed; but where the first vote is taken at a general election, which occurs on the first Tuesday after the first Monday in November, we think the more reasonable and beneficent interpretation of the law justifies and demands the conclusion that another vote may be taken at the next general election to be held on the first Tuesday after the first Monday in November of the second year following. In other words, when the statute uses the term "year" in connection with general elections, the political year is clearly contemplated; but in referring to special elections, since no particular day is specified, the Legislature intended to designate the year of 365 days.

Ordinarily, the term "year," when used in a statute, means a period of 365 days. Section 3257, Pol. Code. "But its meaning in all cases is dependent upon the subject-matter and the connection in which it is used, and it may mean a period of 12 months, beginning on a day other than the 1st of January, or it may mean a political year, or a period between two elections, a year of office, a school year, a fiscal year, or excise year, a year of age, or a theatrical season." 38 Cyc. 310.

As far as this case is concerned, for the purpose of determining the question before us, we may consider the statute as though no provision were made for a special election. We may also incorporate into the statute the date of the general state election, which is fixed by law. No additional element is thereby injected into the provision in question, but the legislative intent may be made more apparent. The statute would then read:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "If said petition shall be certified as sufficient within six months and not less than forty days before the holding of the next general state election on the first Tuesday after the first Monday in November within the territory therein described, such question shall be submitted at said general state election: * * * Provided, that another election on the same question shall not be had within two years thereafter."

If the foregoing were the only provision, it would probably not be seriously contended that four political years must elapse before another election could be held, although the second general election should occur two days less than two calendar years from the first election. But we do not see that the problem is complicated by the additional provision as to special elections as we are dealing with the term "two years" as applying only to general elections.

It may be said that the only cases in point cited by counsel uphold petitioner's contention. In McNeely v. Commissioners of Town of Morganton, 125 N. C. 375, 34 S. E. 510, the statute authorized an election on the first Monday in May to determine whether or not license should be granted in the town of M. for the sale of spirituous liquors by small measure. The act further provided for a resubmission of this question every two years, and it seems that an election was held on the first Monday in May, 1897, and another in 1899, but the first Monday in May, 1899, came two days earlier in the month than in 1897. It was therefore contended that two years had not passed, but the Supreme Court of North Carolina said:

> "But the act provided for the election to be held on the first Monday in May—the same day of election for municipal officers. We think this controls the time. It is like electing members of the Legislature every two years—elections to be held on the first Tuesday in November, which may not be precisely two years, if we count the days. In fact, the Legislature has changed the time of this election from November to August, and, if the plaintiff's contention should be sustained, it would invalidate that election."

Battle Creek Brewery Co. v. Supervisors, 166 Mich. 52, 131 N. W. 160, Ann. Cas. 1912D, 946, involved the construction of the local option law of that state, providing that the license question should be submitted at the time of the general election and containing this provision:

> "Provided, however, that such proposition having been once submitted and decided either way, by a majority of the votes of the qualified electors in any county in this state, voting thereon, the same shall not be again submitted in such county within a period of two years next thereafter, but may, at any time after the expiration of such period upon a like petition and action, be again submitted, and so on, at the expiration of not less than two years after every such election."

It seems that one vote was taken at the general election held April 5, 1909, and the question was again submitted at the general election held April 3, 1911. And it was contended there, as here, that the two years had not expired, two days being lacking. One of the justices agreed with that contention, declaring the election to be void and basing his construction of the law upon the rule of interpretation provided by the statute of that state:

> "In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature: The word 'month' shall be construed to mean a calendar month, and the word 'year' a calendar year."

The opinion of the court, however, concurred in by all the other justices, was as follows:

> "The period of two years mentioned in the proviso to section 5420 is to be interpreted in connection with the amendments fixing the date of the election at the date of the general election for township officers, etc., and the law is to be construed as though the amendments were part of the original act. It was manifestly the intention of the Legislature that the result of the election should not be disturbed for two years; not that it should be final for two years at times, and three years at other times, as the time between the first and third general elections might be two years or a day or two less than two years. I am therefore of the opinion that the two years referred to are political years, and not calendar years. Inhabitants of Paris v. Inhabitants of Hiram, 12 Mass. 262; McNeely v. Commissioners of Morganton, 125 N. C. 375, 34 S. E. 510."

The only substantial difference between the statutes thus construed in the two foregoing cases and the one before us is that here the question may also be submitted at a special election. The interests of the people, however, demand, and no doubt it was the intention of the Legislature, that as far as practicable the question should be submitted at the general election, and in such case we can see no good reason why it should not be held that it is fully two years from one general election to another.

Harrison v. Roberts, 145 Cal. 173, 78 Pac. 537, was clearly a different case. There the first vote was taken at a special election held December 4, 1902, and the second proposed vote was to be taken at the general election to be held November 8, 1904, and it was justly held that between these two dates the period was not two years—the matter relating to the proposed amendments to the charter of San Francisco.

We think it a reasonable construction of the statute and in the interests of the taxpayers to hold that the clerk should file the petition; and it is so ordered, and, in accordance with the stipulation of the parties, the remittitur will issue forthwith.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 388

PEOPLE v. FORD. (Cr. 253.)

(District Court of Appeal, Third District, California. Sept. 10, 1914. Rehearing Denied by Supreme Court Nov. 9, 1914.)

1. Criminal Law (§§ 125, 126*)—Change of Venue—Grounds—Affidavit.

The affidavit on motion for change of venue in a murder case alleged the existence of friendly relations between the person slain and the district judge, that the former had been a popular public official, and that there existed a highly inflamed condition of the public mind prejudicial to defendant, but failed to state any facts disclosing that any passion or prejudice or any disposition to prejudge the merits had been shown. It also alleged that the person, in connection with whose affairs the killing took place, was a rich landowner, widely known in the county, but did not show how such facts could interfere with a fair trial. Such allegations as could possibly have been material were met by counter affidavits. A jury was obtained with apparent ease without defendant having exercised all his peremptory challenges. *Held*, that the application for a change of venue was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 242, 243; Dec. Dig. §§ 125, 126.*]

2. Criminal Law (§ 134*)—Change of Venue—Requisites of Affidavit.

An application for a change of venue in a criminal case for local prejudice and bias of the trial judge must be supported by an affidavit which not only states facts, as against conclusions, but states facts establishing, to the satisfaction of a reasonable mind, that a fair trial cannot be had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 243, 251, 252; Dec. Dig. § 134.*]

3. Homicide (§ 169*)—Evidence of Conspiracy—Admissibility.

Under an indictment charging several with murder in the language of the statute, evidence of a conspiracy between such persons is admissible to show the circumstances under which the homicide was committed, and that the acts were unlawful in the commission of which the killing resulted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341–350; Dec. Dig. § 169.*]

4. Homicide (§ 30*)—Conspiracy—Criminal Responsibility—"Principal."

Where one person unites with others to commit a felony or misdemeanor, intending to withstand all opposition by force, and is present aiding and abetting the deed and a murder is committed by one of the party pursuant to the original design, he is guilty as a principal offender.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 48–51; Dec. Dig. § 30.*

For other definitions, see Words and Phrases, First and Second Series, Principal.]

5. Conspiracy (§ 41*)—Criminal Responsibility.

Where several persons conspire to commit any unlawful act, each is criminally responsible for the acts of his associates, done in furtherance of the common design, though such acts were not originally intended as a part of such design.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 74; Dec. Dig. § 41.*]

6 Criminal Law (§ 814*)—Instructions—Issues.

Where, in a prosecution for a murder committed at a meeting of hop pickers who were on a strike, the legal right of the hop pickers to strike was not in issue and could furnish no justification for the killing, the court properly refused to instruct on the legality of the strike, though the tragedy remotely had its origin in the strike, and but for the strike there would have been no occasion for the presence at the meeting of the officers who were killed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

7. Homicide (§ 7*) — "Murder" — Malice — Murder in Second Degree.

Any unlawful killing of a human being with malice aforethought, express or implied, "when no considerable provocation appears," is murder, under the express provisions of Pen. Code, § 187, and by section 188. Where there is no evidence of any considerable provocation, malice will be implied.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 12; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, First and Second Series, Murder.]

8. Homicide (§ 254*)—Murder in Second Degree—Sufficiency of Evidence.

Evidence on the trial of F. and others for murder *held* to sustain a finding that F. was guilty as a principal of murder in the second degree, though he did not fire the fatal shot.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

9. Criminal Law (§ 741*)—Confessions—Question for Jury.

In a homicide case, whether the alleged confessions were actually made by defendant *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

10. Criminal Law (§§ 409, 531*)—"Confessions"—"Admissions."

A distinction exists between "admissions" and "confessions." A confession is a voluntary declaration made by a person, who has committed a crime, to another, of the agency or participation he had in the same, and is restricted to the acknowledgment of guilt, but an "admission" of a fact, not in itself involving criminal intent, is not to be rejected as evidence, without preliminary proof, merely because it may, when considered with other facts, tend to establish guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972, 1212–1217; Dec. Dig. §§ 409, 531.*

For other definitions, see Words and Phrases, First and Second Series, Admission; Confession.]

11. Criminal Law (§ 538*)—Confessions—Probative Effect.

While confessions are to be received in evidence with great caution, they afford evidence of the most satisfactory nature, when deliberately made and precisely identified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1227–1229; Dec. Dig. § 538.*]

12. Criminal Law (§ 535*)—Confession—Probative Effect.

Where the corpus delicti is otherwise satisfactorily proven, a defendant may be convicted of murder on his uncorroborated confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1225, 1226; Dec. Dig. § 535.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

13. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—INSTRUCTION—REASONABLE DOUBT.

An instruction, in a homicide case, that the term "reasonable doubt" is "pretty well understood, but not easily defined," though unnecessary, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

14. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction stating that a doubt justifying an acquittal must arise from a want of sufficient evidence to convince the jury of the truth of the charge was not erroneous for failure to add "beyond a reasonable doubt," where the jury were plainly told in other instructions that they could not convict until the evidence convinced them beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

15. CRIMINAL LAW (§ 785*)—REFUSAL OF INSTRUCTIONS—TESTIMONY OF WITNESSES.

A requested instruction that the jury could disregard the testimony of any witness whom they believed to have willfully testified falsely was properly refused as misleading and for failure to use the necessary qualifying words "in a material matter."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. § 785.*]

16. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—TESTIMONY OF WITNESSES.

An instruction in a criminal case that a witness who is "willfully false in one part of his testimony is to be distrusted in others" sufficiently covered the point to justify refusal of any other instruction thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Richard Ford was convicted of murder in the second degree, and appeals. Affirmed.

R. M. Royce and Austin Lewis, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. An indictment was returned September 8, 1913, against the defendant for the murder of E. T. Manwell on the 3d day of August, 1913, at the county of Yuba. On October 30, 1913, H. D. Suhr was indicted, and still later, November 4, 1913, William Beck and Harry Bagan were jointly indicted, all for the same crime. By stipulation all the defendants were tried jointly. Beck and Bagan were acquitted, and Ford and Suhr were convicted of murder in the second degree, and each was sentenced to imprisonment for life in the state's prison. The record in case No. 253 presents the appeal of defendant Ford from the judgment of conviction and from the order denying his motion for a new trial. By stipulation the appeal of defendant Suhr (No. 254) is to be heard upon the transcript brought up in No. 253.

1. On November 28, 1913, defendant Ford made a motion "for an order transferring this cause to some convenient county for trial, and that some judge other than the Honorable Eugene P. McDaniel hear the same." The ground of the motion was that the defendant cannot have a fair trial in Yuba county "by reason of the bias and prejudice and high feeling against the said defendant, and that the said judge, by reason of bias and prejudice, is disqualified from hearing said cause. Said motion will be based upon the affidavit of said defendant Richard Ford." A like motion was made on behalf of defendant Suhr, supported by his affidavit, alleging substantially the same facts as were set forth by defendant Ford, and both motions were heard at the same time. On behalf of the people, counter affidavits of E. B. Stanwood, district attorney, and Eugene P. McDaniel, judge of the superior court of Yuba county, were read in resistance of the motion. Both motions were denied.

The affidavit of Ford states:

That Manwell, district attorney, and one Reardon, deputy sheriff of Yuba county, died of gunshot wounds; that Sheriff Voss, a deputy sheriff, and Constable Anderson were beaten and injured; that two of the hop pickers were killed, and the arm of a man by the name of Nielsen was shot off by Deputy Sheriff Daken; that Manwell was widely and favorably known in the county and was a personal friend of Judge McDaniel; that District Attorney Stanwood was a personal friend of Manwell and was his assistant district attorney, and the present district attorney is a son of Manwell; that said sheriff and Daken and Anderson were very popular in the county; that on August 2, 1913, the employés on the Durst hop ranch, near Wheatland, some 2,300 in number, had protested against the unsanitary and intolerable conditions of the camp, specifying the particulars as to such conditions; that Ford was selected by the hop pickers as spokesman to present their grievances, and at about 5 o'clock on Sunday, August 3, 1913, said employés were holding a peaceful meeting on said ranch, and said sheriff, Anderson, Armstead, Reardon, and others, with Manwell, some of whom were armed, entered said assemblage; that a disturbance ensued, and, as to the fatal results and the responsibility therefor, the facts are in dispute; that Durst is a large landowner, rich and widely known; that later eight persons were arrested at Wheatland and were taken to Marysville by the state militia, "to prevent being lynched by the people of Yuba county, and the people of Yuba county are biased and prejudiced against said defendant"; that District Attorney Stanwood has arrested many persons "without bringing them before a magistrate for periods running from 30 days to 3 months with the approval of the community," and that detectives were employed who made efforts to compel said persons so arrested "to swear to facts tending to convict some one of murder"; that the issues of fact at the trial of defendant involve the general condition of labor on ranches in the county, and the veracity of said Durst and said sheriff and constables and other officers and their acts are involved in the case; that said Stanwood is widely known in said county and has many personal friends, and the propriety of his conduct and his fitness for his office are also issues in the case: "that Yuba county is a rural county, and the people generally know one another, and most of the people know all of the aforesaid parties" and are the friends of said parties; that the witnesses for the prosecution are many of them residents of said county and well and favorably known, and this defendant, and many of his witnesses are strangers in said county and unknown, and "some of defendant's witnesses are afraid to come to Marysville to testify in defendant's behalf."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

District Attorney Stanwood made affidavit:

That he is well acquainted throughout the county and with the people thereof. That since said August 3, 1913, he has had charge of the prosecution of defendant, has interviewed witnesses and conducted the investigation up to the present time. That affiant has tried many of the criminal cases and mingled largely with the people of said county, "and at no time has affiant discovered or learned of any sentiment or prejudice among the people of Yuba county against any defendant," and affiant, on information and belief, "alleges the fact to be that there is in Yuba county, and among the people thereof, no prejudice or bias against said defendant whatsoever," and defendant "can have in said county, before any jury that may be selected, an absolutely fair and impartial trial." That there is and was nothing in the relationship between affiant and said Manwell or that existing with his son, or any other reason or cause, "which has biased or prejudiced this affiant against defendant, nor does this affiant at this time entertain the slightest bias or prejudice against him." That nothing in affiant's friendship for Sheriff Voss in any way affects affiant to defendant's prejudice, and affiant says that he is informed and believes that said Sheriff Voss at no time has entertained any bias or prejudice against defendant, and it is a fact that said sheriff and said deputies referred to in defendant's affidavit are well and favorably known in the county, "but there is nothing in said acquaintanceship or knowledge which in any way has biased or will bias or prejudice any of the people of said county against defendant upon his trial in the above-entitled action or in any way at all." That two companies of militia were, shortly after August 3, 1913, called to the scene of the killing for the purpose of restoring peace and order thereat, and for no other purpose. That eight or more persons arrested at said time were escorted to Marysville by certain members of the militia solely for the reason that there did not happen to be at hand sufficient peace officers for that purpose. That, however, they were not so escorted for the purpose of protecting them from violence; and, as a matter of fact, there was no manifestation of any ill feeling or violence against any of said persons or against any person, at or after the killing of said Manwell and Reardon, by any of the people of said Yuba county. That affiant "has caused several persons to be arrested and confined for a certain time, and thereafter has caused several persons thus arrested to be released after a full and fair investigation." That certain detectives were employed, but at no time did affiant "do or advise the doing of any act or acts, except as were entirely necessary, legal, and proper in the premises." Affiant denies that the issues of fact at the trial can be made to involve any general or other condition of labor on the ranches of Yuba county, and he denies that the involving of such conditions would in any way tend to prejudice any of the people of Yuba county against the defendant. That affiant has known Judge McDaniel intimately for 20 years, and since said August 3, 1913, "he has frequently heard said judge make expressions concerning matters involved, and which necessarily will become involved upon the trial of said action. That at no time has he heard said judge express any sentiments directly or indirectly tending to show the existence in his mind of the slightest bias or prejudice against the above-named defendant or his case, * * * and affiant alleges that said judge is in no way biased or prejudiced against said defendant, and defendant can have before him an absolutely fair and impartial trial."

Judge McDaniel made affidavit:

That Manwell was personally known to and a friend of affiant. That nothing in the acquaintance of affiant with Manwell "in any way affects affiant as such judge, and the same in no way produces in the mind of affiant any prejudice towards the defendant in this action. Affiant, as such judge, can sit and preside upon the trial of this action as fairly and as unbiased as he could in any criminal action whatsoever. * * * Affiant has at no time had, nor has he now, any bias or prejudice against defendant, either resulting from affiant's friendship for said Manwell or from his sharing in any general sentiment of the community in said Yuba county, or for any reason or in any way at all. Affiant has no knowledge at this time of the existence of any prejudice or feeling among the people or the community in said Yuba county against defendant." That nothing in affiant's acquaintance with and friendship for Sheriff Voss can in any way affect affiant as a judge or will have any bearing on his actions in said case or in any way cause any prejudice or bias in the mind of affiant against defendant. That he has read the affidavit of defendant, and that "neither from any matters in said affidavit set out nor for any cause or reason whatsoever does he entertain any bias or prejudice whatsoever against the defendant."

[1, 2] There is much in Ford's affidavit concerning the intimate and friendly relations existing between the district attorney and the judge and the parties named that might be said in almost any criminal case arising in the county. The popularity of an official can hardly be taken as evidence, certainly not as conclusive, that a fair and impartial trial could not be given a defendant who had assaulted or even killed such official. Ordinarily, where there is an existing highly inflamed condition of the public mind prejudicial to a person charged with crime, it finds some manifestation through the public press, or by assemblages of the people in the neighborhood of the scene of the crime, and, if general, in other parts of the county. We have here no evidence that the people of Yuba county had, even to a limited extent, shown any feeling of passion or prejudice toward Ford or any of the defendants or had manifested any disposition to prejudge the merits of the case. Ford's statement that such was the condition of the public mind towards him is but his conclusion which is expressly denied by the counter affidavits. In People v. Findley, 132 Cal. 304, 64 Pac. 472, the court said:

> "It is not sufficient, in a case of this kind, to allege in the affidavit simply that the defendant 'believes that he cannot have a fair and impartial trial,' etc., but it must be made to appear by the affidavit or affidavits on file that a fair trial cannot be had before the judge about to try the case, by reason of the bias and prejudice of such judge. Code Civ. Proc. § 170, subd. 4. The affidavit or affidavits must not only state facts, but the facts stated must establish, to the satisfaction of a reasonable mind, that the judge has a bias or prejudice that will in all probability prevent him from dealing fairly with the defendant."

The same is true in respect of alleged bias and prejudice of the people at large. Some facts should appear which would convince a reasonable mind that the opinion of the affiant is well founded.

A jury was obtained apparently without any great delay or difficulty, and defendant did not exercise all the peremptory challenges to which he was entitled.

The statement that the case involved the general condition of farm labor and wages in the county carries with it no inference that the subject will in any way cloud the real issues in the case or be likely to prejudice farmers, should any of that class be chosen as jurymen, against the defendant. Besides, the counter affidavits deny that any such issue would be involved, and we cannot see that it could have been, as in fact it was not. Nor can we attach significance to the statement that Mr. Durst "is a large landowner, and a very rich man and widely known in Yuba county." There is no showing that his wealth or that the knowledge of the people of the county had of him could in any way have interfered with defendant's having a fair and impartial trial.

Without noticing in further detail the averments of Ford's affidavit, we think such of them as have any essential bearing upon his claim that he could not have a fair and impartial trial in Yuba county or before Judge McDaniel are substantially controverted in the counter affidavits. The facts presented in a similar motion, in People v. Suesser, 132 Cal. 631, 64 Pac. 1095, were so very different from the facts here shown as to make that case of little value in the determination of the present question. We think the order denying the motion for a change of the place of trial was rightly made.

[3] 2. Some questions are discussed in appellants' brief that may be disposed of before reaching the more important contention that the evidence is insufficient to justify the verdict. For a proper understanding of defendant's points now to be noticed, it may be stated that there was no evidence that Ford fired the shot which resulted in Manwell's death, although the confession of Suhr might give rise to an inference that he may have done so. The contention of defendant is thus stated:

> "As it is admitted that neither Ford nor Suhr fired the fatal shot [we find no such admission as to Suhr], it was very important to correctly charge as to the illegality of the acts or words from which it was sought to hold them guilty of Manwell's death. The acts and words we submit should have been pleaded. The question as to their illegality was one of law for the court. The issue of fact was: Were the acts done or words spoken, and what was their effect or result?"

As we understand defendant's position, it is that defendant was at most engaged in conducting a strike, which was not an unlawful act, or that, if he was committing a trespass, it was but a misdemeanor; that, whatever his acts or his words spoken which may have led to the killing, they should have been alleged, and as his acts and words concerned only an undertaking not unlawful, or, if unlawful, was but a misdemeanor, the killing, as matter of law, must be held not to have been murder in either degree; that, unless defendant's acts and words constituted a felony, he could not be held for murder because they resulted in the death of some one, and at most his offense would be manslaughter because lacking the essential elements of murder. It is hence contended: First, that evidence of a conspiracy was not admissible and cannot be considered because the conspiracy was not pleaded; and, second, that evidence which fell short of showing a conspiracy to commit a felony would not support the verdict. We confess to some difficulty in discovering precisely defendant's contention, but have given it as we understand it. The indictment was for murder and was charged in the language of the statute. We entertain no doubt as to the admissibility of evidence of a conspiracy under such an indictment, where the murder was committed while the conspirators were engaged in the consummation of some other unlawful act. Proof of the conspiracy is not made to establish another and distinct crime (that is, conspiracy as such), but to show the circumstances under which the homicide was committed, and that the acts were unlawful in the commission of which the killing resulted. People v. Brown, 59 Cal. 345, and People v. Kauffman, 152 Cal. 331, 92 Pac. 861, were cases (many others might be cited) where the charge was murder and evidence was taken of a conspiracy to do an unlawful act.

[4] Upon the question of the responsibility for the acts of the conspirators, we conceive the law to be that where one person unites with one or more other persons in an enterprise to commit an unlawful act, whether a felony or misdemeanor, with the intention to withstand all opposition by force, and is present aiding and abetting the deed, and murder is committed by some one of the party in pursuance of the original design, or the unlawful act results in death, he is guilty as the principal or immediate offender. State v. Nash, 7 Iowa, 347, 350; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. In the Spies Case it was said (122 Ill. at page 177, 12 N. E. at page 951, 3 Am. St. Rep. 320):

> "Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though, at the time of the act, some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design."

At page 225 of 122 Ill., at page 974 of 12 N. E. (3 Am. St. Rep. 320), it was said:

> "A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable."

And again:

> "There might be no special malice against the party slain nor deliberate intention to hurt him; but if the act was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any conspirator in the accomplishment of the purpose in which they are all at the time engaged."

And it was held in Ruloff v. People, 45 N. Y. 213, 217:

> "This general resolution of the confederates need not be proved by direct evidence. It may be inferred from circumstances; by the number, aims, and behavior of the parties at or before the scene of action."

See People v. Donnolly, 143 Cal. 394, 77 Pac. 177.

The principle governing conspiracies is well stated in People v. Brown, 59 Cal. 345, 352, and, although the conspiracy there was to commit a felony, we do not think that the grade of the crime involved in the conspiracy is material, if the act or design is unlawful. It was said in People v. Kauffman, 152 Cal. 331, 335, 92 Pac. 861, 863:

> "But whether or not the act committed was the ordinary and probable effect of the common design, or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury (citing cases), and, if there be any evidence to support the finding of the jury on this question, its determination is conclusive."

[5] It was not the theory of the prosecution, as claimed by defendant, "that every labor leader is responsible for all the acts of striking workmen, and that each labor leader can be tried under an indictment baldly stating that the said labor leader has personally done a specific thing, in this case murder, whereas, in fact, it is sought to hold him responsible for the act of another." The theory of the prosecution was that Ford, as the leader in this instance, was engaged in the unlawful act of resisting arrest by a peace officer armed with a lawful warrant, and that by his words and acts he incited the persons then under his leadership to aid and assist him in such unlawful act, and that Manwell met his death through the act of one or more of these conspirators thereunto induced by Ford. Appellant cites subdivision 2, § 192, of the Penal Code, and People v. Munn, 65 Cal. 215, 3 Pac. 653, to show that instruction numbered 48, presently to be noticed, was incorrect and to establish the proposition that the killing of Manwell was at most but manslaughter The section of the Code defines involuntary manslaughter to be:

> "In the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

In the Munn Case:

> "The defendant was convicted of the crime of murder of the second degree. The evidence showed that he struck the deceased two or three blows with his fist, from which death ensued. It was not shown that he intended to kill deceased, but the court instructed the jury that he was liable for all possible consequences of his act. Held, error." Syllabus.

In that case the court quoted the language of Chief Justice Shaw in Commonwealth v. Webster, 5 Cush. (Mass.) 305, 52 Am. Dec. 711, as follows:

> "This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own act."

The instruction given by the trial court stated the rule correctly to a certain point, but added that, if the act intended was unlawful, the defendant would be responsible "for all the consequences, even the possible consequences." The instruction (numbered 48) given in the present case was as follows:

> "I instruct you that, where several persons conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law, the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."

This instruction is taken from a statement of "the rules of law governing the criminal liability of each of several parties engaging in an unlawful conspiracy or combination," said by the Supreme Court in People v. Kauffman, 152 Cal. 331, 334, 92 Pac. 861, 862, to be "an apt statement of them (the rules), abundantly supported by authority," and found in 8 Cyc. 641. Appellant replies that in the Kauffman Case the conspiracy was to commit a felony (robbery), and hence the case does not apply here. Appellant's error is in assuming that a distinction is made between conspiracies to commit misdemeanors and conspiracies to commit felonies. In short, his position is that a homicide perpetrated in furtherance of a conspiracy to commit a felony is murder, but that a homicide perpetrated in furtherance of a conspiracy to commit a breach of the peace, or to resist an officer in the discharge of his official duty, is nothing more than manslaughter. The law recognizes no such distinction. Sufficient of the evidence, tending to show that the unlawful act was in furtherance of which the murder was committed, will be hereafter stated.

[6] In this connection appellant complains of the refusal of the court to give the following instructions:

> "I charge you, as matter of law, that a strike is lawful."
>
> "I charge you, as matter of law, that a boycott is lawful."
>
> "I charge you, as matter of law, that one or more men have a right to quit work for any reason, or no reason, or a frivolous reason, singly or in a body, and peaceably to picket, and peaceably

to request or persuade others to do so, and to request others to assist them in so persuading and so picketing."

It is urged that, under the instructions given, the jury might have assumed that striking or picketing or boycotting was an unlawful act, and, to prevent such assumption by the jury, defendant was entitled to have the instructions given. There was no evidence that the killing occurred while the conspirators were in the act of striking, picketing, or boycotting. There was evidence that many of the hop pickers quit work Sunday morning on their part a strike; that a boycott was declared and was in operation early in the day against certain businesses being carried on in the camp—a store, a restaurant, a near-beer booth, and a shooting gallery.

Manwell was killed at a meeting of hop pickers held about 5 o'clock of that day under circumstances which will hereinafter be more fully set forth. Suffice it at this point to say that, while it may be assumed that the hop pickers were assembled at this meeting originally to consider or talk over their grievances, it soon, under the leadership of Ford, took on altogether a different complexion. He made it known to the people that the officers of the law were approaching with an intention to arrest him, and he called upon his followers to stand by him and prevent his being taken. This they did promptly upon the coming of the officers into their midst, and there quickly followed, not only Manwell's death, but other tragic and fatal happenings which showed that the sole purpose of the actors was to prevent Ford's arrest at all hazards. The tragedy may be said to have remotely had its origin in the strike; that is, if there had been no strike, there might have been no officers there, and no occasion for their being there. But, so far as the strike and the occurrences of the earlier part of the day are concerned, they became collateral to the events happening at 5 o'clock and immaterial to the issue being tried. See People v. Conkling, 111 Cal. 616, 44 Pac. 314. The legal right of the parties to strike was not an issue and furnished no justification for killing Manwell in their effort to protect their leader, Ford, from arrest.

[7] Appellant presents a still further phase of this contention. He says that the verdict acquitted him of murder in the first degree; that there is no evidence warranting a conviction of manslaughter, and hence there remained only murder of the second degree, of which he could have been convicted, but "that the only possible justification for a verdict of murder in the second degree would have been evidence that Manwell was killed in the perpetration or attempt to perpetrate some felony other than arson, rape, robbery, burglary, or mayhem, but there is absolutely no evidence of any perpetration or attempted perpetration of any felony whatsoever." The answer to this view of the law seems to be quite obvious. Murder in the first degree is specifically defined, "and all other kinds of murders are of the second degree." Pen. Code, § 189. Manslaughter is not any kind of murder. So there must be murders which are not murders in the first degree. "Murder is the unlawful killing of a human being, with malice aforethought." Section 187, Pen. Code. Any unlawful killing of a human being with malice aforethought is murder. The degree has nothing to do with the definition. But "such malice may be express or implied. * * * It is implied when no considerable provocation appears." Section 188, Pen. Code. If, then, the killing of Manwell was done in the absence of "considerable provocation," malice is implied, and we have the very case provided for by the statute. It will be observed that the statute makes no distinction between cases where the killing was in the perpetration of a misdemeanor and of a felony. It says "all other kinds of murder are of the second degree"; that it, the unlawful killing of a human being with malice (express or implied) aforethought is murder, and the killing is equally unlawful whether done in the perpetration of a misdemeanor or felony.

[8] 3. It appears that on Sunday, August 3, 1913, there were at the Durst ranch, near Wheatland, about 2,000 or 2,500 people of several different nationalities, men, women, and children, gathered there to pick hops. The hop picking had begun about the middle of the preceding week. The unsanitary conditions surrounding these laborers, and some unnecessary hardships to which they were subjected in the performance of their work, naturally aroused a feeling among them of dissatisfaction, which manifested itself first in an open manner at meetings on Saturday, August 2d. That the movement towards a strike had taken shape at that time is shown by certain telegrams sent by defendant Suhr; defendant Ford being with him. There were nine of these telegrams, each signed by Suhr, sent through the Western Union office at Wheatland during Sunday, August 3d, the first at 5:54 a. m. to T. W. O'Brien, 238 South California street, Stockton, reading:

> "Strike on at Durst Bros. Twenty-five hundred out. Send literature at once. Notify Sacramento."

He telegraphed:

> "To Secy Local 73, 1117 3rd St Sacramento Cal.: Strike on at Dursts twenty-five hundred out Send books and due stamps and delegate if possible at once."

In the afternoon, at 2:40 of the clock, he telegraphed:

> "To I. W. W. Hall, 3345 17th street, San Francisco: Strike on in full demands turned down. I. W. W. ordered off the grounds but are here to stay. Send all speakers and wobbles possible. Money needed, lots of families des-

titute, boycott all employment sharks. Answer."

It appeared at the trial that the term "wobbles" meant members of the I. W. W. He sent at the same time a message, reading the same as last above, "To Secy Ryan, Local 71, I. W. W. Hall, Sacramento;" also one "To Secty. B. Sodder, I. W. W. Hall, San Pedro St., Los Angeles;" also one to I. W. W. Hall, Tenth street, Oakland, reading the same; and a similar one to "T. W. O'Brien, 228 So. Cal. St., Stockton;" also to Otto Gantz, I. W. W. Hall, 822 F. Street, Fresno; also one:

"To San Francisco Bulletin, San Francisco. Twenty-five hundred hop pickers out on strike at Durst Bros. ranch. Thirteen hundred to come on Horst Co. ranch to-morrow. Strike conducted by I. W. W. Send reporter to take news."

Much testimony was admitted describing in detail the conditions existing at the Durst hop fields. We do not think it necessary to set out this testimony. It showed a situation calling for some radical reform measures in order to make it a desirable place for such numbers of people to work, both in respect of their moral and physical well-being. Bad as these conditions were, however, they furnished no justification for the tragic events of that Sunday and need not be dwelt upon. Ford was the leader and spokesman of these hop pickers. He conducted their meetings, of which there were several, during Sunday before the 5 o'clock meeting at which Manwell was killed. There was a meeting on the previous Saturday evening, largely attended, as these meetings generally were; the attendance estimated by some of the witnesses as 1,500 or 2,000—"nearly the entire camp," as one witness expressed it. The usual place of meeting was a platform slightly elevated from the ground and situated in the midst of the camp, near to the store, restaurant, and some places of amusement. These meetings were in the main orderly, but plainly disclosed Ford's mastery and power to lead and control the more or less excited and turbulent body of persons comprising a considerable part of the assembled masses of striking and disappointed people, looking to their leader for guidance and relief. Suhr's telegrams show that it was an I. W. W. movement. In the earlier part of the day Constable Anderson made an effort to arrest Ford, but being challenged to produce a warrant, and not then being able to do so, and after some rather rough handling by persons around Ford, he desisted, but later a complaint was sworn to before a justice of the peace at Wheatland, and a warrant was duly issued thereon and placed in Anderson's hands. The situation finally became so threatening that Sheriff Voss, of Yuba county, was sent for. He came to Wheatland, and with him Deputy Sheriffs Reardon and Matthews. At Wheatland he was joined by District Attorney Manwell, Constable Anderson, Henry Daken, and A. W. Armstead, the two latter deputized as part of the posse. Robert Durst was also with them. They went to the Durst ranch in two automobiles, arriving together about 5 o'clock Sunday afternoon, driving near to where a largely attended meeting was in progress. Sheriff Voss directed Daken, Armstead, and Matthews to remain on the outside of the crowd. Sheriff Voss, Constable Anderson, Deputy Reardon, and District Attorney Manwell entered the crowd and went towards the platform where Ford was standing and had been speaking. Sheriff Voss' account of what happened is brief. He testified:

"We arrived there at the hop yards, and I got out of the machine and started towards the crowd; and I got up close to the crowd and held up my hand and told them I was sheriff of Yuba county and 'in the name of the people of the state of California, I demand you to disperse.' I can't remember the very words that I used, but that is the sum and substance of it; and I hardly got through talking when I noticed a commotion at one side, and I saw five or six men jumping on Constable Anderson * * * over there, and I hadn't taken but one or two steps when I was stunned by something hitting me on the head, and the next thing I remember I was turned and facing in the opposite direction, and that is all I know about it."

He testified that up to that time he had not heard any shots fired. He was asked if he saw anything of the deceased, Mr. Manwell, and replied:

"Yes, sir; as I started over there I saw Mr. Manwell away over there about 10 or 15 feet I judge from where I was, and he had his hand up in the air. * * * Q. Now, did you see Mr. Manwell again after you last saw him there, as I understand you, facing the crowd with his hand up? A. After I came to I saw him laying on the ground. Q. Was it near where you saw him with his hands up? A. About the same place. * * * Q. Did you draw your pistol or revolver there at that time at all? A. No, sir."

He testified that his revolver was taken from him, and it was gone "when he came to"; that, when he started towards Anderson, he drew his policeman's billy, but he had no chance to use it, and it was gone also.

Constable Anderson is the only other survivor of the four officers who entered the crowd. Manwell and Reardon were shot and almost instantly killed. Constable Anderson testified that, after the sheriff had told the crowd to disperse, he observed that "Ford jumped down off the box," and Anderson stepped into the crowd to find him and—

"came right onto him. Q. Let us be particular about that now. A. He was all kind of crouched up like that (showing), and when I stepped in there I was surprised to see him so quick, * * * and I said, 'Here, I have got that warrant you were talking about;' and he backed off, and as he backed off he said, 'Hey, hey, hey;' and I said, 'None of that,' and reached to grab him, and as I grabbed hold of him I hollered to the sheriff—I glanced that way (showing)—and said, 'Here Sheriff, here is the man we want.' And as I said 'Sheriff,' why, I was hit. * * * I came to laying on the ground. * * * The next thing I remember * * * I threw my hand down right quick, and as I did I felt the shock of a shot in my arm here. Q. At the time you were shot you were on the ground? A. Yes, sir."

He was asked how long it was from the time Ford cried "Hey, Hey, Hey," until he was struck.

"A. It seemed like the same time that I said 'Sheriff' it seemed the same time I was hit. * * * It would seem from the time that he said 'Hey, Hey, Hey,' it seemed that they all looked around and the crowd milled around me, and I grabbed him, and I said, 'Here, Sheriff, is the man we want;' and I was hit; it took just about that long."

Deputy Daken was one of the posse left on the outside of the crowd. What he saw from his standpoint he testified to as follows:

"I had orders from Mr. Voss to stay on the outside of the crowd; I and Mr. Armstead and a man named Matthews. We stood there as Sheriff Voss and Mr. Durst and Mr. Reardon and Ed. Manwell and Lee Anderson walked into the crowd, and, as they walked in, Mr. Anderson said to the sheriff, he said—while the sheriff had his hand up he said, 'As sheriff of Yuba county, I demand peace;' and also Mr. Manwell had his hand up, and he said, 'Keep the peace, boys, keep the peace;' and about that time Mr. Anderson reached over and said, 'Sheriff, here is our man;' and he reached for Ford; and at that time they all commenced to beating with clubs and rocks and beat them down; and when I saw that there was no chance to get in there I said to Mr. Armstead, 'I am going to break this crowd up if I can;' and I fired a shot over their heads, and the shooting commenced in general, and I fired the second shot before the crowd opened, and when they opened I observed the bodies laying on the ground. Q. How did you fire the second shot? A. Over their heads; and I saw a Porto Rican. He was beating Mr. Voss with a club, and I took it to be a police billy. It looked to me like it, and I hollered to him to 'cut it out,' and he kind of looked at me and offered to strike again, and I shot him; and at that the crowd kind of surged and were throwing rocks and clubs and hitting me all over, and I looked and saw a man come in from behind with a club that I recognized as Nelson afterwards, and yelled to him to stop, and he kept coming, and I shot. I shot him through the left arm, if I remember right, and my shells were exhausted, and I made my way for the store. Q. Now, Mr. Daken, you were standing there on the ground, and the officers had gone in. Can you give me a picture of what happened in there before you fired that first shot over their heads there? Tell it in detail. A. My fellow officers were all beaten down before I fired the shot; that is why I fired it. Q. Who were down? A. They were all down, Mr. Anderson, Mr. Voss, Mr. Manwell, Mr. Reardon. Q. And up to this time no shots had been fired? A. No, sir. Q. Did you see the sheriff fall? A. I did. Q. You have given us the sheriff demanding peace and the district attorney asking for peace. Did the district attorney make any gesture? How was his hand? A. He held his hand up, and, if I remember right, he had a cigar between those two fingers (indicating). Q. Did you see the defendants, or any of them, at that particular time? A. The only man I saw was Ford. As we drove up he was speaking, and he stepped down off the box as the posse walked in. Q. Did you see Ford at the time the sheriff and district attorney, Mr. Manwell, had their hands up asking for peace? A. Yes, sir. Q. Where was Ford at that time? A. He had just stepped down off the box."

A large number of witnesses, both for the prosecution and defense, testified to their recollection of what they saw and heard after the sheriff's posse arrived, and, as is not unusual, there was some conflict in this testimony. It was not clearly or satisfactorily shown who killed Manwell or Reardon or who shot Constable Anderson. Defendant claims that Manwell was shot by a hop picker, known as the Porto Rican, with the gun he knocked out of Anderson's hand—a witness so testified. But, if such was the fact, it does not relieve defendant from his responsibility, for the Porto Rican was one of the confederates, all of whom, who were engaged in the original design, were equally guilty. Many details were brought out corroborative of the testimony given by Voss, Anderson, and Daken and some important facts not seen by either Voss or Anderson, who were down at an early stage of the fray. It is not necessary to go further into this phase of the case. It was clearly shown that the two officers were killed and Sheriff Voss and Constable Anderson beaten down into insensibility, the latter also shot and seriously wounded, by persons in the crowd which Ford had around him, and by persons who, as we think will appear from the testimony, were actuated in so doing by the encouragement given them by Ford and his influence over them. There were, as the testimony showed, 15 or 20 shots fired—some witnesses said 30—and it was shown that 2 of these were by Daken who fired over the heads of the crowd, with the third shot he killed the Porto Rican, and the fourth he fired at one of the crowd who was armed and approaching him, as he thought, in a hostile manner. All the other shots came from Ford's confederates. The important and vital question in dispute is: Does the evidence fix the responsibility for these fatal events, with reasonable certainty, upon Ford? To this question we will next address the inquiry.

At the Saturday night meeting Ford was the speaker. Witness Jameson testified to some of his utterances. Being asked what Ford said, he replied:

"As I came up he was talking, and he said, 'The conditions here are hell;' and he said, 'If you people want to live in hell, you can, but for my part I don't want to live in hell.'"

One of the persons present made some protest—

"and quite a number wanted to make him [the intruder] shut up, and Ford said, 'Let him alone; it is only disturbing my meeting.' He said: 'There is no use of them sending any tin-horn scissor bill officers after me with stars on them as big as tin cans. They can't get me. If they get me, they have got to have guns, and they can't get me then.'"

The expression "scissor bill officer" and "scissor bill boss" occurs frequently in Ford's speeches and in responses sometimes by his audience, but no explanation was given of its meaning; that it was an epithet showing hatred is manifest.

Witness Earl Smith was running a restaurant at the camp. The platform where the people mostly assembled was near by. He testified to a meeting at the platform about half past 9 or 10 o'clock Sunday morning at which Ford was the speaker. That he read from a paper or had read the demands of the strikers in various languages. One of the crowd said, "It is better for every one to stand together, stick together." That later they went to Durst's office. At about half past 1 or 2 o'clock the hop pickers met again at the platform. At the close of the meeting Ford said:

> "Before we adjourn our mass meeting, I have a few words to say. 'Now,' he said, 'I ask everybody to stand loyal to our demands;' and he said, 'If the scissor bill boss don't meet our demands by 10 o'clock tomorrow, he will go up in smoke;' and he said, 'Now, it is up to you people whether the scissor bill officers from Wheatland comes out here and arrests me or not;' he said, 'If they do come, I hope you tear them into dog meat;' and the crowd cheered and said, 'Yes, make mince meat out of them;' and he said, 'Now, we are going to adjourn our mass meeting; anybody that wants to know anything or any information about the strike report at the I. W. W.'s.'"

This place was a frame building 12x14, called the Bull Pen, at the hop yards, and about 50 steps from Smith's restaurant. Smith further testified that Constable Anderson came to his place between 10 and 11 o'clock, from the store—

> "and there was a large crowd following him and talking, and some said 'Hop head,' and 'You big soak,' and so on, and I came out of the restaurant before Anderson was at the pumping plant, and I said, 'Get in the rig, Lee, and I will take you to town; they are liable to murder you.' * * * There was a big posse of people after him around the restaurant at that time, and Mr. Durst came around the south side of the restaurant and motioned to Lee and said, 'Come on and I will take you to town;' and they got in the machine and started to town, and they throwed rocks and said, 'You big hop head,' and 'You big soak,' and 'We will learn you to come out here and meddle with other people's business; we will teach you.'"

Witness Alvin James was at a meeting in the forenoon of Sunday at which the demands of the hop pickers were stated by Ford to Durst; that Durst agreed to most of the terms, but not all, and refused the demand of $1.25 per hundred for picking. The witness testified that when Durst left he heard Ford say that their demands had been refused, and continued:

> "I want all of you that is in any way interested in this now to stand loyal to what I have said and done, and we will see that he comes through with these demands."

About 12 o'clock the people came together again, the witness said, about 1,500 of them, and Ford and some others were appointed a committee to see if Durst would come to their terms, and later Ford reported that he had refused, "and he told them the only other thing was to see that no other pickers came—to boycott all outside pickers."

Witness Phillips testified that he passed the crowd at a meeting about 11 o'clock and heard Ford say:

> "'The officers may get me yet.' He said, 'If they do, I don't care a tinker's dam.' He said, 'If you people have any nerve, that you will stand by me.'"

Witness Howard was present when Constable Anderson came into the camp, and heard some one in the crowd say:

> "'There is one of the scissor bill s— of b—; now let's get him.' I heard Blackie Ford say, 'If we will stay together, we will stay on the grounds;' and that the I. W. W. had money enough to feed all the hop pickers, and that they would start a free lunch."

Witness L. K. Smith testified that he was at a meeting about 1 o'clock and heard Ford addressing the crowd—

> "something about the scissor bill officers and the scissor bill boss and the constable not to take him. And one of the fellows out in the crowd, in reply to that statement, he said that they would mob them if they did. Q. Mob who? A. The boss or the constable."

Witness Frank Stineman testified that he was at the meeting about 10 o'clock Sunday and heard what was said to Durst and his reply, and was at the meeting when the committee returned from Durst's office. He testified:

> "About 2 o'clock I heard the crowd yelling and went to see what was going on. The crowd was running around. They seemed to be like a bunch of wild people, and Ford was running around with a bunch following behind him, * * * and Ford was talking to them all the time, telling them to stand loyal and they could not take him."

Witness Lewis McCurry testified that he was at one of the meetings about half past 1 or 2 o'clock Sunday. He testified:

> "I thought I would stop and hear what he (Ford) was going to say, and I heard him say, 'Let the officers fire the first shot, and then they would finish it.'"

Deputy Sheriff Daken was at the hop yard Sunday morning and was at the 10 o'clock meeting at the platform and heard Ford speaking and reading resolutions. He testified:

> "I heard Ford say at the morning meeting, 'Don't let them take me.' He was speaking to the crowd in general."

There is much other testimony tending to show that the hop pickers very generally were wrought up to a high state of excitement and had placed their confidence in Ford to lead them successfully in securing better working conditions and better pay, and, when they assembled at 5 o'clock in large numbers, they were, at least many of them, in such temper that not much was required, as was soon demonstrated, to induce them to resort to acts of criminal violence.

At this 5 o'clock meeting Ford was in charge and was the speaker and leader, as he had been throughout the day, and it appeared very clearly that the officers were expected any moment. Witness Alvin James was present. Speaking of the coming of the officers, he testified:

> "Just before the automobiles drove up, or as they were coming in, Ford said, 'Well, boys,' he said, 'the sheriffs are coming, and I suppose they will get me;' and he said, 'I don't care a tinker's dam whether they do or not, but if you are loyal to this cause, and want to see that this thing is carried through, you will stand by me;' and I don't know how many said, 'We

will knock their damn blocks off if they come in here.'"

Witness R. R. Jameson was present at this meeting and testified:

"Q. Did you hear any statements made by Ford prior to the sheriff's coming up? A. The only statement I heard, otherwise than I have said, Blackie Ford said, 'Stand your ground,' or something like that. I couldn't catch all of it, but he said, 'Stand your ground,' just as the officers were coming up."

Witness J. J. Hicks testified to what he heard and saw at this meeting:

"Q. Tell us what, if anything, you heard Ford say. A. The first I heard him say was: They heard they had sent after the sheriff, something to that order, and he guessed they would come after him, and he said, 'Here they come now, and it is up to you fellows whether they take me or not;' and some of them said, 'They won't take you.' Most of them hollered that, and some of them said, 'We will cut them into dog meat first.'"

Witness L. K. Smith was present at this meeting. He testified:

"When we got there some one said, 'Here they come;' and Ford held up his hands and talked to the crowd and said he 'hoped they would stand loyal and not let them take him,' or words to that effect."

Witness Chester Cass testified:

"Well, I left Wheatland and got there just about the same time the sheriff landed there; and as I got there some one was speaking up above the crowd. I could see him. I don't know who he was. He had both hands out, and said, 'Stand your ground.'"

The principles of law already to some extent pointed out, it seems to us, are clearly applicable to the case here presented, and that the jury were fully justified in finding defendant Ford guilty as a principal in the murder of Manwell, although he did not himself fire the fatal shot. The conclusion of the jury that the unwarranted attack upon the sheriff and his assistants while in the execution of a lawful duty, resulting in the death of a deputy sheriff and Manwell, was the direct result of Ford's acts and conduct was, we think, fully justified by the evidence.

[9] 4. We are next to notice the evidence so far as it tended to connect defendant Suhr with the killing. We have already given the telegrams sent by him Sunday, August 3d, showing that he was one of the organizers and conductors of the strike and boycott. Witness Magruder testified to being present at a meeting of the hop pickers held about noon of the 3d of August, and heard some talk about Durst not agreeing to the terms demanded.

"He said he 'would not give the dollar and a quarter but would agree to everything else'; and they took up a collection to find out to see what they could do to send messages, and while I was sitting there a little while afterwards there was a collection, and one man came up; I don't know his name; I didn't know until I came in here— Q. (interrupting) Do you know now? A. Yes, I know now; that gentleman there. Q. Which one? A. Suhr. He said, 'Blackie, I have $33.' * * * Mr. Suhr came, and there was a man had a shooting gallery opposite me (one of these target shooting games), and this man came and said: 'You shut that up. We will not have any target shooting on the ranch. There is a boycott on the ranch.' Q. Who said that? A. Mr. Suhr, and this man that had the gun place, he said, 'I will give you 25 per cent. of what I take in if you let me shoot this afternoon;' and Mr. Suhr said: 'You don't take me for a 25 per cent. man, do you? You have got to shut up.' And that evening the shooting gallery moved away, and he continued to say everything else would be closed up on the Durst ranch. Q. Who said that? A. Mr. Suhr said that; it looks like the man. Q. In your opinion, is this the same man? A. Yes, I believe it to be the same man."

Four witnesses testified to certain admissions or confessions made by Suhr, which will next be stated.

Witness Francis Heenan, deputy sheriff of Yuba county, testified to a statement made to him by Suhr. The witness had been sent to the Sutter county jail, where Suhr was confined, to bring him to Marysville for the purpose of identifying some one. The statement was made on the way from the courthouse in Yuba City to the Northern Electric depot, where they got on the cars, some time about the middle of October, 1913. The witness was examined and cross-examined, from which it appeared that Suhr had not been asked to make any statement; that no promises or inducements were held out to him or threats or coercion in any manner used; and that the statement was—

"freely and voluntarily made. Q. What was the statement? Tell the jury. A. Well, he first spoke up and said, 'I wish they would take me out and shoot me or give me life imprisonment; I can't stand this thing;' and I asked him what was the matter, and what was the trouble; and he said, 'About that shooting down at Wheatland.' Q. Tell it all. A. I asked him what kind of a gun he had; and I said, 'There has been a couple of guns missed down there that we never got track of;' and he said, 'A small one;' and I asked him what make it was; and he said he didn't know; and I asked him where he got it; and he said he took it out of an old man's hand; and that was about the extent of the conversation. * * * Q. Have you given all of the statement to the jury which Mr. Suhr gave you? A. No. Q. Give it all then. A. Well, since you call my attention there, he spoke about taking a couple of shots at the officers; and I asked him, if I recollect right, if he knew the names of the officers; and he said, 'No, they were officers,' or words to that effect. Q. Anything further? A. Yes, I asked him if he hit anybody; and he said he 'saw one of them fall—one of the officers fall.' Q. Where were you and Mr. Suhr at the time he made this statement to you? A. Walking from the courthouse to where we could catch the car, walking along the street."

On cross-examination he testified that it was half a minute or a couple minutes' walk to the car from the courthouse, and that they walked along without stopping; that he had no further talk with Suhr on the way over to the courthouse nor on returning.

H. O. Brown, a witness for the defense, testified that he measured the distance from the Sutter county courthouse "to the first turn where Heenan and Suhr took the street car" and found it 320 feet.

Witness Bennett Schillig, deputy sheriff of Sutter county, testified to a statement made by Suhr on December 2, 1913, at the time the Ford case was set for trial. The witness was at the time undersheriff and in charge with the sheriff of the jail where Suhr was confined. He testified that no inducement or promise of immunity or reward for making the statement was given him, and that "no coercion or duress or anything of that kind to make him make the statement" was used. He was asked to give the statement verbatim to the best of his recollection.

"A. It was on the evening of the 2d. Q. Of December? A. Yes, sir; and about between 8 and 9 o'clock. It was about 8 o'clock. It was my custom to go into the jail and lock Mr. Suhr into his cell. When I first went in he complained to me about the postponement of these cases, and we had some little talk about that; and he asked me my opinion about it and about the cases; and I told him I didn't know anything about the facts of the matter down there; and we had some little conversation in regard to Ford. Q. Tell us all of it, as nearly as you can. A. He told me on other occasions that he was not well acquainted with Ford; in fact he said, 'We were not good friends while we were at Wheatland, not very good friends;' and that night when I was in there I said, 'Herman, I thought you told me you and Ford were not very good friends at Wheatland;' and he wanted to know why; and I said, 'I noticed your greetings in the sheriff's office at Yuba county;' and I said, 'I thought Ford greeted you like a long lost brother;' and he said, 'Ford is not a bad fellow;' and he said, 'I used to get sore at him down there.' Mr. Royce: Never mind what he said about their not being— Mr. Carlin (interrupting): I am not particular about it. Tell us about the shooting, what he said about it. Mr. Royce: All right, go ahead. It will all come out anyway. A. I am trying to repeat it as I have it in my mind; you will get me mixed up. Mr. Royce: It is my fault. A. Anyway, in that remark I mentioned if he thought it was a good idea to be tried with the other defendants; and he said he didn't know; and I said, 'Perhaps Ford was more guilty than you, and it might have a bad effect on your case.' And he said, 'I am in worse than Ford;' that 'Ford did not have any gun;' and I said, 'Did you have one?' and he said, 'Yes;' and I said, 'Herman, I don't know what to say about it; I did not know any facts of the matter.' He said, 'I will tell you;' and he said, 'When the officers drove up, we were there at the platform;' and he said, 'The officers got out and come towards the platform, and the first I knew'— He said, 'There was a man stepped up on a box, or something, he thought; it looked to me as though a man stepped on a box or bench, and it broke down. The man went down, and the trouble started.' And the confusion was such that he couldn't tell who any one was. He didn't know any one there in town, didn't know any of the officers, but he was trying to get out through the crowd, and as he passed some old man he handed him a pistol, and he said, 'Young fellow, defend yourself.' He took the pistol and fired it; he didn't know exactly how many times. He said he might have fired a couple of times, he didn't know, and he felt a stinging in his arm, and he got out of the crowd and went to some camp. He had been shot in the arm some place, he didn't know the place, but I think it was near the elbow, as near as I recall; but there at the camp some lady bandaged this wound, and he started out and went down to the river, and when he got to the river he said, 'I thought to myself, "What am I running away for?" I will go back.' And, as he started back and had gone a little ways, he met Ford and some others. I don't remember now; I have forgotten; but it was either—"

At this point some discussion was had between counsel, after which the witness resumed the narrative:

"A. Well, he said he thought, 'I have nothing to run away for; I will go back.' And he met Ford and these other parties. Q. State what he did, not what he said. The Court: If he stated anything further as to what he himself did, state it. A. Then he turned back and caught a freight train that was crossing the bridge, and he rode on that freight train to Roseville, and from Roseville he got a motor car and went into Sacramento, and it was too late to get a train for Stockton, and he remained all night in Sacramento and went home the next day to Stockton; and it was either the next day after or the second day, I don't know which, that there was some article come out in the papers in regard to Suhr and Ford wanted for murder, and he was somewhat alarmed about it, and he left there and went up into Tuolumne county, I believe it was, a timber camp where there was some 75 or 80 men working, and he worked in the kitchen as dish washer and waiting on the table, and he worked there about a month, and he got to thinking the matter over, and he thought he would come back to Marysville and surrender himself and quit his job; that he told the foreman who he was and why he was quitting, and he got back to Stockton, and there he saw some more articles in the papers in regard to the inhuman treatment that the prisoners were receiving in Yuba county; that they were compelled to lie on the floor, and their bodies were covered with sores, and he changed his mind about coming to Marysville, and he concluded that he would go on to Arizona or to Mexico or some place to get out of the way for a while, and he started at that time. I can't remember all the details of his trip down there. He was several days going to Arizona, and he was arrested there and brought back. Q. Was there anything by him said about the name he used in camp in Tuolumne county? A. Well, he said that he used a different name; I can't recall whether it was there at Tuolumne or at Arizona that he used a portion of his own name. He didn't use all of his name; just a portion of it."

Witness Ben Manford testified to a statement made by Suhr on Sunday morning, December 14, 1913. Isaac Smallwood was a deputy sheriff and had charge of the jail at Yuba City, and Manford went there to see Smallwood on some business. He had no official connection with the jail, but was a constable or marshal. He found Smallwood with Suhr "in a little room in front of the cell," and "wanted to see him to give him a book to collect some taxes." Smallwood was talking to Suhr.

"Mr. Carlin: Q. We have already brought you up in your testimony wherein you stated—I believe you said that on the 14th of December of last year Mr. Suhr, the defendant here, made a statement to you in the county jail at Yuba City. Now give the jury all that was said by him and you at that time, as near as you can recollect it. A. I walked in the jail that morning hunting for Mr. Smallwood; and I said, 'Good morning, gentlemen;' and I said—I see this man in there and I said, 'You just as well be in this morning as out; it is a bad day;' and said, 'Are you from Live Oak?' and he said, 'No;' and Mr. Smallwood said,

> 'That man gave bail and went back;' and said he was in for murder. Q. What man? A. Mr. Suhr. Q. All right, this man said what? A. He said, 'I am held for murder in the Wheatland riot;' and I said, 'How is that? Did you just happen to be standing around?' and he said, 'I had been there two or three days waiting for work and for my family;' and he said, 'This riot took place;' and he said, 'Some man handed me a gun, and I fired two shots at two men;' and I turned and walked out. Q. You did? A. Yes, sir; I did, and Mr. Smallwood walked out. Q. Is that all that was said? A. Yes, sir; that is all I heard said."

Smallwood testified:

> "I am night man over there, deputy sheriff, and by instructions of Sheriff Noyes to look after things there, and I make it a point to go around once in a while to see that everything is O. K., and that Sunday morning I was there and said good morning to the gentleman. Q. To Mr. Suhr? A. Yes, sir; and he said, 'Hello, Ike, how are you?' and I said, 'Pretty fair;' and by that time Mr. Manford came in. Q. And before Mr. Manford's arrival you and the defendant Suhr—had you and the defendant Suhr had any conversation or talk at all concerning the subject-matter, concerning the statement he made to Mr. Manford? A. No, sir; none whatever. Q. Had he and you been talking in any way at all about the case that he was in jail on—on the charge? A. No, sir. Q. In no way? A. In no way. Q. Did you hold out to him there at that time—hold out to the defendant Suhr any promise of reward or inducement to cause him to make a statement? A. I never did. Q. Did you ask him to make a statement? A. I never did. Q. Did you exercise or was there exercised at any time in your presence any coercion or duress to cause the defendant to make a statement? A. Never did. Q. Did anybody else in your presence? A. No, sir. Q. Did Mr. Manford hold out any hope of reward or promise or use any duress? A. No, sir. * * * Q. Now, did the defendant Suhr at that time and place, in the presence of yourself and Mr. Manford, make a statement concerning his complicity in the Wheatland shooting which resulted in the death of Mr. E. T. Manwell? Tell the jury what the statement was. Mr. Royce: State the whole conversation. Mr. Carlin: Yes, sir. The Witness: Word for word? Mr. Carlin: Yes, sir. A. I can't, word for word. Q. As near as you can. The Court: Give your best recollection. A. The best recollection was when Mr. Manford came back he said, 'Good morning, Ike;' and I said, 'Hello, Ben;' and he stepped up and looked around and said, 'Good morning,' to Mr. Suhr; and he said, 'Are you here yet?' and he said, 'Yes, I am here;' and the conversation led on; and he said, 'Yes, I am in here regarding the Wheatland riot;' and he said, 'I didn't know that;' that is what I understood Mr. Manford to say. Then I understood Mr. Manford to say, 'Is that so?' and he said, 'Yes;' that is as near as I can remember it; and I understood him to say—Mr. Royce (interrupting): We will object to what you understood him to say. The Court: Your best recollection. A. In my best recollection Mr. Suhr said, 'I grabbed the gun and fired;' and I understood him to say he grabbed it from an old man; and then there was another word or two passed, I didn't catch it; and I said, 'Ben, I have got to be going;' and he said, 'All right.' That was the marshal. And that is about all that I heard. Q. Was there anything said there about shooting at anybody? A. I heard him say he fired. * * * Q. Have you stated all that you remember? A. All that I remember, outside of Mr. Suhr speaking to the marshal that he was expecting his family there."

Suhr testified in his own behalf. As to the conversation with witness Heenan, he testified that he had none that he can remember. His testimony as to the statement made to witnesses Smallwood and Manford was:

> "Well, Mr. Smallwood came in there and talked to me, and we were talking about the weather, and another fellow came in there and said, 'Good morning' (presumably Manford); he said, 'You are better off inside than out;' and I said, 'I am not;' and he said, 'What are you in here for?' and I said, 'On account of the Wheatland trouble;' and he said, 'Did you have any gun, and did you do any shooting?' and I said, 'I didn't;' and that was all that was said, and they walked out."

Of his conversation with witness Schillig, he testified as follows:

> "When we left the courthouse I said to Mr. Schillig that I was going to buy a piece of tobacco, and I went to the store and bought a piece of tobacco, and I wanted to go across the street where the car stopped, and he said, 'Oh, come on, I am dry;' and he went to the saloon and bought a bottle of beer for himself, and he give me a glass of beer; and he said one wasn't enough, and he took another bottle and give me a glass, and then we went out and stood on the corner, and he let the car pass; and he said, 'There goes the car;' and I said 'We better walk than standing here;' and he started off and left me standing there, and I followed him off until we got across the street. He was about five yards ahead of me, and I saw Mr. Stanwood there talking to two fellows, and Mr. Stanwood looked at me as though he was going to grab hold of me, and he didn't. And then we walked past the park and Mr. Schillig got into an automobile, and I stood on the hind axle and held on with one hand until we got into Yuba City, and he locked me up, and he went over and got my supper, and then he went to the post office and came back and asked me what they made out to-day; and I said that we were all going to be tried in one case; and he got mad at my attorneys and said he was going to slap them in the face if they came in there again. Q. Did he mention their names? A. Yes, sir; Royce and Downing, and started in cursing about a fellow named 'Burton'; and then he said to me, 'They haven't got any case against you, and what do you want to be tried with those fellows for;' and I said, 'I didn't think that they have any case against Ford; I didn't see him doing anything;' and that is practically all that was said."

The foregoing is substantially Suhr's entire testimony, except as to his personal history up to the time he came to Wheatland, which showed that he had a wife and children and had pursued farming and various other honorable occupations.

[10] A distinction exists, in legal contemplation, between admissions and confessions, as pointed out in People v. Miller, 122 Cal. 84, 87, 54 Pac. 523. In People v. Strong, 30 Cal. 151, it was said:

> "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime, or misdemeanor, to another, of the agency or participation he had in the same. * * * The word 'confessions' is not the mere equivalent of the words statements or declarations."

The term "confession" is restricted to acknowledgment of guilt. 1 Green. Ev. 170.

> "An admission of a fact, not in itself involving criminal intent, is not to be rejected as

evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt." People v. Parton, 49 Cal. 632, 638.

See, also, People v. Le Roy, 65 Cal. 613, 4 Pac. 649.

It was held in People v. Knowlton, 122 Cal. 357, 55 Pac. 141, that declarations of the accused which are not confessions of guilt cannot be objected to as obtained under duress. People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

It is perhaps not necessary to make any distinction between the different statements of Suhr testified to, for in each instance full preliminary proof was made of their voluntary character.

[11] While the rule is that confessions are to be received with great caution (People v. Gelabert, 39 Cal. 664; 1 Green. Ev. § 200), Mr. Greenleaf says:

"When the admission is deliberately made and precisely identified, the evidence it affords is of the most satisfactory nature."

Speaking further on the subject, and after stating certain cautions to be observed, he says:

"Subject to these cautions, in receiving and weighing them it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are at common law received in evidence as among proofs of guilt." Id. § 215.

[12] Admissions and confessions of a defendant, which appear to have been voluntarily made, may properly be received in evidence (People v. Goldenson, 76 Cal. 328, 19 Pac. 161; People v. Fredericks, 106 Cal. 554, 39 Pac. 944); they are substantial evidence of guilt (People v. Chrisman, 135 Cal. 282, 286, 67 Pac. 136); and it seems to be well settled that, where the corpus delicti is otherwise satisfactorily proven, a defendant may be convicted on his uncorroborated confession (Andrews v. People, 117 Ill. 201, 7 N. E. 265; Bartley v. Illinois, 156 Ill. 234, 40 N. E. 831; Wimberly v. State, 105 Ga. 188, 31 S. E. 162; Mitchell v. State, 45 Fla. 76, 33 South. 1009; Dugan v. Commonwealth, 102 Ky. 251, 43 S. W. 418; Sullivan v. State, 58 Neb. 799, 79 N. W. 721).

Where there is clear and positive proof of the corpus delicti, the court said, in Wimberly v. State, supra:

"It has been too often ruled, to be now gainsaid, that such proof of the corpus delicti may be considered as a circumstance sufficiently corroborating a confession."

Nor is it necessary that proof of the corpus delicti connect him with the commission of the crime to authorize proof of admissions. People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

It may be conceded that Suhr's telegrams, sent on August 3d, early in the morning and in the afternoon of that day, go no further than to show his activities in the strike and boycott, and alone would not justify an inference of complicity in the conspiracy formed later in the day; and the same may be said of his connection with the meeting at which a collection was taken up. That he was, however, one of the prominent and influential spirits in keeping alive the feeling which finally culminated in a tragedy is fairly inferable from all the evidence, although we do not think that this alone would warrant an inference that he at any time prior to the 5 o'clock meeting contemplated forcible resistance to the officers or any open violation of law, as was the case with Ford. The proof of the commission of the crime was fully established, independently of any admissions or confessions of Suhr. These admissions and confessions, then, must be given whatever weight the law authorizes. There was in them sufficient to make him directly responsible for the death of Manwell, under the principles of law which we have applied to Ford's case, although he may not himself have killed Manwell. We cannot say that, on the face of these confessions, they appear to be unbelievable or inherently improbable. They were testified to by witnesses who stand unimpeached and whose official position would seem to carry with it some evidence of their character for truth and honesty. It may seem improbable that Suhr would have "given himself away" at a time when his counsel were preparing his defense, as is strongly urged. But is it less improbable that the witnesses to his confession committed perjury? However, the sole responsibility for accepting the testimony of these witnesses as true and making their own deductions from it was with the jury, and with its conclusions the Constitution of the state prevents our interfering.

5. Some alleged errors in giving and refusing instructions, not hereinbefore considered, and in rulings upon testimony offered, will be briefly noticed.

[13, 14] It is claimed that defendants' requested instruction numbered 3, upon the question of reasonable doubt, was that given in the case of Commonwealth v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, and should have been given and was not in effect given by instruction 28. The criticism arises out of some expressions in the instruction given in addition to the form so often approved, and the safest to be used on the subject, as given by Chief Justice Shaw. For example, it reads in part:

The term "'reasonable doubt' [as referred to in these instructions] is a term often used, probably pretty well understood, but not easily defined," etc.

In its concluding paragraph the court said:

"A doubt that will justify an acquittal must not only be a reasonable one, but must arise from a candid and impartial examination of all the evidence in the case, or from a want of sufficient evidence on the part of the prosecution to convince you of the truth of the charge."

The suggestion to the jury that the term "reasonable doubt" is "pretty well understood, but not easily defined," was unnecessary, but harmless. The other criticized language, it is claimed, "eliminates the plain mandate of the law that the jury must be convinced, beyond a reasonable doubt, of the guilt of the accused." The jury were so plainly told that they could not convict unless the evidence convinced them beyond a reasonable doubt, and this admonition occurs so frequently in the instructions that we cannot believe there was prejudicial error in not repeating it at the end of this paragraph.

[15, 16] 6. The refusal to give defendants' instruction 21 was justified. It relates to the testimony of witnesses who may have had an interest in the result, and states:

> "You have a right to disregard entirely the testimony of any witness whom you believe to have willfully testified falsely."

The instruction fails to use the necessary qualifying words "in a material matter." Otherwise the instruction would be misleading and not a correct statement of the law. Besides, the court instructed the jury that "a witness willfully false in one part of his testimony is to be distrusted in others."

7. The record is singularly free from alleged errors in rulings upon testimony admitted and refused. We feel justified in remarking that the learned trial judge showed a degree of patience and judicial equipoise and fairness not always found in hotly contested criminal trials lasting many days, as this did. But two assignments have been called to our attention, and these are of little importance. One of defendants' witnesses was asked, on cross-examination, if he had ever attended any of the meetings of the I. W. W., and defendants' objection was overruled. A witness for the defense was asked, on his direct examination, "Did you ever hear any threats made there at that meeting Saturday evening?" Objection was sustained. He was then asked, "What, if anything, did you hear at that meeting?" and answered fully. We discover no error in these rulings.

The judgment and order are affirmed.

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25 Cal. App. 805

PEOPLE v. SUHR. (Cr. 254.)

(District Court of Appeal, Third District, California. Sept. 10, 1914. Rehearing Denied by Supreme Court Nov. 9, 1914.)

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

H. D. Suhr was convicted of murder in the second degree, and appeals. Affirmed.

R. M. Royce and Austin Lewis, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. It was stipulated that Crim. No. 253, People v. Ford, 143 Pac. 1075, and Crim. No. 254, People v. Suhr, should be tried together, and that the appeals in both cases should be heard on the record brought up in Crim. No. 253, People v. Ford. The law and the facts in both cases have been fully considered in People v. Ford, this day decided.

Upon the authority of that case, and for the reasons therein given, the judgment and order are affirmed.

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In re BRADLEY'S ESTATE. (L. A. 3562.)

(Supreme Court of California. Oct. 15, 1914.)

1. Appeal and Error (§ 151*)—Parties Entitled to Appeal—Aggrieved Parties.

Where, on the hearing on the return of an administratrix showing a sale of real property, a higher bid than that for which the sale was made was presented, whereupon the court confirmed the sale of the real estate to this subsequent bidder, the order amounted in effect to a refusal to confirm the sale to the first bidder, and he was an aggrieved party, and entitled to appeal from the order of confirmation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

2. Appeal and Error (§ 151*)—Parties Entitled to Appeal—Aggrieved Parties.

Where an order confirming a sale of land of an intestate also ordered a broker, with whom the land had been listed for sale, to pay to the administratrix money deposited with him by the successful bidder, the broker was entitled to appeal from the order of confirmation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

3. Executors and Administrators (§ 375*)—Sale of Real Estate—Confirmation or Vacation.

Under Code Civ. Proc. § 1552, providing, relative to the return by an executor or administrator, after making a sale of real estate, that if the proceedings were unfair, or the bid disproportionate to the value, and it appears that a sum exceeding such bid at least 10 per cent. exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, and that if an offer of 10 per cent. more in amount be made to the court in writing, it is in the discretion of the court to accept such offer, and confirm the sale to such person, or order a new sale, to justify an order vacating the sale on the ground that a sum exceeding the bid by 10 per cent. may be obtained, it must also appear that the proceedings were unfair, or that the bid was disproportionate to the value, but where there is a written offer to the court of 10 per cent. more in amount, this is sufficient in itself to justify the court in confirming the sale to the higher bidder, or ordering a new sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. § 375.*]

4. Executors and Administrators (§ 375*)—Sale of Real Estate—Conditional Bids.

Real estate of an intestate which the administratrix was authorized by the superior court to sell for cash at private sale, was listed for sale with a real estate broker, who obtained an offer of $5,500 from T., and who received from T. a deposit of $2,750. The broker informed the administratrix that he could get $4,500 for the place, and prepared and presented a bid for that amount, signed by H., who was an employé of the broker, accompanied by a deposit of $450. At the hearing on the return of the administratrix, T. expressed his willingness to pay $5,500, and signed a bid for that amount, providing that it was made on the assurance that the money paid the broker should be repaid, and that he should not be required to make any payment in excess of $2,750, until the $2,750 paid the broker was returned, whereupon the sale to him for $5,500 was confirmed; the order further directing the broker to pay $2,300 to the administratrix. The court found unfairness of proceedings and disproportion of price in connection with the sale to the broker, but did not expressly find that a higher price could be obtained. *Held*, that the court was not authorized to accept T.'s bid, as it was made on a condition which deprived it of the absolute character required by the order of sale and the nature of the transaction, and did not amount to a contract which T. could be compelled to complete as contemplated by the probate law, especially as the court had no power to order the broker to make the payment to the administratrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. § 375.*]

5. Executors and Administrators (§ 375*)—Sale—Confirmation.

The court had no authority to order such payment by the broker to the administratrix, as this amounted to a judgment against the broker in a proceeding to which he was not made a party, and without any pleadings presenting the issues of his indebtedness to the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. § 375.*]

6. Appeal and Error (§ 1176*)—Disposition of Cause—Remanding for Further Proceedings.

Upon a reversal of the order confirming the sale to T., the matter would be remanded for such further order as might seem just, instead of directing the court to confirm the sale to the broker, as though there was no finding that a price higher by 10 per cent. than the broker's bid could be obtained on a new sale, such a finding would have been warranted, and was doubtless omitted as immaterial, as it would have been had T.'s bid been in proper form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588–4596; Dec. Dig. § 1176.*]

7. Executors and Administrators (§ 375*)—Sale of Real Estate—Confirmation—Unfairness.

A real estate broker obtained the listing of real estate of an intestate with him for sale by one of the heirs, and obtained the approval of the administratrix of this action. He thereafter obtained an offer from T. of $5,500, and executed an earnest money receipt, describing himself as agent and the sale as subject to the approval of the owner. He then offered the administratrix, $4,500 for the property, and presented a bid of that amount in the name of one of his employés; the administratrix understanding that he had made a sale as agent for the estate for this price. *Held*, that there was such unfairness as justified the court in refusing to confirm the sale under Code Civ. Proc. § 1552, as a real estate agent, seeking the authorization of an owner to sell the property or the ratification of a sale already made without authority, is bound to disclose the price actually received or to be received, and has not the right, after making a sale, to represent the price to be smaller than it is, or to secretly purchase the property at a smaller price in order to make a profit on a resale, in view of Civ. Code, § 2228, providing that a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage by the slightest misrepresentation or concealment, and section 2322, providing that an agent is not authorized to do any act which a trustee is forbidden to do by article 2, c. 1, of the preceding title, which includes section 2228, and the broker occupied the position of agent for the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1529–1538; Dec. Dig. § 375.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

In the matter of the estate of Francis William Bradley, deceased. From an order confirming an administrator's sale of real estate, James W. Going and another appeal. Reversed, with directions.

Geo. B. Watson and Hamilton & Lindley, all of San Diego, for appellants. L. E. Dadmun and James E. Wadham, both of San Diego, and J. C. Tobin, for respondents.

SLOSS, J. Upon the petition of Ida May Bradley, as administratrix of the estate of Francis William Bradley, deceased, the superior court of San Diego county, in which the administration of said estate was pending, made its order authorizing the administratrix to sell certain real property at private sale. On February 4, 1913, the administratrix made her return, showing a sale of the property to Hal G. Hotchkiss for $4,500, $450 of which had been deposited with her, and praying for confirmation of the sale. The return coming on for hearing, objection to the confirmation was made on behalf of some of the heirs, and, a bid in the sum of $5,500 being presented by J. C. Tobin, the court made its order confirming the sale of said real estate to Tobin for $5,500. The order further recited that James W. Going had in his possession the sum of $2,300 belonging to the estate and heirs of Francis William Bradley, deceased, and directed that Going pay said sum, within a stated time, to the executrix. From this order Going and Hotchkiss (who had made his bid at Going's request, and, it is claimed, on behalf of Going) appeal.

[1, 2] The order confirming the sale to Tobin was, in effect, a refusal to confirm the reported sale to Hotchkiss. The latter, therefore, is undoubtedly an aggrieved party, and he has the right to appeal. Estate of Leonis, 138 Cal. 194, 71 Pac. 171. See, also, In re Pearsons, 98 Cal. 603, 33 Pac. 451; Estate of West, 162 Cal. 352, 122 Pac. 953. And, whether or not Going has so connected himself with the Hotchkiss bid as to entitle him to appeal in his own name from the order refusing to confirm the sale to Hotchkiss, he is unquestionably a party aggrieved by the part of the order directing him to pay $2,300 to the administratrix. The respondents' position that the appellants are not interested, and are not entitled to appeal, cannot be sustained.

The evidence disclosed this state of facts. Going was a real estate agent. Hotchkiss was in his employ. In January, 1913, one of the heirs of the estate signed a paper authorizing Going to sell the property for $7,000, Going's commission to be anything received over $6,000. Going was informed that the land belonged to the Bradley estate. On the same day he obtained the oral approval of the administratrix to the "listing of the property with him" for sale. A few days later Going obtained from J. C. Tobin an offer of $5,500 for the property, Tobin paying $450 down, and afterwards depositing a further $2,300. A contract was signed by Going and Tobin. It was in the ordinary form of a deposit receipt signed by a real estate agent. By its terms Going, describing himself as agent, acknowledged the receipt from Tobin of $450 in part payment for the land, the entire purchase price being $5,500. Terms of sale, including time for perfecting title, were stated, and the sale was declared to be "subject to approval of owner." Following Going's signature, there appeared an agreement, signed by Tobin, to "purchase the above described property on the above described terms."

While these negotiations were being carried on, Going informed the administratrix that he could get $4,500 for the place, and, upon the suggestion of her attorney that a written bid be made, he prepared a bid in writing, offering $4,500 for the property, had Hotchkiss sign it, and presented it, with a check for $450 to the administratrix. Upon this bid the return of sale was made up and filed. Before the matter came up for hearing, Mr. Wadham, the attorney for the administratrix, learned that Tobin was to pay Going $5,500, and informed Going that he felt obliged to call that fact to the attention of the court. When the return came on for hearing, Mr. Wadham informed the court that Going was getting $5,500 for the property, and that Hotchkiss, the bidder, was acting for Going. The heirs other than the administratrix objected to the confirmation of the sale. Tobin was called, and expressed his willingness to pay $5,500 for the land. The hearing was then continued for one week. At the adjourned hearing, Going testified to the transactions between himself, Tobin, and Hotchkiss. He stated that the $4,500 bid had been made in behalf of Tobin. After this testimony had been given a written bid for $5,500, signed by Tobin, was presented and filed. This paper, addressed to the administratrix and the estate, contained the following:

> "This bid is made on the assurance that the money that I have heretofore paid Mr. James W. Going on account of said property shall be fully repaid to me, and I shall not be required to make any payment in excess of two thousand seven hundred fifty dollars ($2,750.00) until said two thousand seven hundred fifty ($2,750.00) so paid to James W. Going is returned to me."

Thereupon, there being no higher bid, the court confirmed the sale to Tobin. The court recited, in its order, the circumstances leading up to the Hotchkiss bid, that:

> "Said bid so signed by Hal G. Hotchkiss was unfair and disproportionate to the value of the property in this, That the said bid was not made bona fide by Hal G. Hotchkiss for and in his own behalf, but was made at the request of James W. Going, agent of said J. C. Tobin, * * * and that the sum of $450 so deposited, was * * * a portion of the money deposited by J. C. Tobin to be applied upon the pur-

chase price of said property, and that said bid so signed by said Hal G. Hotchkiss was in * * * fact the bid made by said J. C. Tobin, and that said bid * * * was disproportionate to the value of the property in this, that it was $1,000 less than the actual amount already bid by J. C. Tobin for the said property, said J. C. Tobin having renewed his said bid of $5,500 in open court and in writing."

The order goes on to recite that there is in the possession of Going, as agent of the heirs and the estate, and as agent of Tobin, $2,300, paid by Tobin to Going to be paid to the administratrix and applied upon the purchase price of said property. After these recitals, and others relating to the adequacy of the price of $5,500, the order confirms the sale to Tobin for $5,500, and directs the administratrix to execute a deed to him upon payment of the balance of the purchase price, to wit, $5,050. It is further ordered that Going pay to the administratrix, on or before February 24, 1913, the sum of $2,300.

[3] The appellants take the position that the Hotchkiss bid of $4,500 was the only bid which the court was authorized to consider, and that the sale under that bid should have been confirmed. Section 1552 of the Code of Civil Procedure provides that:

> "If the proceedings were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent. exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had."

To justify an order vacating the sale under this provision, it is not only necessary that it appear that a sum exceeding the bid by 10 per cent. may be obtained, but it must also appear that "the proceedings were unfair," or that the "sum bid was disproportionate to the value." Estate of Leonis, 138 Cal. 194, 71 Pac. 171; Estate of Robinson, 142 Cal. 152, 75 Pac. 777. It is argued that the requirement of unfairness or disproportion must also be met to authorize the court to accept an increased offer of 10 per cent. under the final sentence of section 1552. It is there provided that:

> "If an offer of ten per cent. more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale."

But no such condition is stated in this part of the statute, and we see no sufficient reason for reading it in. That the increased offer, to the amount stated, is all that is needed to justify the court in confirming the sale to the higher bidder or ordering a new sale was clearly intimated in Griffin v. Warner, 48 Cal. 383, where the court was considering a section of the Practice Act, substantially similar to section 1552 of the Code of Civil Procedure, and the construction contended for by appellants was distinctly repudiated in Estate of Reed, 3 Cal. App. 144, 85 Pac. 155, a case which this court declined to rehear after judgment in the district court of appeal.

[4, 5] We think, however, that the appellants are right in their contention that the bid of Tobin was not one which the court was authorized to accept. The order of sale authorized the administratrix to sell for "cash, in gold coin of the United States, ten per cent. of the purchase price to be paid * * * at the time the bid therefor is accepted; the balance * * * to be paid upon confirmation of the sale." Tobin's offer declared upon its face that it was made upon the "assurance" that the money paid by him to Going should be refunded, and that one-half of the purchase price, or $2,750, was not to be paid until it had been returned to him. This was, in effect, a condition attached to the offer. Such condition deprived the offer of the absolute character which the terms of the order of sale, and the nature of the transaction, required. Tobin did not undertake to pay the entire purchase price, except upon an event which might or might not take place. The probate law contemplates a contract which the buyer may be compelled to complete. Tobin did not agree to enter into any such contract. It is true that the order of confirmation in the clause confirming the sale and directing a conveyance makes no reference to the condition embraced in the offer. But the order recites the offer, and rests upon it. The further provision, directing Going to pay $2,300 to the administratrix, serves to explain the failure to insert in the order the condition attached to Tobin's bid. It was probably expected that this payment would be made, and that Tobin would receive credit for it as a part payment of the purchase price. But, as will hereafter be pointed out, this part of the order cannot stand. Under these circumstances, it would manifestly be unjust to the purchaser to hold him to an absolute agreement, even though he is not here complaining of the form of the order. Furthermore, the appellant Hotchkiss, as the original bidder, has the clear right to object that the higher bid, which alone could authorize confirmation of the sale to another, was not made.

There is no legal foundation for the order requiring Going to pay $2,300 to the administratrix. This constituted a judgment against Going, and it was rendered in a proceeding to which he was not made a party, and without any pleadings presenting the issue of his indebtedness to the estate. That a valid judgment cannot be given under such circumstances is too elementary to require the citation of authority.

[6, 7] The order appealed from must, accordingly, be reversed. We do not, however, agree with the contention of the appellants that the court below should be directed to confirm the sale to Hotchkiss for $4,500. The refusal to confirm that sale was based on the ground that a written offer of 10 per cent. more had been made to the court—a ground which was, as we have seen, unten-

able. The sale could therefore have been vacated, under the first part of section 1552, only upon a showing that unfairness or disproportion of price concurred with the probability that a price, higher by 10 per cent. could be obtained on a new sale. While the order finds both unfairness of proceedings and disproportion of price, it does not find that the higher price could be obtained. We have no doubt, however, that the evidence would have warranted such a finding. The transaction between Going and Tobin, together with the latter's testimony at the trial, were sufficient in this regard. It is altogether probable that the court omitted any finding on the subject because, in view of the acceptance by it of Tobin's offer, the question was deemed immaterial, as in fact it would have been if Tobin's offer had been in proper form. Under these circumstances, we would not be justified in assuming that the court below actually concluded that 10 per cent. more could not be obtained on a new sale. The entire matter of the sale should be remanded for such further order as may seem just, in the light of what has been here said and of such additional facts as may be presented. As an aid in the further proceedings which are to follow, it may be well to notice the claim of the appellants that the evidence fails to support the findings of unfairness and disproportion of value. We may concede, for the purposes of this discussion, that the evidence was not such as to justify the finding that the sum bid by Hotchkiss was disproportionate to the value of the property. There is no need to go into this, as direct evidence on the point, one way or the other, may readily be supplied at another hearing. The court was, however, we think, fully warranted in concluding and finding that the proceedings leading up to the sale to Hotchkiss had been unfair. Hotchkiss was acting under the direction and in the interest of Going, and is affected by any circumstances affecting Going's status in the transaction. The appellants complain of the recitals that Going acted as agent for the heirs and estate of Bradley, as well as for Tobin. Whatever may have been his relationship to Tobin, he was properly regarded as occupying the position of agent for the estate and those interested in it. He had sought and obtained the "listing" of the property by one of the heirs, and had had this action approved by the administratrix. He had thereafter taken a deposit from Tobin on a sale to the latter for $5,500, describing himself in the contract and receipt as agent, and making the sale subject to the approval of the owner. Thereupon he had notified the administratrix that he could get $4,500 for the property. In communicating with the administratrix, he impliedly requested her to ratify a sale which he, as agent for the estate or the heirs, had made, or to authorize him to make a sale. That this was the administratrix's understanding of the situation is shown by the return, in which she states that the bid of Hotchkiss was "made through the real estate firm of James W. Going," and that a commission would be due to Going. No commission had in fact been agreed upon. Going was attempting to secure, as his compensation, the difference between the $5,500 offered by Tobin, and the $4,500 named in the Hotchkiss bid. We do not suggest that there would have been any impropriety in this effort, if the facts had been made known to the parties in interest. But certainly a real estate agent, seeking the authorization of an owner to sell property, or the ratification of a sale already made without authority, is bound to disclose the price actually received or to be received by him on a sale. He has not the right, after making a sale for a given price, to represent that price to be smaller than it is, or to secretly purchase the property himself at a smaller price, in order to make the profit of a resale at the price which he might and should have secured for his principal. The latter course of dealing, which is the one pursued by Going in this case, is in violation of the fundamental rule prohibiting an agent or trustee, in matters connected with the agency or trust, from obtaining any advantage therein over his principal or beneficiary by the slightest misrepresentation * * * or concealment." Civ. Code, §§ 2322, 2228; Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486. A sale, induced by such proceedings, is tainted with "unfairness" within the meaning of sections 1552 and 1554 of the Code of Civil Procedure.

The order is reversed, with directions to the court below to take further proceedings not inconsistent with this opinion.

We concur: SHAW, J.; ANGELLOTTI, J.

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168 Cal. 642

ROYAL TRUST CO. v. MacBEAN et al.
(L. A. 3364.)

(Supreme Court of California. Oct. 15, 1914.)

1. Limitation of Actions (§ 2*)—Actions to Recover on Depositor's Liability—What Law Governs.

The limitation statutes of the place where an action is brought to recover on the double liability of a shareholder of an insolvent bank, govern.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4–8; Dec. Dig. § 2.*]

2. Limitation of Actions (§ 34*)—Statutes —Applicability.

The three-year limitation prescribed by Code Civ. Proc. § 359, on actions to enforce liabilities created by law, applies to an action to enforce the liability of the shareholders in a Canadian bank under the bank act of that dominion, providing that stockholders in a bank shall be liable for an amount equal to the par value of their shares over and above any unpaid balance due on their subscriptions, such liability being one imposed by law in contradistinction to the contractual liability to pay the full amount of the subscription price.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*]

3. Limitation of Actions (§ 34*)—Construction—Statutes.

Under Code Civ. Proc. § 359, providing a three-year limitation upon actions to enforce liabilities created by law, an action against a stockholder in an insolvent bank to recover an additional amount equal to the par value of his shares is barred at the expiration of three years from the time when the liability was created.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*]

4. Limitation of Actions (§ 58*)—Accrual of Right of Action.

Under Bank Act of Canada, declaring that the shareholders in an insolvent bank shall be liable for an amount equal to the par value of their shares over and above any unpaid balance due on their subscriptions in the event the property of the bank is insufficient to pay its debts, and the Winding Up Act, declaring that the amount which shareholders are liable to contribute shall be deemed an asset of the bank and a debt due to be paid as directed, and in view of act of 1906, expressly declaring that shareholders shall be considered indebted from the time their liability commences, but that the debt shall be payable when calls are made, the right of action to recover upon the liability of a shareholder in an insolvent Canadian bank accrues upon insolvency, and hence the three-year limitation prescribed by Code Civ. Proc. § 359, begins to run from that date.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324–328, 346, 347; Dec. Dig. § 58.*]

5. Limitation of Actions (§ 58*)—Running of Limitations—Statutes—Construction.

Under Code Civ. Proc. § 359, prescribing a three-year limitation to enforce the liability created by law, or to recover a penalty or forfeiture imposed, and providing that such actions must be brought within three years after discovery of the facts upon which the penalty or forfeiture attached, or the liability was created, the fact that it could not immediately, upon the insolvency of a foreign bank, be determined what part of the shareholder's double liability should be enforced does not toll the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324–328, 346, 347; Dec. Dig. § 58.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Royal Trust Company, as liquidator of the Ontario Bank, against Isabella MacBean and another. From a judgment for defendants, plaintiff appeals. Affirmed.

C. White Mortimer and H. A. Massey, both of Los Angeles, for appellant. Wm. Chambers, of Los Angeles, for respondents.

SLOSS, J. The plaintiff appeals from a judgment entered in favor of defendants upon the sustaining of their demurrer to the second amended complaint.

The action was brought to enforce the liability of the defendants, under the laws of the Dominion of Canada, as stockholders of an insolvent bank which had been incorporated under the laws of said dominion. The complaint sets forth very fully the statutory provisions governing the incorporation of banks, the liability of stockholders, and the procedure in cases of insolvency or bankruptcy.

It appears that by the Bank Act of Canada, enacted in 1890, it is provided that:

> "In the event of the property and assets of the bank being insufficient to pay its debts and liabilities, each shareholder of the bank shall be liable for the deficiency to an amount equal to the par value of the shares held by him, in addition to any amount not paid up on such shares."

In the event that no proceedings are taken under any act for winding up the bank, the directors, if suspension of payment continues for three months after the insolvency of the bank (as defined in the act), are required to make calls on the shareholders to the amount deemed by them necessary to pay the liabilities of the bank. In case of winding up, calls are governed by the terms of the Winding Up Act. These provisions, which were in force when the defendants became owners of shares in the Ontario Bank, were re-enacted in the Bank Act of 1906, in effect at the commencement of this action.

There was a "Winding Up Act" in force when the defendants became stockholders. It, too, was superseded by an act of 1906. The two acts are substantially the same, so far as the provisions affecting this action are concerned. They define insolvency, provide for application to the court by creditors for a winding up order, authorize the court to appoint a liquidator (or more than one), who shall take the property of the company, and have power, with the approval of the court, to bring or defend actions, to carry on the business, and do other acts so far as necessary to the beneficial winding up of the business. Provision is made for the settlement, by the court, of a list of contributories. Every shareholder, it is declared, shall be liable to contribute the amount unpaid on his shares, or on his liability to the company, or to its members or creditors under the act or charter of incorporation; "and the amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this act." Section 46 of the earlier act, and section 53 of the later, provide that:

> "The liability of any person to contribute to the assets of a company under this act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the respective times when calls are made, as hereinafter provided, for enforcing such liability."

The court is empowered, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company, to "make calls on and order payment thereof by all or any of the contributories * * * to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs * * * of winding up. * * *" The court is also empowered, after making a winding up order, to make an order of reference, referring and delegating its powers to an officer of the court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In addition to setting forth these provisions of the Canadian laws, the complaint alleges the corporate capacity of the plaintiff and of the Ontario Bank, and alleges that since March, 1898, the defendants have been the owners of 34 shares of the capital stock of said bank. On October 13, 1906, the Ontario Bank suspended payment, and, under the law of Canada, it became insolvent 90 days thereafter. On September 29, 1908, the high court of justice for the province of Ontario made its order declaring the Ontario Bank to be insolvent, and ordering that its business be wound up. On the same day said court appointed the plaintiff, the Royal Trust Company, liquidator of said bank, and delegated to George Kappele, official referee, "all such powers as are conferred upon the court by the Winding Up Act and as may be necessary for the winding up of the said bank." Thereafter a list of contributories was duly settled, the defendants appearing on said list as owners of 34 shares, and the amount of their liability being stated as $3,400. On November 1, 1910, the official referee made a call upon each of the contributories for 95 per cent. of the amount for which they were respectively settled upon the list, and such contributories were ordered to make payment to the plaintiff, as liquidator, on or before December 1, 1910. Notice of this order was served on defendants, but they declined to pay. In January, 1911, a second order, requiring defendants to pay to the plaintiff the sum of $3,230 (being 95 per cent. of the amount of their liability), together with $15 costs, was made, and a copy of this order was served on defendants. The amount remaining unpaid, this action was instituted to recover $3,245.

[1, 2] The demurrer specifies various grounds. One of these is that the cause of action is barred by the provisions of section 359 of the Code of Civil Procedure. Whatever may be the merit of other specifications, we think the demurrer was rightly sustained on this ground. The second amended complaint was filed on February 13, 1912. The record does not show the date of filing of the original complaint. The appellant states, in one of its briefs, that this pleading was filed on June 22, 1911. This may, for the purposes of the present discussion, be accepted as a correct statement of the date of the commencement of the action.

Since the action was brought in this state, it is, of course, governed by the limitation statutes of California. Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Miller v. Lane, 160 Cal. 90, 116 Pac. 58; Platt v. Wilmot, 193 U. S. 602, 24 Sup. Ct. 542, 48 L. Ed. 809.

The obligation which the complaint seeks to enforce is the liability of shareholders under the Bank Act of Canada, for an amount equal to the par value of their shares, over and above the unpaid balance due on the subscription for the shares. This is a "liability created by law," and an action to enforce it is accordingly subject to the limitation declared in section 359 of the Code of Civil Procedure. It has been settled by repeated decisions of this court that the section in question is applicable to actions brought to enforce the liability of stockholders, under the Constitution and statutes of California (Const. art. 12, § 3; Civ. Code, § 322) for a proportionate part of the indebtedness of the corporation. Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Bank of S. L. O. v. Pac. Coast S. S. Co., 103 Cal. 594, 37 Pac. 499; Wells v. Black, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162; Santa Rosa Nat. Bank v. Barnett, 125 Cal. 410, 58 Pac. 85; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939; Gardiner v. Royer, 167 Cal. 238, 139 Pac. 75. On the other hand, an action to compel the stockholder to respond to a call for the unpaid balance of his subscription is founded upon a contract, and, unless such contract is in writing, and executed within this state, is governed by subdivision 1 of section 332 of the Civil Code. Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420. See Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441. We can see no real distinction, so far as the question of limitation is concerned, between the liability of a stockholder in a California corporation for such proportion of the corporate debts as the amount of stock owned by him bears to the whole subscribed capital stock and the liability of a shareholder in a Canadian bank for "an amount equal to the par value of the shares held by him" (in addition to any amount not paid up). Each is a liability declared by statute, and each is a liability differing from and superimposed upon the contractual obligation to pay the par value of shares subscribed for. It is no doubt true that one who voluntarily subscribes for or purchases shares of stock does, in a sense, contract to become liable in accordance with the statute governing the incorporation. But so, too, is the proportionate liability of stockholders in California corporations on corporate contracts a contractual liability for certain purposes, as, for example, to authorize an attachment in an action against the stockholder. Kennedy v. Cal. Sav. Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163. The liability is nevertheless one created by law, within the meaning of the statute of limitations. In Platt v. Wilmot, 193 U. S.

602, 24 Sup. Ct. 542, 48 L. Ed. 809, the court had under consideration a New York statute (section 394, Code Civ. Proc.) applying a three-year limitation to "an action against a * * * stockholder of a moneyed corporation, * * * to enforce a liability created by the common law or by statute." By section 382 of the same Code, an action upon a contract obligation or liability was barred in six years. The action was brought in New York against a holder of stock in a Kansas corporation, organized under laws making stockholders individually liable for "an additional amount equal to the stock owned by each stockholder"—a provision, it will be observed, very similar to that found in the Canadian Bank Act. It was held that the action was governed by section 394. The court declared that, although the liability was of a contractual nature, in that the stockholder, in subscribing for or purchasing his stock, entered into a contract authorized by statute, yet the liability was created by statute within the meaning of section 394, "as it was by virtue of the statute that the contractual liability arose." The decision, which is directly in point, strongly reinforces the view that section 359 of our Code of Civil Procedure is applicable to the action before us. Miller v. Lane, 160 Cal. 90, 116 Pac. 58, does not conflict with this conclusion. Indeed, it is in harmony with what we have here said. The opinion in the Miller Case contains one or two expressions from which the appellant seeks to argue that where the claim sued upon constitutes "corporate assets," the action is not governed by section 359. But the case did not involve this question, and it cannot be said to have decided it. Whether section 359 or some other part of the statute of limitations applies to an action against a stockholder must, under the provisions of our Code, depend upon whether the liability is one "created by law," not upon whether it is "assets of the corporation."

[3] Taking it, then, that section 359 is the statutory provision applying to the case, there arises the further question, When did the statute begin to run. It must be taken as definitely settled in this state that, under the peculiar language of section 359, an action against a stockholder on a liability created by law (e. g., the proportionate liability of stockholders of California corporations) is barred at the expiration of three years from the time when the liability was created. Hunt v. Ward, supra; Gardiner v. Royer, supra, and cases cited. This is, of course, a marked exception to the general rule, which measures the period of limitation from the accrual of the cause of action.

[4] It seems entirely clear that, under the provisions of the Canadian statutes set forth in the complaint, the liability of stockholders to pay an amount equal to the par value of their shares was "created" at least as early as the insolvency of the corporation. Under the Bank Act, shareholders are declared subject to this liability "in the event of the property * * * of the bank being insufficient to pay its debts." The Winding Up Act, after setting forth the procedure in insolvency, declares the liability of shareholders to contribute as provided in the charter or act of incorporation, and the amount which the shareholder is liable to contribute (i. e., in this case, an amount equal to the par value of the shares) is "deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this act." Other provisions of the act lay down various methods of making calls on account of such liability. The language last quoted, however, indicates very clearly the intent of the lawmakers to distinguish between the time when the liability originates as an existing obligation and the time when it becomes payable. The liability is deemed *a debt due to the company*, although it is not *payable* until there has been a call pursuant to the terms of the law. Any possible doubt on this score is removed by the later section (46 of the prior and 53 of the subsequent act), to the effect that the liability to contribute, in the event of the business being wound up, "shall create a debt accruing due from such person at the time when his liability commenced, but payable at the respective times when calls are made. * * * " The liability came into being, then, or was created, before any calls were made. It "accrued due," in the language of the act, when the liability commenced. And the commencement of the liability must be taken to be the time when, under the act of incorporation (the bank act) such liability is declared to arise, i. e., in the event of the inability of the corporation to pay its debts. The bank suspended payment in October, 1906. Under the law, it became insolvent 90 days thereafter. The liability was created, at the latest, upon the beginning of the status of insolvency, and the three year period of limitation began to run then. It may be that no action could be brought in advance of a call, and that the action became barred before the occurrence of the event upon which the right to institute suit depended. But this result, anomalous as it seems, necessarily follows from the language of section 359, construed as that section has uniformly been construed by this court.

[5] The foregoing discussion takes no account of an allegation (added to the complaint by amendment) to the effect that the amount of the debts and assets of the Ontario Bank, and the sum which would have to be paid by shareholders, were not known to plaintiff until November 1, 1910, a date less than three years before the commencement of the action. The theory upon which plaintiff makes this averment is that the statute does not begin to run until the discovery by the plaintiff of the facts upon which his cause of action depends. Section 359, we think,

will not bear the construction thus sought to be put upon it. The actions therein referred to "must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." The fair reading of this section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture. In actions to enforce a "liability created by law," the period is three years from the creation of the liability. It is true that in Moore v. Boyd, 74 Cal. 171, 15 Pac. 670, the court assumed that the discovery of the facts started the period of limitation in an action on stockholders' liability. The point was not, however, material to the decision. In later cases, the court seems to have taken it for granted that the section required an action like the one before us to be begun "within three years after the liability was created." Hunt v. Ward, supra; Wells v. Black, supra; Gardiner v. Royer, supra. In none of the later decisions on the subject is there any suggestion that the discovery of the facts by the plaintiff has any bearing on the question of limitation. But, even if this view be wrong, the plaintiff has not pleaded a belated discovery of the "facts upon which the liability was created." The facts which it avers were not known until within three years had to do merely with the amount of the liability which it would be necessary to call. This may have affected the accrual of a cause of action, but it did not, as has been pointed out heretofore, touch the creation of the liability. The liability of the defendants as shareholders was created when the bank became insolvent. It is not alleged that the fact of insolvency was not known to plaintiff when it occurred.

Holding these views on the question of limitation, we find it unnecessary to consider any other ground specified in the demurrer.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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168 Cal. 640

In re SHIPP'S ESTATE. (L. A. 3755.)

(Supreme Court of California. Oct. 15, 1914.)

BASTARDS (§ 1*)—ISSUE OF INVALID MARRIAGE —"LEGITIMATE CHILD."

Under Civ. Code, § 1387, providing that the issue of all marriages null in law or dissolved by divorce are legitimate, the child of parents who celebrated a ceremonial marriage, though no license was procured, as required by Civ. Code, § 55, must be considered legitimate and entitled to inherit; the mother at least believing that the marriage was solemnized as required by law.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, First and Second Series, Legitimate Child.]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Louis Shipp, deceased. From decree of distribution in favor of Harry Shipp and Donald Shipp, a minor, the former appeals. Affirmed.

Shepard & Alm and Arvid G. Alm, all of Los Angeles, for appellant. G. F. McCulloch, of Los Angeles, for respondent.

SLOSS, J. The court below entered its decree distributing the estate of Louis Shipp in equal shares to Harry Shipp and to Donald Shipp, a minor. Harry Shipp appeals.

The only question is whether Donald Shipp was entitled to share in the estate. Harry Shipp, the appellant, was the son of Louis Shipp by a marriage which had been dissolved by divorce prior to 1909. He was, beyond any question, an heir of the decedent. Donald Shipp was born March 1, 1911, the offspring of a union between Louis Shipp and Ora McCoy. There was evidence which amply warranted the trial court in believing that in January, 1909, a ceremony of marriage between Louis Shipp and Ora McCoy, thereafter known as Ora Shipp, had been solemnized by a priest; that the solemnization was regular in every respect save for the want of a license; that Ora McCoy believed that a license had been duly issued; and that she entered into marital relations with Shipp in good faith, believing that she was his wife. The child was recognized by Louis Shipp as his son. Counsel for Donald Shipp stipulated at the hearing that there was no record of any license in the county of Los Angeles, where the ceremony was performed, nor any record of any marriage, and admitted that "the purported marriage was a void or null marriage." Perhaps, in thus admitting the invalidity of the marriage, he conceded too much. No doubt solemnization is, since the amendment of 1895 to section 55 of the Civil Code, essential to a valid marriage in this state. Whether, however, the failure to secure a license will nullify a marriage otherwise legally solemnized is a question that may be debatable (Bish. Mar., Div. & Sep. § 426), and that has been left open by this court. Norman v. Norman, 121 Cal. 621, 629, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. Rep. 74. But granting, as has been said, the invalidity of the marriage, the respondent contends that the child is entitled to inherit as legitimate by virtue of the last clause of section 1387 of the Civil Code, providing that "the issue of all marriages null in law, or dissolved by divorce, are legitimate." The appellant seeks to give to this clause a very limited interpretation; his contention being that the term "marriages null in law," as here used, includes only the marriages which are subject to an action for annulment on one of the grounds specified in section 82 of the Civil Code. We think the provision should not be construed so narrowly. The statute was passed with the generous and kindly purpose of relieving children, to some extent, from the harsh consequences of illegitimacy—a status for which the children affected are in no degree morally responsible. The section should be liberally construed. Blythe v. Ayres, 96 Cal. 532, 582, 31 Pac. 915, 19 L. R. A. 40.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There may be some question whether the enactment applies to the offspring of marriages which are declared by the Code to be "illegal and void," or "void from the beginning," such as incestuous marriages (section 59), marriages of whites with negroes (section 60), or (under certain conditions) marriages between persons one of whom is already married (section 61). This question was very fully argued in Estate of Baldwin, but the court, in deciding the case (162 Cal. 471, 123 Pac. 267), did not find it necessary to express any opinion on the point. See, however, Graham v. Bennet, 2 Cal. 503. Be this as it may, we are satisfied that section 1387 should be held to apply to an attempted marriage, contracted in good faith, so far, at least, as one of the parties is concerned, where there is a concurrence of the elements of marriage, as defined in section 55 of the Civil Code; that is to say, where there has been the consent of parties capable of making a contract of marriage, followed by a solemnization authorized by the Code. Such is the situation here. The parties were capable of entering into the marriage relation. They consented to do so, and to their consent was added a solemnization by a person authorized. If such marriage was vitiated by the want of a license, it was nevertheless within the beneficent scope of section 1387, and the child resulting from it should be saved the stigma and loss resulting from bastardy.

The respondent makes the further claim that the child was legitimated by adoption, in accordance with the provisions of section 230 of the Civil Code. Our conclusion on the question already discussed makes it unnecessary to consider the soundness of this position.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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168 Cal. 651

HYNES v. M. J. & M. M. CONSOLIDATED et al. (L. A. 3273.)

(Supreme Court of California. Oct. 15, 1914.)

1. Limitation of Actions (§ 39*)—Suit to Vacate Judgment—Accrual of Right of Action.

Where judgment was rendered in favor of the state canceling a certificate of purchase of school land December 27, 1892, after which the state issued to a subsequent purchaser a certificate of purchase for the same land, a right of action then accrued in favor of those holding under the original certificate to sue to set aside the previous judgment, and, such action not having been instituted until July, 1911, it was barred by the four-year statute of limitations (Code Civ. Proc. § 343), regardless of the fact that the original judgment was in favor of the state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 172, 190–211; Dec. Dig. § 39.*]

2. Judgment (§ 456*)—Vacation—Laches.

The state having issued a certificate for the purchase of certain school lands to D. on payment of 20 per cent. of the price March 20, 1889, and he having made no further payments, a judgment was recovered canceling his certificate December 27, 1892. The state again sold the land to B. July 27, 1899, and no claim was made to the land by those claiming under D. until the year 1900, after those claiming under B. had expended large sums of money and discovered oil on the land. *Held*, that D.'s successors in interest were then barred by laches from maintaining a suit to set aside the judgment canceling the original certificate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863–866; Dec. Dig. § 456.*]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by M. J. Hynes, administrator of the estate of Charles H. Gilman, deceased, against M. J. & M. M. Consolidated. From a judgment for defendants and against cross-complainants J. B. Treadwell and Fred W. Lake, plaintiff appeals. Affirmed.

Cullinan & Hickey, of San Francisco, James F. Peck, of Oakland, and Walter Shelton, Chas. C. Boynton, and Frank M. Hultman, all of San Francisco, for appellant. Frank H. Short, of Fresno, Geo. E. Whitaker, of Bakersfield, Everts & Ewing, of Fresno, J. W. McKinley and Hunsaker & Britt, all of Los Angeles, and Thomas Scott, of Bakersfield, for respondents.

SHAW, J. The object of the action of the plaintiff was to declare that certain of the defendants were trustees holding, as such, the title to section 36, township 12 north, range 24 west, in Kern county, for the use and benefit of the heirs of Charles H. Gilman, deceased, for a conveyance thereof by or for said defendants to said heirs, and, further, that a certain judgment rendered against one S. Davis, under whom said heirs claim, in favor of the people of the state of California, on December 27, 1892, be set aside. The judgment referred to is the same judgment that was under consideration by this court in People v. Davis, 143 Cal. 673, 77 Pac. 651, Lake v. Bonynge, 161 Cal. 120, 118 Pac. 535, and Lake v. Superior Court, 165 Cal. 182, 131 Pac. 371. J. B. Treadwell and Fred W. Lake were made defendants, and it was said that they had or claimed some interest in the premises. They appeared and filed a cross-complaint against the other defendants, alleging that they were interested with said Gilman in his lifetime in said section of land, and asking practically the same relief against the other defendants as that asked by the plaintiff Hynes on behalf of the Gilman heirs. To this complaint and cross-complaint the other defendants filed demurrers. The court sustained these demurrers without leave to amend, and thereupon entered judgment against the plaintiff on his complaint and against Treadwell and Lake on their cross-complaint, declaring that they should take nothing by their respective actions. From this judgment the plaintiff and said cross-complainants appeal.

The land above described was one of the school sections belonging to the state. The aforesaid S. Davis applied to purchase the same from the state, and on March 20, 1889, he having paid the sum of $160 and interest to that date on the purchase price, leaving $640 of the principal unpaid, the register of the state land office issued to him a certificate of purchase therefor. The effect of the aforesaid judgment of December 27, 1892, was to declare that said certificate was null and void and to terminate all right, interest, and estate of Davis in and to the land.

In People v. Davis, supra, it was decided by this court that the aforesaid judgment was not void on the face of the record, and that it could not be vacated or annulled by the court on motion in the case on the ground that it was a judgment which on its face did not show jurisdiction, but that the only remedy of any party deeming himself aggrieved thereby was by a separate suit in equity to set it aside. This view of that judgment has since been affirmed by this court in Lake v. Bonynge, supra, and Lake v. Superior Court, supra. The present action by the plaintiff and the cross-complainants purports to be a suit in equity begun in pursuance of the declaration made in People v. Davis, supra.

It appears from the allegations that on April 1, 1890, Davis transferred his interest in the land to said Charles H. Gilman; that Gilman, on December 7, 1900, transferred a half interest therein to Lake and a one-fourth interest to one H. H. Snow, and that Snow, on April 14, 1910, transferred his said one-fourth interest to J. B. Treadwell, one of the cross-complainants herein. Mary A. Bonynge applied to purchase the land from the state on July 22, 1899, and on January 23, 1900, having paid the portion of the purchase money necessary for that purpose, she obtained from the state register a certificate of purchase therefor. Her right to purchase the land was contested. The case was certified to the court for determination, and the court decided and decreed that she was entitled to purchase. This judgment was rendered on May 19, 1908, and the same was affirmed on appeal by this court on February 7, 1910. See Moran v. Bonynge, 157 Cal. 295, 107 Pac. 312. The defendants other than Treadwell and Lake and one Carpenter, who claims as assignee of one of the heirs of Gilman, but who refused to join as plaintiff, all claim under the Bonynge purchase.

[1] It is assigned as cause of demurrer by the respondents that neither the complaint nor the cross-complaint state facts sufficient to constitute a cause of action, and that the actions stated therein are each barred by the statute of limitations and by laches. We think the point that the actions are barred by the statute of limitations is well taken. The judgment sought to be set aside, as we have said, was rendered on December 27, 1892. This action was begun by the filing of the complaint on July 21, 1911. The limitation provided by the Code for an action in equity to vacate a judgment is four years, at the utmost. Code Civ. Proc. § 343. The appellants claim that this statute does not apply in the present case because the judgment was in favor of the state and there is no statute providing that such actions may be maintained against the state. Conceding, for the purposes of the case that this is true, so far as the state itself is concerned, it does not follow that the actions are not barred. These actions are not against the state, but against the respondents claiming under the certificate of purchase issued by the state to Bonynge on July 22, 1899. The statute provides when an application to purchase school land is approved and the first payment of the purchase money is made, such certificate of purchase shall be issued to the purchaser, "which certificate is prima facie evidence of title." Pol. Code, § 3514. Ever since the 22d of July, 1899, therefore, the said Mary A. Bonynge, and those claiming under her, have been holding under a certificate from the state purporting to transfer to them all the right, title, and interest of the state in said land. After that date there was no legal obstacle to an action against them to declare that the previous judgment in People v. Davis, purporting to annul the certificate of 1889, on which the appellants relied, was invalid because of the lack of due service of process. From and after the date of the Bonynge certificate, if not before, such action could have been begun against these parties. The period of limitation for such action, fixed by section 343, began to run at that time, and it expired eight years before this action was begun.

[2] The equitable rule that stale demands will not be recognized and enforced in equity, commonly called the doctrine of laches, is also a sufficient bar in this case. Davis paid 20 per cent. of the purchase price and obtained his certificate of purchase on March 20, 1889. This certificate recited that further payments of 7 per cent. interest in advance on the balance of the purchase were due annually thereafter. No such payment ever was made by Davis or any other person. No attention whatever did he or those claiming under him pay to the completion of that purchase until, in the year 1900, 11 years

having passed, the persons holding under the Bonynge purchase discovered oil in the land, and it thereby became extremely valuable. It is not asserted that either Davis or his successors ever took possession of or occupied the land, or made any improvements thereon. After this discovery of oil had demonstrated the value of the land, the successors of Davis attempted to complete his purchase and tendered to the county treasurer the amount that would then have been due thereon. It is quite clear that before that discovery they did not intend to complete the purchase and did not want the land. It is not alleged in terms, but it is obvious from the facts appearing in the record, that the Bonynge parties expended large sums of money in making that discovery. They have since that time extracted large quantities of oil therefrom, and a number of transfers of the property have been made, while the appellants made no direct attack upon said judgment. They do not plead ignorance, but on the contrary, they show that in the year 1900 they then became aware of all the facts they now aver. No sufficient excuse for the delay is alleged.

With respect to Lake and Treadwell, it may be further observed that they are concluded by the judgment in the case of Lake v. Bonynge, above cited. The judgment is recited in the complaint and also in the cross-complaint. It was held in Lake v. Superior Court, supra, that the judgment in Lake v. Bonynge was conclusive upon the parties thereto and to those claiming under them by subsequent purchases, and that it forever determined that the original judgment in People v. Davis was valid as against them; also that Treadwell, as a successor of Snow, was bound thereby.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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25 Cal. App. 474

INTERNATIONAL TEXT-BOOK CO. v. HOLMES. (Civ. 1370.)

(District Court of Appeal, First District, California. Sept. 19, 1914. Rehearing Denied by Supreme Court Nov. 18, 1914.)

1. Appeal and Error (§ 1011*)—Finding — Conclusiveness.

A finding upon evidence in substantial conflict must stand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Replevin (§ 93*)—Finding—Judgment.

In an action for claim and delivery for the possession or value of certain books, based on the theory of defendant's conversion, a finding that defendant was not guilty of the conversion was a finding upon the paramount issue, which in itself disposed of the case upon its merits and supported an ultimate judgment for defendant.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 360–368, 371–375; Dec. Dig. § 93.*]

3. Replevin (§ 93*)—Finding—Effect.

In view of a finding in claim and delivery that defendant was not guilty of a conversion, the finding as to value and the conclusion of law that plaintiff was without legal capacity to sue in the state, because it had not complied with Civ. Code, §§ 405, 408, 410, requiring a foreign corporation to file with the secretary of a state a certified copy of its articles and a designation of some person to receive process, were immaterial and would be ignored.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 360–368, 371–375; Dec. Dig. § 93.*]

Appeal from Superior Court, City and County of San Francisco; J. O. Moncur, Judge.

Action by International Text-Book Company against Harold C. Holmes. Judgment for defendant, and plaintiff appeals. Affirmed.

Lew B. Douglass and Alexander & O'Donnell, all of San Francisco, for appellant. H. U. Brandenstein, of San Francisco, for respondent.

LENNON, P. J. The plaintiff in this action is a foreign corporation doing business in this state. The business of the plaintiff is that of teaching students by the correspondence method. The appeal was prepared and perfected under the new or alternative method from a judgment rendered in favor of the defendant in an action of claim and delivery wherein the plaintiff sought to recover the possession or the value of a certain lot of books. The books in controversy were delivered to various students of the plaintiff in the state of California, under the terms and conditions of a written contract. Subsequently the books were found in the possession of the defendant. The plaintiff's complaint proceeded upon the theory that the possession of the books in question by the students was the plaintiff's possession, and alleged that the defendant wrongfully and unlawfully took the books from the possession of the plaintiff and refused to return the same upon demand. The answer of the defendant denied the tort and pleaded in abatement the plaintiff's noncompliance with the provisions of the Civil Code which require that before a foreign corporation may maintain a suit or action in any of the courts of this state, it must file with the secretary of state a certified copy of its articles of incorporation and a designation of a person upon whom process may be served. Civ. Code, §§ 405, 408, 410.

The judgment roll is accompanied by a special and limited transcription of the evidence taken upon the trial, that is to say, the transcript purports to show only so much of the evidence received upon the trial as relates to and bears upon two findings of the court below, namely, the finding sustaining the defendant's plea in abatement and the finding declaring that the property in suit had no value beyond its market value. But two points are made in support of the appeal, and they are: (1) That the finding of value is contrary to the evidence; and (2) that the lower court erred in its conclusion of law that the plaintiff had no legal capacity to sue in this state because of the undisputed fact that it had failed to comply with the provisions of section 405 et seq. of the Civil Code.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The condition of the record before us renders the two points stated unavailing to the plaintiff. In the first place, it is doubtful if the record shows any evidence to the effect that the books in question had a special value. In any event, the evidence upon that phase of the case is in substantial conflict and for this reason, if for no other, the finding must stand.

[2, 3] But, aside from these considerations the record shows a further finding to the effect that the defendant was not guilty of the conversion charged. The latter finding is not assailed. Obviously the latter finding presents the paramount issue in the case; that is to say, it is a finding upon an issue which in itself disposes of the case upon its merits, and, having been made in favor of the defendant, the further finding as to the value of the property in suit was immaterial and unnecessary. Rosewarn v. Washington Gold Mining Co., 84 Cal. 219, 23 Pac. 1035. The paramount finding in the case is sufficient to support the ultimate judgment rendered in favor of the defendant; and therefore the conclusion of law that the plaintiff had not the right to maintain the action may be ignored. Spencer v. Duncan, 107 Cal. 423, 40 Pac. 549; Lange v. Waters, 156 Cal. 142, 103 Pac. 889.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 484

DAVIDSON v. GRAHAM. (Civ. 1262.)

(District Court of Appeal, Third District, California. Sept. 21, 1914. Rehearing Denied by Supreme Court Nov. 20, 1914.)

1. Mandamus (§ 163*)—Pleading—Demurrer—Admission.

On demurrer to a petition for mandamus, its averments must be taken as true.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 341–343; Dec. Dig. § 163.*]

2. Judgment (§ 106*)—Default Judgment—"Answer."

Under Code Civ. Proc. § 585, providing that in an action on contract for the recovery of money or damages only, if no answer has been filed within the time specified in the summons or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the defendant's default, and immediately enter judgment for the amount demanded, a general demurrer, and a demurrer also to the jurisdiction of the court filed by defendant in an action on a bond, constituted an "answer," saving defendant from a default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180–197; Dec. Dig. § 106.*

For other definitions, see Words and Phrases, First and Second Series, Answer.]

3. Appearance (§ 8*)—Demurrer—Statute.

Filing by defendants of demurrers constitutes an appearance within Code Civ. Proc. § 1014, providing that a defendant appears in an action when he answers, demurs, or gives plaintiff written notice of his appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23–41; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, First and Second Series, Appearance.]

4. Judgment (§ 107*)—Demurrer—Disposition.

It is irregular to enter a judgment against a defendant, in whose behalf a demurrer has been filed, without disposing of the demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198–200; Dec. Dig. § 107.*]

5. Mandamus (§ 10*)—Entry of Default—Stipulation.

The clerk of the superior court having a stipulation that no default should be taken against the defendant waiving his demurrer, without express limit as to time, in the filing of which plaintiff treated the defendant as having appeared, and there being a doubt as to the plaintiff's right to such entry, mandamus would not lie to compel the entry.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

6. Mandamus (§ 6*) — Relief — Clerk of Court.

Where petitioner was refused an order putting defendant in default on the same facts as were before the court on mandamus to compel the entry of such default, the court will not command the clerk to enter the default, since it will not compel parties to perform acts in conflict with an order or writ of another court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 36; Dec. Dig. § 6.*]

7. Mandamus (§ 10*) — Relief — Doubtful Right.

It is the policy of the law that every case be tried upon its merits, and where it is sought to prevent such trial by entry of a default, upon a showing which presents no hardship to the party asking the relief, and the case is one where the right to the relief is doubtful, the parties should be remitted to a trial upon the merits and mandamus to compel the entry of the default denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

Mandamus by Mattie E. Davidson against Eugene D. Graham. Peremptory writ denied.

See, also, 141 Pac. 834.

Webster, Webster & Blewett, of Stockton, for petitioner. A. H. Carpenter and Walter F. Lynch, both of Stockton, for respondent.

CHIPMAN, P. J. This is an application for a writ of mandate commanding defendant to enter the default of A. T. Karry in a certain action wherein Mattie E. Davidson is plaintiff and Samuel Hinckley and A. T. Karry are defendants, now pending in the superior court of San Joaquin county.

It appears from the amended petition that the action above referred to was commenced to recover judgment upon a bond, in which Hinckley and Karry were sureties, to stay execution in a certain action entitled Emanuel Gjurich, Plaintiff, v. Fanny Fieg, Defendant, pending in the superior court of San Joaquin county. Petitioner is assignee of the assignee of plaintiff in said action last referred to. Summons in the present action was duly served on Karry February 13, 1913, and on July 28, 1913, he filed therein a general demurrer, and a demurrer also to the jurisdiction of the court. It further appears from the petition that on August 18, 1913—

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"there was entered into and filed in said action a stipulation in the words and figures as follows, to wit:

"'[Title of Court and Cause.] It is hereby stipulated and agreed that no default shall be taken against the defendant A. T. Karry, he waiving his demurrer, and that the said defendant A. T. Karry shall have to and inclusive of September 15, 1913, in which to file and serve his answer on the merits. Dated this 18th day of August, 1913.

"'Webster, Webster & Blewett,
"'Attorneys for Plaintiff.

"'I agree to the above stipulation:

"'A. H. Carpenter,
"'Attorney for Defendant A. T. Karry,
"'By Walter F. Lynch, Clerk.'"

The demurrer above referred to was similarly signed. It is alleged that Mr. Lynch was authorized by Mr. Carpenter to sign both the demurrer and stipulation in his name, and that both were signed with the knowledge and consent of Karry. We understand that no question is now raised as to Lynch's authority to act in the matter.

It is alleged in the petition that:

"It was distinctly agreed and understood that, by reason of the plaintiff's giving and granting to said defendant A. T. Karry to and inclusive of September 15, 1913, in which to file and serve his answer on the merits, the said demurrer should be and was waived and withdrawn, and that no default should be taken against the defendant Karry if his answer on the merits should be filed on or before said September 15, 1913, but, if said answer should not be filed on or before September 15, 1913, then such default might be taken."

It is then alleged that several oral stipulations were entered into extending the time in which Karry might answer, "but no oral stipulation extended the time to later than the 30th day of November, 1913"; that on December 1, 1913, plaintiff filed with the clerk of the court a demand as follows:

"In this action the defendant A. T. Karry having been regularly served with process, and having failed to appear and demur or answer the plaintiff's complaint within the time prescribed by law, and stipulation, and the legal time for demurring or answering having expired, application is hereby made by the plaintiff to the clerk of said court for the entry of a default against said defendant A. T. Karry. Dated December 4, 1913.

"Webster, Webster & Blewett,
"Attorneys for Plaintiff."

It is alleged that all legal fees were at the same time tendered said clerk, but that he "refused to enter said default." It further appears that on December 16, 1913, plaintiff served upon defendant's attorney, Carpenter, and filed a notice that he would on December 23, 1913, move the court "for its order that plaintiff take a judgment against the defendant A. T. Karry on the grounds that said defendant A. T. Karry has not answered to the complaint of plaintiff herein within the time allowed by law. Said motion is based and will be heard upon the records in this action including this notice of motion." Thereafter, and on the same day, to wit, December 16, 1913, defendant Karry, by his attorney, A. H. Carpenter, served and filed a general demurrer to the complaint in the action, and on January 19, 1914, the said motion having come on to be heard, the court made an order "denying plaintiff's motion for judgment herein without prejudice, to which ruling counsel for plaintiff duly excepts."

Petitioner claims that, when the demand was made upon the clerk to enter Karry's default, it became the duty of the clerk, in the exercise of a mere ministerial act, to comply with the request; citing section 585, Code of Civil Procedure:

"Judgment may be had if the defendant fails to answer the complaint as follows: (1) In an action arising upon contract for the recovery of money damages only, if no answer has been filed with the clerk of the court, within the time specified in the summons or such other time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant."

When the matter was here on the original petition, it did not appear that said stipulation was executed by defendant Karry, nor that it was executed by Karry's attorney, but by the attorney's clerk whose authority to sign the name of the attorney was not shown. Nor did it appear that there was any oral agreement or understanding not expressed in the stipulation.

[1] The amended petition, however, alleges that the stipulation was executed with the consent of Karry, and that Mr. Lynch was authorized to execute it for Attorney Carpenter, and on demurrer to the petition we must assume this to be the fact.

[2, 3] The demurrer filed by Karry's attorney was an appearance and was an answer, within the meaning of the provision of the Code, above quoted. Section 1014, Code Civ. Proc.

[4] It is irregular to enter a judgment against a defendant, in whose behalf a demurrer has been filed, without disposing of the demurrer, and a judgment so entered will be reversed on appeal. Hestres v. Clements, 21 Cal. 425.

It is contended, however, that the effect of the stipulation waiving the demurrer was to withdraw it from the case, leaving defendant Karry with no other right than to answer within the time given him by the stipulation. In the opinion written by Mr. Justice Burnett, some doubt was expressed as to whether a demurrer could be waived, as it presents an issue of law which must be tried by the court (section 591, Code Civ. Proc.); and, there being no statutory provision for waiving a demurrer, to effectually dispose of it some order of the court might probably be required. But it was also said that, conceding the effect of the stipulation to be as claimed—

"it would at least appear doubtful whether, according to its terms, the clerk should enter the

> default of defendant Karry. Therein it is provided that 'no default shall be taken against the defendant A. T. Karry.' As to this covenant, there is certainly no express limit as to time. Probably the parties signing the paper intended to provide that no default would be taken prior to September 15, 1913, but, if so, it should have been more clearly expressed, and it is not an unreasonable construction that, in view of the waiver of the demurrer, no default was to be taken, although there was no express agreement to extend the time to answer beyond September, 15, 1913."

We venture to suggest further that it is very doubtful whether the waiver of the demurrer was intended to effect a withdrawal of defendant's appearance, or whether it was anything more than an agreement not to urge it. It is quite certain that plaintiff treated defendant as having appeared by stipulating with him and filing the stipulation. And he says in his petition that he granted several other extensions of time, orally, in which to answer.

[5] However this may be, when the demand was made upon the clerk, he had before him, as authority for entering defendant's default, nothing but this stipulation, indefinite as to its meaning and accompanied by no evidence that it was signed either by the authority of the defendant or his attorney. It is true that the amended petition shows that such authority existed, and that it was agreed that, unless an answer was filed by September 15, 1913, a default might be taken, but there is no averment or evidence that the clerk knew such to be the fact. He had a right to act, and the correctness of his act must be judged upon what was before him as a basis for the demand.

> "The right which it is sought to protect must be clearly established, and the writ is never granted in doubtful cases. The person seeking the relief must show a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced." High's Ex. Legal Rem. § 9.

We have seen that there was here both a doubt as to the right of the petitioner to the relief sought and the duty of the respondent to grant it.

[6] Furthermore, inasmuch as petitioner sought an order of the trial court for the same relief in the same action and on the same facts as were before the clerk, and was refused, we should hesitate to command the clerk to do the thing which, on petitioner's application, the court had in effect ordered should not be done.

It has been held that a court will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of another court. Id., § 23. The same rule should apply where a clerk is asked to perform an act when it would put him in conflict with a valid order made by the same court in the same action and upon the same matter.

[7] It is the policy of the law that every case should be tried upon its merits, and where it is sought to prevent this upon a showing which presents no circumstances of hardship to the party asking the relief, and the case is one where the right to the relief is so doubtful as it is in this case, we think the parties should be remitted to a trial upon the merits.

The peremptory writ is denied.

We concur: HART, J.; BURNETT, J.

25 Cal. App. 469

PUTERBAUGH v. McCRAY. (Civ. 1486.)

(District Court of Appeal, Second District, California. Sept. 17, 1914. Rehearing Denied by Supreme Court Nov. 16, 1914.)

1. ASSIGNMENTS (§ 34*)—ORAL ASSIGNMENT.

One having a right to money collected on account of the sale of real property may assign it orally as well as in writing.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 67–71; Dec. Dig. § 34.*]

2. ASSIGNMENTS (§ 50*)—EQUITABLE ASSIGNMENT.

The request of a husband to his debtor to pay money due him to his wife was an equitable assignment of the debt; no express words being necessary if from the entire transaction it clearly appears that it is the intention of the parties to pass title.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105; Dec. Dig. § 50.*]

3. ASSIGNMENTS (§ 121*) — EQUITABLE ASSIGNMENT—RIGHT OF ACTION.

Where an equitable assignment is shown, the real party in interest, and who should prosecute any action, is the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200–205; Dec. Dig. § 121.*]

4. MONEY RECEIVED (§ 17*)—ACTIONS—SUFFICIENCY OF COMPLAINT.

Where one entitled to money on account of the sale of real property made an equitable assignment of it to his wife prior to the time defendant received it, of which assignment he had notice, he received the part assigned for the use of the assignee; and in her action for money had and received it was not necessary that the complaint set forth facts as to the assignment.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 54–61, 64–68; Dec. Dig. § 17.*]

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Amy C. Puterbaugh against F. P. McCray. Judgment for plaintiff, and defendant appeals. Affirmed.

Houghton & Houghton, of San Francisco, for appellant. J. C. Hizar and Johnson W. Puterbaugh, both of San Diego, for respondent.

JAMES, J. Action in form by common count for money had and received for the benefit of respondent. The amount involved was the sum of $1,000. Plaintiff had judgment, from which the defendant appealed and presents the judgment roll and a bill of exceptions.

The testimony introduced on behalf of the plaintiff (and there was none submitted in support of appellant's answer) showed that defendant held an equal interest in certain real property in the county of San Diego with the husband of plaintiff; that, desiring to dispose of the same, a purchaser was found by the owners, who agreed to pay therefor the sum of $7,000; an escrow agreement was prepared and left with a title company at San Diego, together with a deed of the property signed by defendant and plaintiff's husband. The sum of $4,000 was paid shortly after the making of the escrow and a few months later the balance of $3,000 was received by the defendant who, throughout the transaction with the title company, was authorized to collect the proceeds of the sale on behalf of his co-owner as well as himself. At the time the escrow transaction was closed the husband of plaintiff instructed defendant to pay over the share of the proceeds which were received for the former, to the plaintiff, his wife, and pursuant to this agreement $2,500 of the first $4,000 received was paid over to the plaintiff. Defendant had agreed that in view of the fact that plaintiff and her husband were in need of money, he would pay over the amount mentioned, which was in excess of one-half of the sum first received, and that out of the final payment of $3,000 he would retain $2,000 and pay over $1,000, which would equalize the amounts to be received by both interests. After defendant had been paid the sum of $3,000 he refused to turn over any part of the same to the plaintiff, and wrote a letter to plaintiff's husband, stating that he thought the circumstances warranted him in holding the amount as a sinking fund, and referred to some promise made for the taking of legal action against third parties, which matter was not shown by any evidence to constitute any excuse for his failure to pay over the $1,000 which he had received in his capacity as a trustee. There was some slight testimony as to defendant having paid a claim made against plaintiff's husband by one Whitney, but no authority so to do was shown to have been vested in him. His entire defense as made upon this appeal hangs upon the contention that the complaint did not set forth that any assignment had been made by plaintiff's husband to the plaintiff of the right to receive moneys collected, and that therefore, as defendant was entitled to have the action prosecuted in the name of the real party at interest, the judgment entered against him was unauthorized.

[1, 2] Presumptively, of course, one-half of the money collected on account of the sale of the real property belonged to plaintiff's husband. His right to that money was the subject of an assignment, and there can be no doubt but that the assignment could be expressed orally as well as in writing.

The request of one party to his debtor that the latter shall pay money due the former to a third party has often been held to constitute an equitable assignment of the debt. Brady v. Ranch Mining Co., 7 Cal. App. 182, 94 Pac. 85; Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462.

In order to constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title. McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69.

[3] And where such equitable assignment is shown, the real party in interest, and who should prosecute the action, is the assignee. Wiggins v. McDonald, 18 Cal. 126.

[4] The direction by the plaintiff's husband to the defendant, and which we think was sufficient under the circumstances of the case to constitute an equitable assignment of the moneys to be collected, was given prior to the time that the defendant received the money, so that, the assignment having become complete, the defendant, when the money was paid to him, received that part of it for which he was liable to account, to and for the use and benefit of the plaintiff here, as alleged in the complaint. Under such circumstances there is no good reason why the complaint should have set forth the facts concerning the assignment. The defendant not only had notice prior to the receipt of the moneys that were to be paid over to the plaintiff, but he actually acted upon that direction and paid the first installment of $2,500 to her. No error is shown which requires that the judgment as entered be disturbed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

25 Cal. App. 466

PEOPLE v. GIBBS. (Cr. 504.)

(District Court of Appeal, First District, California. Sept. 16, 1914.)

1. CRIMINAL LAW (§ 93*)—NUISANCE—PROSECUTION—JURISDICTION—MISDEMEANOR.

Under Pen. Code, § 1425, giving police and justices' courts exclusive jurisdiction of misdemeanors punishable by a fine not over $500 or by imprisonment not over six months, section 19, declaring that, unless expressly provided to the contrary, every misdemeanor shall be punishable by a fine of not over $500 or imprisonment for not over six months, the violation of section 373a, declaring the establishment or keeping within any city of a pesthouse, hospital, or place for those afflicted with contagious diseases a misdemeanor, without prescribing the penalty therefor, was a misdemeanor triable only in the police or justices' courts, and not within the jurisdiction of the superior court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129, 137–166; Dec. Dig. § 93.*]

2. INDICTMENT AND INFORMATION (§ 3*)—INDICTABLE MISDEMEANOR — MAINTAINING PUBLIC NUISANCE—"CIVIL CODE."

Such offense could not be held an indictable misdemeanor within the jurisdiction of the superior court by reading Pen. Code, § 373a, with section 377, relating to registration of deaths and burials, subdivision 5 of which declares every willful violation of any public health law a misdemeanor punishable, unless a different punishment is prescribed, by imprisonment not exceeding one year, or by fine not exceeding $1,000, since section 377 deals with but a single subject, and the violation referred to in subdivision 5 is controlled by the introductory paragraph to the entire section; and the fact that Civ. Code, § 3491, provides that a public nuisance may be remedied either by indictment or information does not confer jurisdiction upon the superior court, since the "Civil Code" is but a statement of the substantive law, and the section does not prescribe procedure by which the criminal remedy against a public nuisance, not amounting to an indictable misdemeanor, may be enforced, as appears from section 3492, declaring the remedy by indictment or information to be regulated by the Penal Code.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9–23; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, Civil Code.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

James Gibbs was charged by information with maintaining a public nuisance, and from an order sustaining a demurrer to the information, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and C. M. Fickert, Dist. Atty., and Louis Ferrari, Asst. Dist. Atty., both of San Francisco, for the People. G. Gunzendorfer, of San Francisco, for respondent.

LENNON, P. J. The defendant in this case, in an information filed in the superior court of the city and county of San Francisco, was charged with maintaining a public nuisance in violation of the provisions of section 373a of the Penal Code.

[1] The defendant demurred to the information upon the ground that the offense charged was a misdemeanor which the superior court did not have original jurisdiction to hear and determine. The demurrer was allowed, upon the ground stated, and the people have appealed. The demurrer was well taken and properly allowed. The police and justices' courts have exclusive jurisdiction over all misdemeanors punishable by a fine not to exceed $500 or by imprisonment not to exceed six months; and, unless expressly provided to the contrary, every offense declared to be a misdemeanor is punishable by a fine not to exceed $500 or by imprisonment not to exceed six months. Pen. Code, §§ 19, 1425.

Section 373a of the Penal Code, under which the defendant was informed against, expressly declares the offense defined therein to be a misdemeanor, but does not prescribe the penalty therefor. It follows necessarily that the offense charged against the defendant falls within the category of misdemeanors which are triable only in the police or justices' courts.

[2] The information in the present case cannot be sustained upon the theory that it charges an indictable misdemeanor. The contention of the people in this behalf is based upon the assumption that section 373a of the Penal Code, under which the information was drawn, may be rightfully read and construed in conjunction with the provisions of section 377 of the Penal Code. This cannot be done. The latter section undoubtedly deals only with violations of health laws relating to registrations of deaths and the disposition of human remains. Clearly the provisions of that section have no express or implied relation to the offense defined by section 373a. Section 377 was intended to penalize only the willful omission by any person charged with a duty relating to the registration of deaths to do certain things concerning such registration and the burial of the dead. True, subdivision 5 of that section in general terms declares that the willful violation of any of the laws of this state relating to the preservation of the public health constitutes a misdemeanor which is, "unless a different punishment * * * is prescribed, * * *, punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars"; but subdivision 5 of the section under consideration cannot be construed as a statute separate and apart from that which appears before in the section itself. The Code section in question deals with but a single subject, and therefore must be construed in its entirety in order to arrive at a correct conclusion concerning its intent and purpose. When so construed, it is manifest that the violation generally referred to in subdivision 5 relates to, is covered by, and must be controlled by the provisions of the introductory paragraph to the entire section. So construed, it is evident that subdivision 5 must be understood as applying only to those persons who are charged by law with a duty relating to the registration of deaths, etc. Ex parte Keeney, 84 Cal. 304, 310, 24 Pac. 34.

The fact that section 3491 of the Civil Code provides, among other things, that a public nuisance may be remedied either by an indictment or an information does not avail to confer upon the superior court jurisdiction to hear and determine the particular misdemeanor charged against the defendant. The Civil Code generally, and more particularly with reference to the specific subject in mind, is but a statement of the substantive law. While section 3491 of that Code very properly designates either an indictment or an information as one of the remedies which may be invoked against the maintenance of a public nuisance, nevertheless that section does not undertake to prescribe and limit the precise procedure by which the criminal remedy against a public nuisance not amounting to an indictable misdemeanor may be enforced. That this is so is evidenced by the fact that section 3492 of the same Code emphatically and unequivocally declares that "the remedy by indictment or information is regulated by the Penal Code."

It will thus be seen that the Civil Code, in keeping with its general purpose, merely states the substantive law relating to the criminal remedy which may be directed against a public nuisance, and then very properly relegates the regulation of the remedy to the provisions of the Penal Code, which, containing the adjective law, provides the criminal procedure for the prevention and punishment of crimes. If the Penal Code has omitted to provide for the prosecution by indictment or information of a public nuisance, amounting only to an ordinary misdemeanor, this court cannot supply the omission.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 472

PEOPLE v. MORAN et al. (Cr. 510.)

(District Court of Appeal, First District, California. Sept. 18, 1914.)

1. Witnesses (§ 337*)—Impeachment—Accused.

Where accused takes the stand, he is subject to the same tests of his credibility as any other witness, and may be cross-examined as to whether he has ever before been convicted of a felony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129–1132, 1140–1142, 1146–1148; Dec. Dig. § 337.*]

2. Criminal Law (§ 693*)—Appeal—Presentation of Grounds of Review in Court Below—Sufficiency.

The appellate court will not review alleged errors in cross-examination, where objection was not made until the questions had been answered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

3. Witnesses (§ 337*)—Credibility of Accused—Cross-Examination.

Where accused takes the stand in his own behalf, it was proper to cross-examine him as to how many times he had been convicted of a felony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129–1132, 1140–1142, 1146–1148; Dec. Dig. § 337.*]

4. Criminal Law (§ 824*)—Trial—Instructions—Requests.

Where accused took the stand and it was elicited on cross-examination that he had before been convicted of a felony, the failure of the court to charge that such evidence could be considered only for the purpose of impeachment was not error, where accused requested no such charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Thomas Moran and another were convicted of an attempt to commit burglary, and from an order denying new trial, the defendant named appeals. Affirmed.

Edwin V. McKenzie, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John M. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from the judgment and from an order denying the defendant Moran's motion for a new trial.

The appellant, together with one Stephen Burton, was charged by information with the crime of attempting to commit burglary. Upon the trial Burton was acquitted, and Moran was convicted. In the information appellant was also charged with two prior convictions, which, upon arraignment, he admitted.

[1] During the trial Moran took the witness stand and testified in his own behalf. Upon cross-examination, over his objection, he admitted that he had previously been convicted of a felony. He now assigns as error the action of the court overruling his objections to the questions which elicited this evidence. Having submitted himself as a witness, he was subject to the same tests for ascertaining the truth as any other witness who takes the witness stand. People v. Arnold, 116 Cal. 682, 48 Pac. 803; People v. Martini, 21 Cal. App. 743, 132 Pac. 1069. His objection in this respect was therefore not well taken.

[2, 3] Upon further cross-examination, and in answer to the question, "How often have you been convicted of a felony?" the defendant answered, "Three times." The objection that the state was confined by the information to disclosing but two convictions, having come, as it did, after the answer, was too late to preserve the point for the consideration by this court. Moreover, if, upon cross-examination, it was permissible, as going to the witness' credibility, to ask if he had ever been convicted of a felony, it would seem to follow that the witness might also be asked how often he had been so convicted, as tending to throw light upon the same point.

[4] The court's omission to instruct the jury that the purpose of admitting the testimony with reference to prior convictions was for the sole purpose of impeachment was not error; since the defendant made no request for such instruction. People v. Oliveria, 127 Cal. 376, 59 Pac. 772; People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

No error was committed by the court in its instructions to the jury. The instructions of the court upon the subject of intoxication were not inconsistent, and correctly stated the law upon the subject. People v. Young, 102 Cal. 411, 36 Pac. 770; People v. Dowell, 141 Cal. 493, 75 Pac. 45.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

168 Cal. 793

HAMILTON v. CITY AND COUNTY OF SAN FRANCISCO.

(S. F. Nos. 7178–7188, 7219, 7220.)

(Supreme Court of California. Dec. 1, 1914.)

In Bank. Appeals from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by William H. Hamilton, by Sidney J. Pringle, by the French Savings Bank, by Clarence C. Burr, by George C. Boardman, Jr., by Mary N. Allyne, by Mary M. Allyne and others, by Frank A. Somers, as executor of the last will of Harvey C. Somers, deceased, by the Savings & Loan Society, by Josephine E. Preston, by George F. Lyon, by Arita Moore, and by Edwin Schwab against the City and County of San Francisco. From the judgments, plaintiffs and defendant appeal. Affirmed in part, and reversed in part, with directions.

Drown, Leicester & Drown, of San Francisco, for plaintiffs. Percy V. Long, City Atty., and Jesse H. Steinhart, both of San Francisco, for defendant.

PER CURIAM. The plaintiffs herein sued to recover the aggregate amounts of certain taxes respectively levied for three specific purposes by the defendant's board of supervisors for the fiscal year 1907–08. These taxes had been paid by plaintiffs under protest. The taxes so levied are the same as those involved in the case of Charles Josselyn v. City and County of San Francisco (S. F. No. 6074, decided by this court on October 2, 1914) 143 Pac. 705. The court below gave judgments therein in favor of plaintiffs for the aggregate amounts paid by them on account of two of the items of taxation involved, but held that plaintiffs were not entitled to recover the further amounts paid by them on account of the special tax levied under Ordinance No. 233 (New Series) for the repair, sprinkling, and sweeping of streets. The defendant has appealed from the judgments thus rendered in favor of plaintiffs; and the plaintiffs have also appealed from said judgments in so far as the same denied to said plaintiffs the right to recover the amounts so paid by them for a tax purporting to have been levied for the repair, sprinkling and sweeping of streets. Both sets of appeals have been submitted to this court on stipulation and on the transcript and briefs in the aforesaid Josselyn Case (S. F. No. 6074); and in accordance with the opinion and determination of this court in that case, the judgments herein of the lower court, in so far as they are in favor of plaintiffs, are affirmed, and the parts of said judgments from which the plaintiffs appealed are reversed, with instructions to the trial court to amend its conclusions of law therein, in accordance with the views expressed by this court in its opinion given and made on October 2, 1914, in the aforesaid case of Josselyn v. City and County of San Francisco, S. F. No. 6074, and to enter judgments herein in favor of plaintiffs for the amounts prayed for in the complaints respectively.

25 Cal. App. 916

CONNER v. PLANK et al. (Civ. 1460.)

(District Court of Appeal, Second District, California. Sept. 25, 1914.)

CONTRACTS (§ 32*)—NECESSITY OF WRITING — UNDERSTANDING OF PARTIES.

Where a contract, not required by the law to be in writing, is definitely made, though orally, its binding effect is not impaired by the parties, immediately thereafter, agreeing to evidence it by writing, and not doing this; its reduction to writing being necessary only where it is part of the understanding of the parties, in negotiating, that it be so reduced and signed by them.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. § 32.*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by H. P. Conner against Mary D. Plank and others. Judgment for plaintiff, and said defendant appeals. Affirmed.

Richard J. Culver, of Los Angeles, for appellant. Roy V. Reppy, of Los Angeles, for respondent.

CONREY, P. J. Appeal from judgment in favor of plaintiff. The findings of fact in this case state that on September 8, 1911, the plaintiff entered into an agreement with the defendant Mary D. Plank, whereby the defendant agreed to pay to plaintiff one-half of certain moneys theretofore received by her from F. W. Partridge, and also to pay to plaintiff, on the distribution of the estate of said Partridge, deceased, one-half of the net value of said estate as the same should be distributed to her, and that in consideration of said agreement on the part of defendant the plaintiff agreed to obtain forthwith an assignment to him of all interest of his mother Mary Abigail Conner in the said estate, she being the sole heir at law of said Partridge, deceased, at the time of his death; and plaintiff further agreed not to institute any proceedings for the contest of the will of said deceased, and to relinquish to defendant all claims of his said mother in and to the property of said Partridge, deceased, and of his said estate. It is further found that the plaintiff performed all of the terms of the contract made by him, and that the defendant has neglected and refused to perform her part of said contract, although the entire estate was distributed to her and no contest of the will was made.

There is no dispute as to the correctness of the amount of the judgment, if plaintiff is entitled to recover anything. The only questions presented have reference to the sufficiency of the evidence to support the findings which were made in favor of plaintiff as to the making of the contract. F. W. Partridge died in Los Angeles county, leaving an estate in that county, and there his alleged will was offered for probate. According to the terms of said will the entire estate was given to the defendant (who was not an heir at law of the decedent), except that the sum of $10 was bequeathed to the plaintiff. The plaintiff came to Los Angeles from an Eastern state and on behalf of his mother was preparing to contest the alleged will. He engaged as his attorney Gurney E. Newlin, and the defendant was represented by Samuel M. Haskins, also an attorney at law. In the testimony of Mr. Newlin and Mr. Haskins there is ample evidence that the terms of the alleged agreement were fully understood between them; they are the terms which were offered by Mr. Newlin and accepted by Mr. Haskins. No question exists as to the authority of Mr. Newlin to represent the plaintiff. On the other hand, it appears that Mrs. Plank stated in the presence of Newlin that she would do anything that Mr. Haskins advised her to, and that any agreement that Mr. Haskins reached with Newlin was satisfactory to her. The testimony of Haskins shows that Mrs. Plank was fully informed about the terms of the agreement, that later in the day she expressly gave her sanction to the same in a telephone message to Haskins, and that Haskins thereupon informed Newlin of his understanding that the matter was to be settled upon the basis already outlined.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The principal question of law on this appeal arises out of the fact that arrangements were made for reducing the agreement to writing and the writing was not completed or signed. There is no evidence of any statement made that the result which had been arrived at from the negotiations was not to constitute a contract, unless completed in writing. In proposing to put the terms in writing, it was assumed that they had been agreed upon. Newlin suggested to Haskins that it would be advisable to put the terms of the agreement that had been reached in writing. These transactions took place on September 8, 1911. On the morning of September 9th the attorneys met at the office of Haskins and commenced the dictation of the proposed written instrument. While they were so engaged Mrs. Plank communicated with Haskins by telephone, and informed him that, having discussed the matter with some friends, she had decided that she would enter into no compromise whatever. The preparation of the writing was thereupon suspended and was never resumed.

Counsel for appellant relies upon the proposition that, where parties have agreed to reduce an understanding to writing, it never becomes a binding agreement until it is written and is signed by the parties to it. The principal cases relied upon in support of appellant's position are Pacific R. & M. Co. v. Railway Co., 90 Cal. 632, 27 Pac. 525, Spinney v. Downing, 108 Cal. 666, 41 Pac. 797, and Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 Pac. 1077 (March 17, 1914). These cases go no further than to establish the rule that, when it is a part of the understanding between the parties in negotiating the terms of their contract that the same be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. The record in each of the three cases above cited showed that the parties understood that the agreements were not to become binding upon either until evidenced in the written form. When the facts are as last stated, the rule relied upon here by the appellant will apply; but where, on the other hand, the contract is of such a nature that the law does not require it to be in writing, and the terms of the contract are in the first instance definitely agreed upon and completed, then the mere fact that immediately thereafter they agree to evidence the contract by a written instrument does not interfere with the force and effect of the oral agreement.

Upon the other points mentioned in appellant's brief we find evidence sufficient to support the finding that the parties to the contract had been definitely ascertained, that the attorneys did have authority to bind their principals, and that the contract contained definite promises on each side sufficient to constitute a legal consideration.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

25 Cal. App. 522

FOGG v. McADAM. (Civ. 1504.)

(District Court of Appeal, Second District, California. Sept. 25, 1914.)

1. **Brokers** (§ 43*)—Compensation—Authority in Writing.

Defendant in writing authorized brokers to negotiate an exchange of city property for a ranch owned by P., the writing providing that the offer was made subject to again looking over the ranch within one week. The offer was not accepted by P., and defendant, having inspected the ranch again within one week, withdrew his offer. Thereafter he orally requested the brokers to negotiate an exchange for a part of the ranch upon other and different terms, and as a result of the brokers' efforts an agreement to make such exchange was entered into. *Held*, that the brokers' services in negotiating this exchange were not rendered pursuant to a contract or memorandum in writing authorizing them to perform such services, within Civ. Code, § 1624, providing that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission is invalid, unless it or some memorandum thereof is made in writing, as under the written authorization the employment was not general, but contemplated an exchange of specific properties upon specified terms, and when it was withdrawn the relations between defendant and the brokers were precisely as though the writing had never been executed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. **Brokers** (§ 43*)—Compensation—Authority in Writing.

Under Civ. Code, § 1624, where a written authorization to brokers is for the exchange of specific property, and not a general authorization to sell, it cannot be modified orally.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

3. **Brokers** (§ 82*)—Actions for Commissions—Complaint.

In a brokers' action for bringing about an agreement for exchange, which the complaint alleged defendant consented that the other party might rescind, where, though it appeared that the agreement contemplated that the property to be taken by defendant should be free of incumbrances, except as therein stated, which fact was to be evidenced by a certificate of title delivered with the deed, it was not alleged that the property was free from such incumbrance, nor that such certificate of title was furnished, the complaint, when construed most strongly against the pleader, was insufficient.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. § 82.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. K. Fogg against James McAdam. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

A. W. Sorenson, of Los Angeles, for appellant. J. H. Merriam, of Pasadena, for respondent.

SHAW, J. Action to recover a broker's commission for negotiating an exchange of real estate. The sole question involved is the ruling of the court in sustaining a general demurrer to the complaint. Upon the making of the order and plaintiff's declining to amend, judgment was entered for defendant, from which plaintiff prosecutes this appeal.

The complaint alleges: That on May 11, 1911, defendant in writing authorized Merrill & Fogg, plaintiff's assignors, to negotiate an exchange of certain real estate then owned by him for certain ranch property, consisting of 480 acres, owned by one W. E. Premo. The written authorization, as set forth in the complaint, is as follows:

"Pasadena, Cal., May 11, 1911.

"Messrs. Merrill & Fogg—Gentlemen: As per agreement to make you a definite offer on the Premo ranch of 480 acres, will make the following offer: First, said Premo to take the property shown him on Colorado street for $50,000, and I retain a portion of lot No. 2, in the rear, and give him right of way across the rear of lot No. 1, so that he would have access to the rear of his buildings, also house and lot on Morningside Ave., east of Huntington Drive, lot No. 15, Culver subdivision, and assume the mortgage on his ranch for $10,000 and $8,000 in cash within 60 days, and also $900 commission. This offer is made subject to again looking over the ranch within one week from the above date.

"[Signed] James McAdam."

That thereupon Merrill & Fogg undertook the negotiation of an exchange and endeavored to induce said Premo to accept the offer and make the exchange of the properties described as proposed by defendant. Not only is there a failure to allege the acceptance of the offer on the part of Premo, but it is alleged that defendant, as he reserved the right to do, inspected the property of Premo within a week after the date of making the proposal and withdrew the same. Thereafter as alleged in the complaint, defendant orally requested plaintiff's assignors to secure Premo's consent to an exchange of a part of the ranch (being the property described in the within authorization, less 80 acres) upon other and different terms and considerations than those specified in the withdrawn written proposal made by defendant. That, pursuant to this request, plaintiff's assignors did bring defendant and Premo together, and as a result of their efforts defendant and Premo entered into a written contract for the exchange of certain properties other than those described in the written authorization so withdrawn by defendant, and upon other and entirely different terms and conditions from those therein specified.

[1, 2] Clearly the written authorization cannot be deemed a basis for recovery for the reason, first, that it is not alleged that Premo ever accepted defendant's offer; and, second, it is alleged that defendant upon looking the land over withdrew the offer, as he had a right to do. Under the written authorization the employment was not general, but, at most, contemplated the exchange of specific properties and upon certain specified terms. Conceding that plaintiff's assignors were instrumental in bringing about the execution of a contract between defendant and Premo for the exchange of their properties, such service was not rendered pursuant to any contract or memorandum in writing authorizing them to perform such service. Smith v. Post, 138 Pac. 705. Appellant insists that the oral request, under and in accordance with which the service was rendered, is sufficient, when considered as a modification of the writing. When the written proposal with withdrawn, the relations between defendant and plaintiff's assignors were precisely as though the writing had never been executed; hence there was no written authority to modify, and the alleged oral contract was therefore an original agreement governed by the provisions of section 1624, Civil Code, which requires such contracts, in order to enable the broker to recover, to be in writing. Moreover, where the contract, as here alleged, is for the exchange of specific property, and not a general authorization to sell, there can be no oral modification. "Were it possible to make an oral modification of a contract which by the statute of frauds is required to be in writing and enforce such oral modification, the door would be open for the perpetration of such frauds as the statute seeks to prevent." Boyd v. Big Three Ranch Co., 22 Cal. App. 108, 133 Pac. 623.

[3] We think the complaint also defective in that the contract (never consummated) contemplated that Premo's property should be free of all incumbrance other than as therein stated, which fact was to be evidenced by a certificate of title delivered to defendant with deed. It is not alleged that the property was free from such incumbrance, neither is it alleged that Premo furnished such certificate of title; hence, since pleadings are to be construed most strongly against the pleader, defendant's alleged unwillingness to consummate the exchange may have been due to failure of Premo's title, or existing incumbrance upon the property. Connor v. Riggins, 21 Cal. App. 756, 132 Pac. 849. The alleged consent of defendant that

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Premo might rescind may have been due to the latter's inability to comply with the terms of the contract.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 525

SLATER v. SELOVER. (Civ. 1594.)

(District Court of Appeal, Second District, California. Sept. 25, 1914.)

1. JUDGMENT (§ 143*)—DEFAULT—VACATION—EXCUSABLE NEGLECT.

Where defendant requested his business partner to see to the defense of a suit, and then dismissed the matter from his mind, not recalling it until after default, defendant's negligence is not excusable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

2. JUDGMENT (§ 160*)—DEFAULT—VACATION—AFFIDAVIT OF MERITS.

An affidavit merely reciting that defendant had a good defense, and that his attorney, to whom he had stated it, said so, is an insufficient affidavit of merits to warrant the vacation of a default judgment; it not showing he stated all the facts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314–316; Dec. Dig. § 160.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Horace Slater against S. A. Selover. From an order granting defendant's motion to set aside his default and vacate the judgment entered thereon, plaintiff appeals. Reversed.

Eugene C. Campbell, of Long Beach, for appellant. Walter V. Dysert and Walter T. Gunn, both of Los Angeles, and Jay Briggs, of Hoopestown, Ill., for respondent.

SHAW, J. This is an appeal from an order of court granting defendant's motion to set aside his default and vacate the judgment entered thereon.

Defendant was duly served with summons and neglected to plead within the time prescribed therefor, whereupon his default for such failure was entered by the clerk, followed by the entry of judgment on February 27, 1914. On March 23d following, pursuant to notice thereof duly given, defendant, upon the grounds that he had a good and meritorious defense, and that his failure to plead was due to mistake, inadvertence, and excusable neglect, moved the court to vacate the judgment, set aside the default, and permit him to answer. This motion was supported by defendant's affidavit to the effect that, when served with summons, he expected to be engaged in business out of town, by reason of which fact he gave the papers to one Whipple, his business partner, and instructed him to attend to the matter and have the action defended, and, supposing Whipple had followed his instructions, he dismissed the subject from his mind, and did not discover such omission to answer until after default was entered. Whipple's affidavit, filed in support of the motion, corroborates that of Selover, in addition to which he merely avers that, upon the papers being delivered to him by Selover, he placed them in a pigeonhole, "and through mistake, inadvertence, and excusable neglect did not have an answer put in said case, and forgot all about said action until March 12th."

[1] We think the averments of the affidavit wholly insufficient to sustain the ruling of the court. At the very most, disregarding the conclusion, since no other facts are stated from which the court could find that defendant's omission was due to mistake, inadvertence, and excusable neglect, it appears the defendant intrusted and delivered the papers to Whipple, instructing him to have the action defended, and Whipple, as he says, "forgot all about said action." It would be difficult to conceive of a case possessing less merit.

[2] However this may be, the order is erroneous, for the reason that no sufficient affidavit of merits was presented, without which the order could not be made. Nevada Bank v. Dresbach, 63 Cal. 324; Quan Quock Fong v. Lyons, 20 Cal. App. 668, 130 Pac. 33. The only statement as to merits is contained in the affidavit of defendant, wherein he avers:

> "That affiant has a good and meritorious defense to said action, and wishes to defend same, and that affiant has stated his defense to his attorney, who informs him that he has a good defense to said action."

Such statement has been repeatedly held to be insufficient as an affidavit of merits. Nickerson v. California Raisin Co., 61 Cal. 268; People v. Larue, 66 Cal. 235, 5 Pac. 157; Cooper-Power v. Hanlon, 7 Cal. App. 724, 95 Pac. 678; Phillips v. Logan, 18 Cal. App. 287, 122 Pac. 1096. Not only does the affidavit limit the facts stated by defendant to his attorney to those constituting his defense, but such defense as stated may have been purely technical and without any merit whatsoever. Such affidavit should have shown that defendant stated all the facts of the case to his attorney, and not merely those constituting his defense.

The order is reversed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 533

MANSS v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY.

(Civ. 1219.)

(District Court of Appeal, Third District, California. Sept. 26, 1914.)

1. OBSTRUCTING JUSTICE (§ 11*) — FELONY — INDICTMENT—STATUTES.

An indictment charged that defendant did willfully, etc., resist, delay, and obstruct C., a public officer, to wit, a constable of B. township, who was in the attempted discharge of his duty, being engaged in executing a writ of attachment issued out of the justice court in a specified case, under which he held in possession a lot of ties, and that defendant willfully, etc., obstructed such officer by taking a portion of the ties "by force and violence" from the officer's possession. *Held*, that such indictment stated an offense, within Pen. Code, § 69, declaring that every person who attempts, by any threat or violence, to deter an executive officer from performing any duty imposed on him by law, or who knowingly resists, by force or violence, such officer in the performance of his duty, shall be punished, etc.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19–28; Dec. Dig. § 11.*]

2. CRIMINAL LAW (§ 93*)—JURISDICTION—NATURE OF OFFENSE—STATUTES.

Pen. Code, § 102, provides that every person who willfully takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer any personal property which such officer has in charge under any process of law, is guilty of a misdemeanor. Section 69 declares that every person who attempts, by threat or violence, to prevent an executive officer from performing any duty imposed on him by law, or who knowingly resists, by "force or violence," such officer in the performance of his duty, is punishable, etc. *Held*, that section 102 applies only in case of interference with an officer without force or violence, such offense not being within the jurisdiction of the superior court, while section 69 applies to obstruction of an officer by force or violence, and is within the superior court's jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 127, 137–166; Dec. Dig. § 93.*]

3. OBSTRUCTING JUSTICE (§ 7*)—"EXECUTIVE OFFICER."

A constable is an "executive officer," within Pen. Code, § 69, providing that every person who attempts, by any threat or violence, to obstruct an executive officer in the performance of his duty, or who knowingly resists, by force or violence, such officer in the performance of his duty, is punishable, etc.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 16; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, First and Second Series, Executive Officer.]

Application for a writ of prohibition by F. H. Manss to restrain the Superior Court of Mendocino County from trying petitioner on an indictment for obstructing a peace officer. Demurrer to petition sustained, and writ denied.

Mannon & Mannon, of Ukiah, for petitioner. J. Charles Jones, Deputy Atty. Gen., for respondent.

BURNETT, J. This is an application for a writ of prohibition to restrain respondent from trying petitioner on an indictment found by the grand jury of said county. The charging part of the indictment is as follows:

"The said F. H. Manss, on or about the 20th day of October, A. D. 1913, at the county of Mendocino, state of California, and before the finding of this indictment, did then and there willfully, unlawfully, and knowingly resist, delay, and obstruct a public officer named M. M. Curtis, who was then and there a duly elected, qualified, and acting constable of Big River township, said county of Mendocino, state aforesaid, who was then and there in the discharge of and attempting to discharge his duty as such constable, being then and there engaged in the execution of a writ of attachment duly and regularly issued out of the justice court of Big River township, in said county of Mendocino, in the case wherein Mrs. Oddie Osborne was plaintiff and H. H. Ashley and George Ashley were defendants, under which said writ of attachment said M. M. Curtis, as constable as aforesaid, was in the possession of a certain lot of ties which he had attached under said writ, and said defendant did then and there willfully, unlawfully, and knowingly resist, delay, and obstruct said M. M. Curtis as a public officer as aforesaid, in the discharge of and attempting to discharge his duty as such constable by holding said ties under said attachment, and said defendant by force and violence and against the will of said officer did take a portion of the said ties so in his possession by authority of said writ of attachment as aforesaid from the possession of said officer."

[1] It is thus made plain that the grand jury and the district attorney had in view the offense characterized and condemned by section 69 of the Penal Code as follows:

"Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years."

It is clear, also, that the indictment sufficiently charges said offense. All that is required is to follow substantially the language of the statute. People v. Fowler, 88 Cal. 136, 25 Pac. 1110; People v. Hunt, 120 Cal. 281, 52 Pac. 658. It is, indeed, apparent that the charge is set forth with greater amplitude than is demanded.

[2] It is not disputed that the superior court has jurisdiction to try the offense contemplated by said section of the Penal Code. The contention, however, is that the charge is brought within the provisions of section 102, as follows:

"Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor."

It is further contended that, since no punishment is therein prescribed, we must look for the penalty to section 19, as follows:

"Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

There is no question that of said offense the superior court has no jurisdiction. Said section 102, however, has no application. That is designed for similar interference with the duties of an officer where no force and violence is used. If an individual should surreptitiously or peaceably take personal property from the custody of an officer who had it in charge under process of law, he would be guilty of said offense, and should be prosecuted in the justice court. It is to be observed that neither the term "force" nor "violence" is used in said section 102, while in section 69 an essential element is a "threat" or "force" or "violence." The difference in the gravity of the offenses is, of course, manifest.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] There is also, it may be said, another section, to wit, 148 of the Penal Code, which is general in its terms and applies to interference with or obstruction of "any" public officer in the discharge of his duty, while section 69 is limited to "executive" officers. A constable is manifestly an executive officer, and as the offense is plainly brought under said section 69, there is no merit in this application.

The demurrer is sustained, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 502

HATFIELD v. PEOPLE'S WATER CO. et al. (Civ. 1276.)

(District Court of Appeal, First District, California. Sept. 23, 1914.)

1. WATERS AND WATER COURSES (§ 182*) — PUBLIC WATER COMPANY—FORFEITURE OF FRANCHISE — CONSTITUTIONALITY OF STATUTE.

St. 1881, p. 55, § 7, providing that any company charging or attempting to collect water rates in excess of the fixed rates shall upon the complaint of any water rate payer and upon conviction forfeit its franchise to the city wherein the water is furnished, violates the constitutional provision declaring that any company collecting rates higher than those fixed shall forfeit its franchise to the city in which they are collected; since in view of Const. art. 1, § 21, providing that no special privilege shall be granted which may not be revoked, the only parties interested in the forfeiture are primarily the state, and then the city, and since supplementary legislation was not required to execute the constitutional provision for forfeiture.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 267; Dec. Dig. § 182.*]

2. CORPORATIONS (§ 608*) — FORFEITURE OF CHARTER—ADJUDICATION.

A corporation is responsible only to the sovereignty by which it is created, and ordinarily conduct constituting a cause for the forfeiture of its charter and franchise will not ipso facto work a forfeiture, but the corporation exists until such sovereignty procures and enforces an adjudication of forfeiture.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2416–2419; Dec. Dig. § 608.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Wm. H. Hatfield against the People's Water Company and another. From an order sustaining a demurrer to plaintiff's amended complaint without leave to amend, he appeals. Affirmed.

Milton Shepardson and H. A. Luttrell, both of Oakland, and R. M. F. De Soto, of San Francisco, for appellant. McKee & Tasheira, of Oakland, for respondents.

LENNON, P. J. The prayer of the plaintiff's complaint in this action is that the franchises and waterworks of the defendant, Contra Costa Water Company, now claimed to be owned by its codefendant, People's Water Company, be declared forfeited to the city of Oakland. The appeal is from a judgment entered upon an order sustaining a demurrer to the plaintiff's third amended complaint without leave to amend. The action is prosecuted by the plaintiff in his capacity as a private citizen; and the gist of his complaint is that he, as a water rate payer in the city of Oakland, was overcharged the sum of $3.67½ by the defendant Contra Costa Water Company, during a specified six months preceding the commencement of the action.

The plaintiff's right as a water rate payer to institute and maintain the action is rested solely upon the provisions of section 7 of the act of March 7, 1881, which read as follows:

> "Any person, company, association, or corporation charging, or attempting to collect from the persons, corporations, or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of * * * any water rate payer, and upon conviction before any court of competent jurisdiction * * * forfeit the franchises and water works of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used." Stats. of 1881, p. 55.

[1, 2] It is the contention of the defendants that the act last referred to is unconstitutional in so far as it purports to confer upon a water rate payer the power to compel a forfeiture of the franchises and works of a water company because of an alleged overcharge. We are of the opinion that the contention is well taken and must be sustained. The legislative act in question, in so far as its forfeiture clause is concerned, is inconsistent with and in contravention of that provision of the Constitution which regulates the establishment of water rates, and declares that:

> "Any person, company, or corporation collecting water rates in any city and county or city or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use."

The Constitution, it will be noted, provides that the offending company shall forfeit its franchises and waterworks for public use to the city where the excess rates are collected. Clearly, therefore, only two parties can be said to be interested in the procurement of the forfeiture provided for in the Constitution, viz., the state in the first instance, and, secondly, the city where an excess rate may have been collected. Obviously the state is primarily and directly interested because it is the sovereign power from whom the water company derives its charter and franchises (Const. § 21, art. 1); and manifestly the city where the excess rate has been collected is also interested because it is by the Constitution expressly made the beneficiary of any forfeiture which may be desired and declared at the behest of the state.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is the general rule that a corporation is responsible only to the sovereignty by whom it was created; and, ordinarily, conduct constituting a cause for the forfeiture of corporate charters and franchises will not ipso facto operate to produce such a forfeiture. Notwithstanding such conduct, "the corporation continues to exist until the sovereignty which created it shall * * * procure an adjudication of forfeiture, and enforce it." People v. Los Angeles Elec. Ry. Co., 91 Cal. 338, 340, 27 Pac. 673, 674. In other words, the revocation of corporate charters and franchises is a sovereign right which can be exercised only by the state or in its name.

It is clear that supplemental legislation was not required to execute the provision of the Constitution providing for a forfeiture of the franchises and works of such water companies as might be guilty of charging or collecting rates in excess of those established by law. The constitutional provision in this behalf is in itself complete and therefore controlling. Moreover, the Legislature was neither required nor permitted to enact a law which purported to confer a right in excess of and different from that contemplated by the Constitution. It will be seen at a glance that the right to initiate the forfeiture which the legislative enactment in question attempted to confer upon a water rate payer is neither expressly nor impliedly authorized by the provisions of the Constitution. And therefore the act to that extent is in conflict with the Constitution and to the same extent void.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

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25 Cal. App. 531

CATES v. CONSOLIDATED REALTY CO.

(Civ. 1572.)

(District Court of Appeal, Second District, California. Sept. 26, 1914.)

1. Corporations (§ 155*)—Dividends—Attached Stock.

The right to dividends on corporate stock inheres in the stock, is held under a levy of attachment thereon, and passes to the buyers at an execution sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560–563, 568–576, 578, 593–603; Dec. Dig. § 155.*]

2. Corporations (§ 155*) — Dividends — Transfer of Stock.

An assignment by the buyers of corporate stock at the execution sale after attachment, which conveyed all the right, title, and interest in and to the stock and all thereof, does not include dividends declared on the stock after the attachment was levied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560–563, 568–576, 578, 593–603; Dec. Dig. § 155.*]

3. Corporations (§ 155*)—Dividends—Attached Stock.

When dividends are declared on corporate stock which has been attached, they become a personal debt from the corporation to the stockholders, subject to the lien of the attachment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 560–563, 568–576, 578, 593–603; Dec. Dig. § 155.*]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Alton M. Cates against the Consolidated Realty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Cates & Robinson and Stewart & Stewart, all of Los Angeles, for appellant. Jones & Weller, of Los Angeles, for respondent.

CONREY, P. J. In this action judgment was entered in favor of the defendant after an order had been made sustaining a general demurrer to the complaint without leave to amend. Plaintiff appeals from the judgment.

In a certain action in the superior court, wherein Vickrey and another were plaintiffs and Maier and another were defendants, an attachment was issued and regularly served upon the defendant corporation, covering certain shares of stock belonging to the defendants in that action. The plaintiffs obtained judgment and at an execution sale by the sheriff they purchased said shares of stock and received a certificate of purchase, thereby becoming the owners of the stock. Between the date of the attachment and the time of the execution sale several dividends were declared by the corporation, some of which were paid to the defendants in the attachment suit, and one of which remains unpaid.

After the plaintiffs in the former action had purchased the stock at the sheriff's sale they transferred to this plaintiff "all their right, title and interest in and to said 34 shares of the stock above described, and all thereof." No assignment to plaintiff is alleged, except as shown by the language quoted in the preceding sentence.

[1] The position stated by appellant is that the right to dividends inheres in shares of corporate stock, and is held under levy of attachment on the shares and passes to the execution purchaser of shares attached. With this contention we agree, and it is not denied by the respondent. In McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175, this court declared that all of the profits and dividends to accrue from attached stock are im-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pounded equally with the stock itself. See, also, Cook on Corporations (5th Ed.) § 484.

[2] It is suggested, however, that the plaintiff cannot recover because the assignment under which he claims did not include any interest in past dividends. The transfer to him was of the stock only, and he took the stock as it stood. With this contention we agree. The plaintiff's position is precisely the same as if, without any attachment, the stock had been transferred by the owners thereof to the plaintiff after these dividends were declared. The fact that plaintiff's assignors might have maintained this action is of no benefit to plaintiff, since it is not shown that they transferred to plaintiff anything more than the stock as it stood when assigned to plaintiff.

[3] When the dividends were declared they became a personal debt from the corporation to the defendants Maier et al., but remained subject to the lien of the attachment. The execution sale, therefore, carried to the purchasers the right to these dividends, but this right retained its character as a right to the benefit of declared dividends and remained separate from the stock. Therefore the mere assignment of the stock did not carry with it a right of action on the dividends. 10 Cyc. 557; Cook on Corporations (4th Ed.) § 539; Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771.

The demurrer was properly sustained, and the judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

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25 Cal. App. 499

CAIN v. FRENCH. (Civ. 1310.)

(District Court of Appeal, First District, California. Sept. 22, 1914. Rehearing Denied by Supreme Court Nov. 21, 1914.)

1. Cancellation of Instruments (§ 47*)—Proceedings—Evidence—Sufficiency.

In an action to cancel a note which defendant claimed was given him in payment for legal services for which plaintiff claimed he had been otherwise fully paid, evidence as to the lack of consideration for the note *held* sufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. § 47.*]

2. Appeal and Error (§ 835*)—Courts (§ 487*)—Review—Points as Raised on Motion for Rehearing.

Points raised for the first time in a petition for a rehearing or for a transfer to the Supreme Court will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241–3243; Dec. Dig. § 835;* Courts, Cent. Dig. §§ 703, 1307–1315; Dec. Dig. § 487.*]

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Annie Cain against Henry French. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

See, also, 143 Pac. 67.

Henry French, of San Jose, in pro. per. W. A. Beasley, of San Jose, for respondent.

KERRIGAN, J. The appeal in this case was taken to this court and an opinion rendered and filed; but it appearing upon a petition for transfer to the Supreme Court that the action was one in equity, of which the appellate jurisdiction is in the Supreme Court, the petition for transfer was granted upon that ground. The case was subsequently by the Supreme Court transferred to this court for decision.

After a careful re-examination of the record and briefs, we are satisfied with the views expressed in our opinion heretofore filed, to which we adhere. That opinion is as follows:

"This is an action brought by the plaintiff against the defendant for the cancellation of a promissory note dated October 19, 1909, for $400. In addition to his answer denying the averments of the complaint, defendant filed a cross-complaint, in which he prayed for judgment against the plaintiff for the amount of the note and costs. An answer to the cross-complaint was served and filed.

"The pleadings presented two issues, to wit: Was there a consideration for the note? (2) Was Annie Cain's signature to the note procured by undue influence?

"The case was tried before a jury, which returned a special and also a general verdict, finding both issues in favor of the plaintiff. Findings of facts and conclusions of law were filed; a motion for a new trial was denied, and the case is here on an appeal from the judgment and order denying said motion.

[1] "According to the story told by the defendant the plaintiff called on him at his law office in June, 1907, and stated to him that her uncle, a man of advanced age, with whom she had lived for 21 years, working hard for him during that time, had entirely changed his attitude toward her, and that she feared, from things he had said, that he would revoke a testamentary disposition theretofore made in her favor; that she instructed the defendant to interview her uncle, and if possible to persuade him to modify his attitude toward her, and either pay her for the services rendered him, or, in order that she might not be subject to his whims, to induce him to secure to her some of his property in recognition of her 21 years of service; that accordingly defendant interviewed plaintiff's uncle, and persuaded him to make her an absolute deed of 75 acres of land in Santa Clara valley, worth over $200 per acre. The evidence introduced by the defendant showed also that he rendered her other services, all which defendant claimed were worth more than the amount of the promissory note given to him by plaintiff, and that the note was accepted by him as a compromise of his original claim for fees.

"The evidence introduced by the defendant in support of his answer to the complaint tended to show that he sent his agent to the plaintiff a few days before the time when his claim for services rendered her would be barred by the statute of limitations; that at that time plaintiff stated that she was unable to pay the amount demanded, or any substantial amount; and that it was finally agreed between her and the agent that defendant would accept her promissory note for $400 in payment for said services; that plaintiff was in good health, and knew exactly what she was doing; that moreover no undue influence was attempted or exercised upon her.

"On the other hand, plaintiff testified, on the subject of defendant's services, that she applied to him, not as an attorney, but as an old friend of her uncle, and so stated to him at the time, and that her request to him was to intercede in her behalf with her uncle for permission to take a vacation, she being ill and needing a rest; that he did render her some service in this regard; and that she paid him for the same. She further testified that the defendant was instructed by her uncle to draw up a deed conveying to her his farm, which deed was to be substituted for some other form of disposition of the property which had theretofore been made to her; that she and her uncle called several times at the offices of the defendant for this deed, but being unable to find him in they finally went to another lawyer and employed him to draw the required instrument, by which there was conveyed to plaintiff by her uncle the land mentioned, which deed was duly executed and recorded; that the defendant was paid for his services concerning the deed, and his receipt therefor taken. In brief, as to this branch of the case, plaintiff's testimony is to the effect that the defendant was paid in full for all services rendered by him to her and her uncle.

"On this subject of the consideration for the note there is sufficient evidence given by the plaintiff to support the general verdict of the jury in her favor. Irrespective, then, of plaintiff's allegations of the employment by the defendant of undue influence in procuring the execution of the note, the defendant could not recover thereon. It becomes therefore unnecessary to go into a discussion of the evidence as to such undue influence upon which the special verdict of the jury was founded."

[2] In the petition for transfer to the Supreme Court we note that several points are made which were not theretofore raised. These we think are without substantial merit; but, in any event, points raised for the first time in a petition for rehearing or for transfer will not be considered. Payne v. Treadwell, 16 Cal. 221; Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 506

SILVERIA v. ALEXANDER. (No. 1373.)

(District Court of Appeal, First District, California. Sept. 25, 1914.)

1. Appeal and Error (§ 1009*)—Review—Questions of Fact.

In an action to set aside a deed to the grantor's physician, a finding that no undue influence was exercised supported by material evidence could not be disturbed, even though the evidence showed a fiduciary relation between the grantor and grantee raising a presumption of fraud.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

2. Deeds (§ 19*) — Consideration — Agreements to Support Grantor.

A deed to the grantor's physician in consideration of his agreement to make certain payments of money and to care for the grantor during the rest of her life was supported by a sufficient and adequate consideration in the absence of fraud, though the grantor died shortly afterwards, and the benefits received by her as a result of the contract were therefore small in comparison with the value of the property conveyed; it not appearing that her early death was expected when the deed was executed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

3. Deeds (§ 211*)—Mental Capacity—Sufficiency of Evidence.

In an action to set aside a deed, a finding of mental capacity was sustained by the evidence where five unimpeached witnesses testified that the grantor was not of weak or unsound mind, but on the contrary was a woman of exceedingly sound, independent, and strong mind, even assuming that the relation between the grantor and grantee was fiduciary and that the burden was therefore on the grantee to prove that the deed was made by the grantor while in full possession of her faculties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Julia J. Silveria, as administratrix of Ellen E. Clark, deceased, against Paul C. Alexander. From an order denying a new trial after a judgment for defendant, plaintiff appeals. Affirmed.

Fitzgerald & Abbott, of Oakland (Charles A. Beardsley, of Oakland, of counsel), for appellant. Jordan, Rowe & Brann, of San Francisco, for respondent.

RICHARDS, J. This is an action in equity by the plaintiff, as administratrix of the estate of her mother, Ellen E. Clark, in which it is sought to have a certain deed to the premises described in the complaint set aside upon the ground that at the time the deed was made, Ellen E. Clark was acting under undue influence and was of such feeble mind as not to know what she was doing, and that no adequate consideration passed to her from the defendant for the property. Judgment went for the defendant. Thereafter, in due time, plaintiff moved for a new trial, which was denied; and this appeal is from that order.

For some time prior to the date of the deed, the property had stood of record in the name of Peter and Bona Wrancovich, who, in consideration for the deed to them, had agreed with Mrs. Ellen E. Clark, the deceased, to take care of her as long as she lived; if she needed money to get it for her, and to bury her; and they also loaned her $200. Thereafter, and while the decedent was at the California Woman's Hospital in San Francisco, feeling that she would be ill for some time and not being on good terms with any of her relatives, she, on the 2d day of April, 1909, sent for Peter Wrancovich. When he arrived, she told him that there would be a large expense to meet for the hospital and doctor, and, if she died, there would be also her funeral expenses to pay; that she had a splendid doctor, who was going to take care of her as long as she lived, which might be for a year or two.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"This expense," she said, "you cannot pay." Finally, she requested him to transfer the property to the defendant. Wrancovich was willing to make the requested deed upon payment to him of the $200 which he had advanced. The next morning, April 3, 1909, a deed from Wrancovich and wife to Dr. Paul C. Alexander was made and handed to Mrs. Clark, whereupon she sent for the defendant, and when he arrived said to him:

> "Doctor, here is the deed. You were a good doctor to me. You get the deed, and I get the rent; and you support me as long as I live."

To all of which the doctor agreed.

Subsequently Mrs. Clark was removed from the California Woman's Hospital in San Francisco to the Home of Incurables, also in San Francisco; and on the 19th day of April, 1909, 16 days after the Wrancoviches made the deed to the defendant, she, having been advised that it would be prudent to do so, herself executed a deed of the property to him. At the time of making this last deed, when asked by the attorney who drew it why she was doing so, she replied:

> "Dr. Alexander has been very kind to me; and he is one of the few friends that I have in the world. He not only has treated me when he thought I didn't have any money, but he has treated me ever since I was in the Woman's Hospital. He is going to take care of me and support me, and give me medical attention as long as I live."

These facts, which are undisputed, were corroborated by the testimony of several disinterested witnesses, as was also the fact that she was of sound mind at the time the deed was made. Upon the subject of the consideration for the deed, the defendant testified as follows:

> "There was an agreement or understanding between Mrs. Clark and me other than the money I paid for her in regard to the consideration for the deeds of April 3d and 19th. Mrs. Clark asked me to take care of her as long as she lived; and I certainly did. I gave her medical attendance all the time I agreed to; and I paid for her support and maintenance as I agreed to. I was to defray her funeral expenses, and I did that. I visited Mrs. Clark every day and sometimes twice a day for a period of about six weeks before her death; and I gave her the benefit of my medical skill and advice during that time."

It is admitted by counsel for the plaintiff that the defendant paid out altogether on account of the deceased $506. In addition to this sum, defendant testified that he visited Mrs. Clark 60 times, and that his visits were worth $5 apiece, making the further sum of $300. Mrs. Clark at the time of her death was 56 years old. She was the victim of cancer, and died six weeks after the making of the deed to Dr. Alexander. The deed dated April 19th to the defendant is the one sought by this action to be canceled and annulled.

As before stated, the findings of the trial court were in favor of the defendant; and the plaintiff now, as she did on the motion for a new trial, challenges the sufficiency of the evidence to sustain those findings. She asserts that the defendant used undue influence to procure the deed, that the consideration for the deed was inadequate, and that the decedent was without sufficient understanding to make the transfer in question.

[1] Assuming that the evidence shows that a fiduciary relation existed between the defendant and Ellen E. Clark, sufficient to raise the presumption of fraud, still as the court found on material evidence that no undue influence was exercised on her by the defendant in order to procure the execution of the deed, we are unable, even if so inclined, which we are not, to disturb that finding.

[2] As to the claimed lack of consideration, it is sufficient to say that under the agreement the defendant was to make certain payments of money and to care for Ellen E. Clark during the remaining period of her life. He kept that agreement. True, she died shortly after the deed was executed; but there is nothing in the record to record to show that her early demise was to be expected. While the benefits received by her as a result of the contract were small in comparison with the value of the property conveyed, this is not a sufficient ground for setting it aside. In the absence of fraud, the amount of the consideration for the deed was immaterial. Driscoll v. Driscoll, 143 Cal. 528, 529, 77 Pac. 471.

It is not disputed, and it has been repeatedly held that a deed executed in consideration of a grantee's promise to furnish support to the grantor for life is based upon an adequate consideration. Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188.

[3] Coming finally to the question concerning the capacity of Ellen E. Clark to make the deed, and again assuming that the relation between her and the defendant was fiduciary, and that for this reason the law casts upon the defendant the burden of proving that the deed was made by Mrs. Clark while in full possession of her faculties (Payne v. Payne, 12 Cal. App. 251, 254, 107 Pac. 148), still as five witnesses, all unimpeached, testified that she was not of weak or unsound mind, but on the contrary was a woman of exceedingly sound, independent, and strong mind, we are at a loss to see how it can be seriously contended that the finding as to her soundness of mind was not sustained by the evidence.

No other point urged merits consideration. The order is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 490

REYNOLDS v. JACKSON. (Civ. 1242.)

(District Court of Appeal, Third District, California. Sept. 21, 1914.)

1. PARTNERSHIP (§ 53*)—EVIDENCE — EXISTENCE OF PARTNERSHIP.

Evidence, in an action for an accounting of an alleged partnership between plaintiff's assignor and defendant to procure options on and sell land, *held* to sustain a finding that plaintiff's assignor and defendant had not entered into a partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 76, 79; Dec. Dig. § 53.*]

2. PARTNERSHIP (§ 328*) — ACTION FOR ACCOUNTING—EVIDENCE—PERFORMANCE.

Evidence *held* to sustain a finding that plaintiff's assignor had failed to carry out his part of an oral agreement, by which the net commissions on the sale of land were to be divided.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 779–781; Dec. Dig. § 328.*]

3. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

The appellate court will not disturb findings based on evidence, wherein there is a substantial conflict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

4. PARTNERSHIP (§ 328*) — ACTION FOR ACCOUNTING—EVIDENCE—EXISTENCE OF AGREEMENT.

Evidence, in an action for an accounting of an alleged partnership between plaintiff's assignor and defendant to procure options on and sell land, *held* to sustain a finding that the parties orally agreed to divide the net commissions received by defendant on the sale of such land.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 779–781; Dec. Dig. § 328.*]

5. TRIAL (§ 397*)—FINDINGS—MATERIAL ISSUE.

In such action, where the trial court found that the parties entered into an agreement to share commissions from the sale of the land, provided plaintiff's assignor either sold or procured a purchaser for it, but that plaintiff's assignor did not perform his part of the agreement, the question whether defendant agreed to account to plaintiff's assignor for the commissions from the sale of the tract and to pay him one-half thereof was not a material issue, so as to require any finding thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by William H. Reynolds against George H. Jackson. Judgment for defendant, and plaintiff appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant. Wm. J. Herrin, of San Francisco, and A. H. Hewitt, of Yuba City, for respondent.

HART, J. The plaintiff, as the assignee of W. B. Reynolds, brought this action for an accounting "of all the dealings and transactions of" an alleged copartnership, "and for such other and further relief as may be just," etc.

The complaint alleges that:

"On or about the 15th day of July, 1904, W. B. Reynolds and defendant, at the city and county of San Francisco, state of California, entered into and formed a copartnership, as equal partners, for the sole purpose of procuring options on, buying, selling, and dealing in, a certain tract of land, situated in the county of Sutter, in said state; and that said W. B. Reynolds and defendant thereupon entered upon and transacted said copartnership business. That said tract of land was on or about the 1st day of October, 1904, finally sold and disposed of, resulting in a profit to said partnership, as plaintiff is informed and believes, in at least the sum of $25,000."

It is further alleged that the defendant, at the time of the establishment of said copartnership, promised and agreed with said W. B. Reynolds to account to and pay over to him (Reynolds) his proportional share of all moneys received on account of said partnership and its dealings in said tract of land. It is then complained that the defendant has collected and received the whole of the profits accruing to the said copartnership by reason of the sale of said tract of land; that the profits so received amount to at least the sum of $25,000, and that the defendant has wrongfully, and without the assent of the plaintiff, appropriated the same to his own use and benefit; that neither the plaintiff nor said W. B. Reynolds has ever received or been paid any money by the defendant on account of said profits; that no settlement of said copartnership accounts has ever been made or had between the said W. B. Reynolds and the defendant or between the plaintiff and the defendant; that the plaintiff and said W. B. Reynolds have each frequently applied to and demanded of the defendant to come to a final settlement with respect to said copartnership accounts, but that the defendant has always refused, and still continues to refuse, to render either the plaintiff or to the said W. B. Reynolds any account whatsoever of the said copartnership affairs or of the copartnership money received by him; that it will appear upon a just and true settlement of the said copartnership account that a large sum of money will be due from said defendant in respect of said copartnership.

It is averred that on the 1st day of December, 1904, said W. B. Reynolds sold and transferred all his interest in said copartnership, its property, money, and demands, to the plaintiff.

The answer specifically denies each and all the material averments of the complaint.

The court found that said W. B. Reynolds and the defendant did not at any time enter into or form a copartnership as equal partners or otherwise, for the purposes mentioned in the complaint. The court did find, however, that the plaintiff's assignor and the defendant, on the 15th day of July, 1904, or thereabouts, entered into an oral agreement, by the terms of which the defendant agreed that, if the plaintiff's assignor would sell or find a purchaser for the tract of land referred to in the complaint, the defendant would divide with said W. B. Reynolds the net commissions to be received by him from the sale of said tract of land. But the court further found that "plaintiff's assignor did not sell said land, or any part thereof, nor did he find a purchaser for said land, or for any part thereof." As a conclusion of law from the facts as found, the court found that the plaintiff is not entitled to anything by reason of this action, and judgment passed to the defendant accordingly. The plaintiff appeals from said judgment and from the order denying him a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The points urged for a reversal are mainly that the findings are not supported, and that the court failed to find on a material issue.

It is unnecessary to give here a detailed or even an extended epitomized statement of the testimony of the plaintiff's assignor, W. B. Reynolds, and that of other witnesses called by him. Respecting the evidence offered and received in support of the complaint, it will be sufficient to say that said Reynolds testified to the formation, in July, 1904, by oral agreement, of a copartnership between himself and the defendant, as alleged in the complaint, and that other witnesses testified to facts and to declarations by the defendant tending strongly to corroborate the testimony of the plaintiff's assignor upon that point; that said Reynolds testified further that, upon the establishment of said copartnership, he at once proceeded to take steps to find a purchaser of the land to which the partnership agreement related, and that finally he met and talked with one E. Wineman, of San Luis Obispo (who was looking for an investment in land), relative to the land for the sale of which said alleged copartnership was formed, and that Wineman eventually, and within a short time after said conversation, purchased said land; that the defendant afterwards admitted to said Reynolds that he made a profit of $9,000 on the transaction, but denied that Reynolds was entitled to any part thereof.

The defendant testified, however:

> That he never at any time had any transaction involving the subject-matter of this action with W. B. Reynolds. "He [referring to said Reynolds] asked me if I had some land suitable for dredging and reclaiming," testified the defendant. "This was long before the sale was made. I had no transactions with Mr. Reynolds regarding the sale of land in Sutter county. I didn't have any transactions with the man at all. I had a conversation with him. I don't remember now just what time. He came to me on the street in front of the Lick House, some time along in the summer. That conversation did not relate to the land that Mr. Wineman purchased, only a small portion of it—to the portion of land that belonged to Antone Borel and Mr. Nutal. There were 4,700 acres in that tract. It was situated in Sutter county about three or four miles out from Marcuse. That is part of the land that I sold to Mr. and Mrs. Wineman and referred to in the depositions of Mr. and Mrs. Wineman just read. Regarding this land, Mr. Reynolds told me that he had a man who had two dredgers, and he was looking for a piece of land to buy, and he wanted the land where he could reclaim it, and wanted to know if I had land suitable for that business, and I mentioned this particular piece of land and told him that it might make a fairly good reclamation—this portion. I made an agreement with him regarding the sale of the land. The agreement was not in writing. After talking to me about the land, he spoke about this man and he said—he wanted to know the price, and I told him that, if this man would sell this land for $10, we would divide $2.50 an acre on the land. He would take $1.25 and I would take $1.25, if it was sold at $10. That is all the agreement I had with him. I never had any other agreement with him concerning any other land in Sutter county. That is the only piece of land that I had an agreement with him concerning the sale of. He never sold the land. He never came to me with the name of a purchaser. He told me several times on the street that somebody was going to come. I had not had the land for sale so very long; a few months. I had the land staked out—knew that I could get it any time I wanted it, but I told Mr. Borel that, whenever I found a purchaser, I would call on him for an option for this land; but I never got the option until away along in the latter part—I don't know—but it was the first of August, somewhere along there. The option was in writing. Mr. Borel signed it, but I did my business with his private secretary."

The defendant further testified that he thought that he introduced W. B. Reynolds to Wineman, the purchaser of the Sutter county lands. After Wineman had decided to buy the land through the defendant, the latter met Reynolds at the Lick House. Reynolds asked the defendant if he had sold Wineman "a lot of land" in Sutter county, and, upon an affirmative reply by the defendant, insisted that he (said Reynolds) having first brought Wineman's attention to said land, and thus put him in the way of making the purchase, was entitled to his share of the profits from the sale. The defendant replied to Reynolds: "I am not going to give you a red cent—not a cent." The defendant contradicted the testimony of certain witnesses called for the plaintiff to the effect that the defendant had said to them prior to the sale of the land to Wineman, that W. B. Reynolds was an equal partner with him in the option on and sale of said land and the profits accruing from said sale. The defendant further testified that he was under an agreement with Umbsen & Co., with whom he was connected, in so far as the handling of country real estate was concerned, whereby he was to pay said firm one-third of the profits on all sales of such lands made by him.

Wineman testified that his attention was first called to the land purchased by him by an advertisement that he observed in one of the San Francisco daily newspapers; that he and his wife thereafter went to San Francisco and called at the office of Umbsen & Co., where the advertisement directed them to go to inquire about the land; that there they met the defendant, who, the following morning, started with Wineman and wife to Sutter county to inspect the land; that, after viewing it, he concluded to buy the property, and, returning to San Francisco, there closed the deal. He said that he had no recollection of ever meeting with Reynolds until after the sale of the land to him had been completed, and this meeting took place at the Lick House, in San Francisco. Subsequently he again met Reynolds, who said to him that he (Wineman), in buying the land from the defendant, had "bought no land—you bought an ocean," and that Reynolds further said to him:

> "If we could back out on that bargain we made with Mr. Jackson, he could save us $10,000, sell us the land cheaper, $10,000 cheaper. * * * Mr. Reynolds did not at any time ever mention this land to me before I went up to Sutter county to see it with Jackson."

[1, 2] Thus there has been given a sufficient statement of the evidence introduced by the defendant to show that there was, so far as this court can determine, sufficient justification for the finding that the plaintiff's assignor and the defendant did not enter into the contract of copartnership described in the complaint, but that they did make an agreement concerning the sale of said land at the time the alleged copartnership is alleged to have been formed and entered into by and between them, but that the plaintiff failed to carry out his part of said agreement, and was therefore not entitled to share with the defendant in the profits on the sale made by the latter.

[3] It may be true, as counsel for the plaintiff undertake to point out, that the defendant's testimony is characterized by certain discrepancies or inconsistencies, but these were matters for the trial court to consider in connection with its consideration of the defendant's entire testimony and his demeanor while testifying. If, as appears to be true, the trial court believed and credited his testimony in the main, then it is not for this court to say that the discrepancies in his testimony, if in reality any there were, should be held to be of sufficient force or significance, by way of impeachment, to have required the court, which heard and saw him testify, to repudiate or disregard his testimony in toto. The proposition that an appellate court will not disturb findings based upon evidence wherein there is a substantial conflict has been so often stated and applied that its repetition would seem to be supererogatory. In this case, there being nothing inherently improbable in the testimony of the defendant, notwithstanding the asserted inconsistencies or contradictions pointed out therein, such a conflict does exist, and when we are asked to set aside findings which have been predicated upon testimony which may involve certain inconsistencies or contradictions, which in themselves do not necessarily render such testimony so intrinsically improbable as to justify us in declaring that it is, upon its face, wholly unbelievable, we are called upon to perform a duty which, in the very nature of things, a reviewing court cannot well be expected satisfactorily to discharge, viz., weighing and so determining the credit to be accorded testimony given viva voce before another tribunal. Even if it be true that the defendant became tangled or confused to some extent in his attempted explanations of the price he was to pay for certain lands, of the lands included in those constituting the tract sold to Wineman, and of the amount he was to pay Reynolds in case the latter himself sold or found a purchaser of the Borel tract, the fact remains that he unequivocally declared that there was no arrangement entered into between him and Reynolds, except the one found by the court to have been made, and it was within the legal province of the court to believe that statement as against the confusion into which he may seem to have been led as to the details referred to as well as against the counter statements of W. B. Reynolds and other witnesses of the plaintiff.

[4] It is next contended that there is no evidence to support that part of finding 2 which declares that the defendant agreed that, if the assignor of plaintiff found a purchaser of the land referred to in the complaint, he (defendant) would divide the "net commissions received by him." We think there is enough evidence in the record to have authorized the court to make that part of the finding. The defendant testified (page 120, Trans.) that he was told by Borel's secretary that the Borel tract could be bought for $6 per acre, and that he then figured on selling it at $10 per acre; that he proposed to Reynolds that, if he secured a purchaser for the land at the last mentioned figure, they would thereby make a profit of $2.50 per acre, or $1.25 each per acre. He said that, while he would, at the figures mentioned, receive for the land $4 per acre in excess of the sum paid for it, he would, however, be required to pay one-third of said excess to Umbsen & Co., and, besides, pay other necessary expenses incurred in negotiating the sale, such as the expense of an abstract and that of taking the parties to the land, etc. He testified (page 134, Trans.) that he figured that the sum he would be required to pay Umbsen & Co., and the expenses attending the consummation of the transaction, would total about $7.50, and thus there would be left, to be divided between himself and Reynolds, in case the latter sold or procured a purchaser for the tract, the sum of $2.50. There can hardly be any reason to say that the court was not justified in finding from this testimony that the agreement of the defendant was that he "would divide with plaintiff's assignor the net commissions (or profits) to be received by him from the sale," in the event that Reynolds procured a purchaser. Counsel, however, attempt to establish a distinction between the term "commissions" and the term "profits," and declare that the finding is not sustained, because the testimony shows that the division

between Reynolds and the defendant was to be of the "profits" and not of "net commissions," as the finding states. But, while the two terms are not, in a commercial sense, strictly convertible, the one being more applicable to sales of merchandise and the other to sales of real estate, still in effect they mean one and the same thing in this case. What is unquestionably meant by both the finding and the testimony is that what remained out of the money received on the sale, over and above the cost of the land, and after expenses in negotiating it were deducted, should be equally divided between the parties, if Reynolds was the procuring cause of the sale.

[5] The last point made by the plaintiff is that the court failed to find on a material issue raised by the pleadings. This point arises from the omission by the court to make a specific finding upon the alleged fact that the defendant agreed to account to Reynolds for the profits realized from the sale of the land and to pay him one-half thereof.

But the obvious reply to that proposition is to be found in findings Nos. 2 and 3, the first of which necessarily implies that the defendant agreed to render to W. B. Reynolds an account of the profits on the sale of the land and to pay him his proportionate share thereof, while finding 3 rendered a finding on said issue wholly unnecessary. To be more explicit: While the court found that the copartnership, as alleged in the complaint, was not formed by and between the parties, it did find (finding 2) that, on the day upon which the alleged copartnership was established, the parties did enter into a convention of the nature of a broker's rather than of a partnership agreement, by the terms of which they were to share equally in the profits realized from the sale of the land referred to in the complaint, provided the plaintiff's assignor either sold or procured a purchaser of said land. Of course, the latter finding, as stated, of necessity implies a finding that the defendant agreed to account to W. B. Reynolds for the profits from the sale and to pay him his share thereof according to the terms of the agreement, if said Reynolds carried out his part of said agreement. In other words, such an agreement necessarily carried with it an agreement on the part of the defendant, without an express stipulation to that effect, to account to Reynolds for and pay to him his share of the profits, if he (Reynolds) executed his part of the contract, and therefore a finding that such an agreement was made necessarily carries with it a finding that the agreement by the defendant to account to Reynolds for the profits, etc., was made. But the court further found (finding 3) that Reynolds neither sold nor procured a purchaser of said land or of any part thereof; hence, since, under that finding, no duty rested on the defendant to account to Reynolds for the profits, etc., it became entirely unnecessary for the court to make a specific finding upon that issue, for, in view of the finding last referred to, a finding upon said issue would merely have amounted to a declaration that the defendant agreed to account to Reynolds for profits arising from a transaction in which he had no interest.

We perceive no importance, in its bearing upon the point last considered, in the discussion in the briefs of the question whether, as the plaintiff contends, a finding by the court, upon sufficient evidence, that an agreement other than a partnership agreement had been entered into between the parties, whereby they were to receive an equal share of the profits obtained from the sale of the land referred to in the complaint, would come within the fair and reasonable import or intendments of the averments of a partnership agreement contained in the complaint and the issues made. See Gorham v. Heiman, 90 Cal. 346, 358, 27 Pac. 289; McArthur v. Blaisdell, 159 Cal. 604, 115 Pac. 52; Bedolla v. Williams, 15 Cal. App. 738, 115 Pac. 747. But, conceding the proposition to be important here, the reply to it is that, as shown, the court did find that an agreement of a different character from the one pleaded was entered into between the parties for the purpose of selling the land mentioned in the complaint and of dividing equally between them the profits arising from the sale of said land.

We think the record is free from error, and therefore the judgment and the order denying the plaintiff a new trial should be affirmed.

It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 476

McEVERS v. BOYLE, Auditor. (Civ. 1431.)

(District Court of Appeal, First District, California. Sept. 21, 1914.)

1. Officers (§ 63*)—"Vacation of Office."

Though a city sealer and his deputies, restrained from discharging their duties, obeyed the injunction for 10 months, until the ordinance under which the sealer was appointed was in another case declared valid, their offices did not become vacant, under Pol. Code, § 996, subd. 7, declaring that an office becomes vacant when the officer ceases to discharge his duties for a period of three consecutive months.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 94; Dec. Dig. § 63.*

For other definitions, see Words and Phrases, First and Second Series, Vacancy.]

2. Officers (§ 63*)—Vacation of Office—Surrender of Paraphernalia.

Where a city sealer was enjoined from performing his duties and the city informed him that it would no longer pay the rent of the office he occupied, his surrender of the paraphernalia of his office on the city's demand was not an abandonment of his office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 94; Dec. Dig. § 63.*]

3. OFFICERS (§ 63*)—VACATION OF OFFICE—ABANDONMENT.

Where a city sealer was enjoined from performing his duties, and the city after announcing its refusal to pay his office rent, required him to turn over the paraphernalia of the office, a letter by the sealer, referring to the "reestablishment" of the office upon dissolution of the injunction, does not show an abandonment of the office; other portions of the instrument showing that he still claimed to be the incumbent of the office of city sealer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 94; Dec. Dig. § 63.*]

4. JUDGMENT (§ 217*)—FINALITY.

A judgment of the Supreme Court does not become final until 30 days after rendition.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.*]

5. OFFICERS (§ 63*)—"VACATION OF OFFICE."

Where a city sealer who was enjoined from discharging his duties did not resume them for about 20 days after the injunction was dissolved at the end of which time he resigned, he did not vacate his office, within Pol. Code, § 996, subd. 7, declaring that a failure to perform the duties of an office for three months is a vacation thereof.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 94; Dec. Dig. § 63.*]

6. MANDAMUS (§ 102*)—WARRANTS—COMPELLING ISSUANCE.

In a proceeding for a writ of mandate to compel the auditor of a city to issue warrants for the salary of a city officer, it is immaterial whether there are funds in the treasury applicable to the payment of such warrants.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 217-219, 221, 222; Dec. Dig. § 102.*]

7. MUNICIPAL CORPORATIONS (§ 892*) — FINANCES—FUND IN TREASURY.

A fund, appropriated to pay the salary and expenses of a city officer, which was merged with the general funds when the officer was enjoined from discharging his duties, must, upon dissolution of the injunction, be presumed to have remained intact and be applicable to the payment of the salary of the officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1874, 1875; Dec. Dig. § 892.*]

Petition by J. W. McEvers for a writ of mandate against Thomas F. Boyle, as Auditor of the City and County of San Francisco. Writ issued.

Pemberton & Pemberton, of San Francisco, for petitioner. Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for respondent.

RICHARDS, J. This is an original application to this court for a writ of mandamus directed to the defendant, as auditor of the city and county of San Francisco, commanding him to issue to the petitioner warrants to pay his official salary as deputy sealer of weights and measures, and those of certain other deputies who had assigned to him their claims therefor.

It being necessary to take testimony on the matters at issue, a reference was made to John J. O'Toole, Esq., for that purpose, and with instructions to report findings and conclusions. This has been done, the referee's findings being in favor of the petitioner, and concluding that the writ of mandamus prayed for should issue.

The matter now being submitted to this court for decision, a careful examination of the testimony taken and the briefs filed convinces us that the referee's findings and conclusions are a correct determination of the matter in controversy; and we adopt as the opinion of this court the referee's opinion filed with his findings, and which is as follows:

"The above entitled matter being an original proceeding, and the following questions of fact —i. e., (1) Did the petitioner and his assignors abandon their offices; (2) are there funds in the treasury of the city and county of San Francisco applicable to the demands of petitioner and his assignors—having arisen, and the matter having been submitted to the undersigned as referee to determine said facts, and such evidence as the parties to this action desired to offer having been taken before the referee, the matter was submitted for his decision.

"From the testimony taken and the evidence introduced it appears that Charles G. Johnson was, during the month of November, 1911, and under and by virtue of an ordinance passed by the board of supervisors of the city and county of San Francisco, appointed sealer of weights and measures for said city and county; he qualified as such during said month, and entered upon the discharge of his duties, and appointed petitioner herein his chief deputy, and certain of petitioner's assignors, deputy sealers, and one Rowe, stenographer, all according to the terms of the ordinance. The deputies and stenographer all qualified, and during the month of November, 1911, entered upon the discharge of their respective duties. An office was furnished to the sealer by the proper authorities and he was provided with certain paraphernalia and equipment necessary for the discharge of his official duties. Shortly after the appointment and qualification of the sealer and his deputies, an action was instituted in the superior court of the city and county of San Francisco, asking for an injunction restraining the sealer and his deputies from performing any official act under and pursuant to the ordinance authorizing their appointment, commanding the board of supervisors of the city and county of San Francisco to refrain from passing any demand or incurring any expense against the city pursuant to the provisions of the ordinance, and commanding the auditor not to audit, and the treasurer not to pay any claim against the treasury of the city and county for any expense incurred in carrying out or attempting to carry out any of the provisions of the act. A temporary restraining order was granted in this action, and on or about the 8th day of February, 1912, the court announced its decision to the effect that a writ of injunction should issue as prayed for. While the judgment in this action was appealed from, the appeal was never determined, but it is conceded that Scott v. Boyle, decided December 12, 1912, reported at 164 Cal. 321, 128 Pac. 941, determined that the ordinance in question was valid and that the appeal in the injunction case would have been determined against the plaintiffs in that action.

"From the date of the announcement of the decision in the injunction case, the sealer, his deputies and employés obeyed the injunction, in this that they performed no official act under the ordinance. On February 8, 1912, the sealer in a letter addressed to the mayor of the city and county asked that his deputies and employés be given a leave of absence without prejudice to their positions and without pay until the Supreme Court had passed upon the validity of the ordinance, and he himself offered to continue in his position without pay. On April 8, 1912, the supervisors of the city and county denied the request. On February 19, 1912, the board of supervisors by resolution directed its clerk to close the office which had been provided for the sealer, and to take possession of the paraphernalia. The passage of the resolution was communicated to the sealer, and on the 21st day of February, 1912, he packed and delivered to the representative of the board of supervisors, upon the demand of the latter the paraphernalia of the office. And on the same day the representative of the board notified the owner of the building in which the sealer's office was situated that the city would no longer pay rental for said office. Hereupon the sealer established himself at a new location, where his deputies and employés reported to him daily, and where they all, according to their uncontradicted testimony, at least made an attempt to perform some of the duties of the office, but according to their own testimony, most of their acts were unofficial. However, they took no other employment and received no compensation or salary from any other source. They filed their demands in due form monthly with the auditor. This continued from February 21, 1912, until December 31st of the same year.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] "Counsel for defendant contends that the facts show that the office held by the sealer and his deputies became vacant on May 21, 1912, pursuant to the provisions of section 996, Political Code, which provides that 'an office becomes vacant on the happening of either of the following events before the expiration of the term: * * * Sub. 7. **His** ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the Legislature,' counsel basing his argument on the fact that the sealer voluntarily surrendered all of the paraphernalia to the representative of the board of supervisors, and thereafter performed no official act. The referee is of the opinion that the argument is not sound; it is admitted that the sealer and his deputies and employés performed their duties as provided by the statute up to the time they were restrained from so doing by the injunction issued by the superior court; this injunction for all practical purposes remained in force until December 12, 1912, when the validity of the ordinance was determined by the Supreme Court in another action, but in reality the injunction was never dissolved and actually the sealer and his deputies were restrained from performing their duties until the date of their resignation. Under the circumstances, I am of the opinion that their acts, or rather their failure to act, does not bring them within the provisions of subdivision 7, § 996, Pol. Code. The ceasing to perform the duties, etc., must be a voluntary ceasing. One can well comprehend what would have been the result of any attempt on the part of the sealer or his employés to perform any of the duties of their respective offices while the injunction was in force; undoubtedly on their attempt being called to the attention of the court, the court would have placed them where the attempt could not be renewed, and thereby more effectively than by mere command prevented a repetition of the attempt. Therefore, as long as the injunction was in force, it was their duty to obey it, and their doing so cannot be said to be such a ceasing to perform their duties as would bring them within the provisions of the section. See Bergerow v. Parker, 4 Cal. App. 169 [87 Pac. 248] where it is said: 'The finding of the court that "the office became vacant and the plaintiff ceased to be such constable on the 15th day of October, 1900," is based upon the provision of section 996 (7) of the Political Code that an office becomes vacant by the "ceasing of the incumbent to discharge the duties of the office for the period of three consecutive months except when prevented by sickness, or when absent from the state by permission of the Legislature"; and it is urged that inasmuch as the appellant was continuously held in confinement at San Jose for a period of more than three consecutive months from the date of his arrest, he of necessity ceased to discharge the duties of his office during that period, and therefore at the expiration of three months from his arrest his office ipso facto became vacant. We are of the opinion, however, that this is not a proper construction to be given to this provision of the section, but that, in order to create a vacancy in the office, the cessation to discharge its duties for the designated period must be the voluntary act of the incumbent. The section provides for many of the contingencies upon which a vacancy will be created, and it will be noted that with the exception of the death of the incumbent each of these contingencies contemplates some proceeding against him, in which he will have an opportunity to controvert the ground on which the vacancy is claimed, or some act initiated by himself and voluntarily carried into effect. It is in harmony with the other provisions of the section that, in order to create a vacancy in the office, the cessation to discharge its duties for the period of three consecutive months must have been voluntary on his part, and we hold that such construction must be given to the provision.'

"See, also, Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, where the court said: 'The fact that during the time of his suspension from office its duties were performed by a person properly appointed for that purpose, and that the county has paid him the salary, does not affect the right of plaintiff to recover. He was, without fault on his part, and against his consent, released from the performance of the duties of such office for the period named. Fitzsimmons v. City of Brooklyn, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; Andrews v. Portland, 79 Me. 485, 10 Atl. 458, 10 Am. St. Rep. 280.'

"See, also, Johnson v. Brooks, 139 Ga. 787, 78 S. E. 37, where the court said: 'Section 264, Civil Code, provides "that all offices in this state are vacated by abandoning the office and ceasing to perform its duties or either." This language of the Code means the willful and voluntary forsaking or relinquishment of the office, * * * and not a failure to discharge its duties by reason of the acquiescence in the validity of a statute until it is judicially declared to be nugatory.'

[2] "Counsel for defendant lays particular stress upon the fact that the sealer voluntarily surrendered the paraphernalia of his office. I am of the opinion that no particular importance is to be attached to this act. The sealer was restrained from making use of the paraphernalia, and the city had notified him that it would no longer pay rental for his office, and it is not at all unreasonable that he presumed that when the paraphernalia could be used, he could have obtained it.

[3] "Counsel for defendant also quotes in his brief portions of a letter from the sealer to the mayor relative to the bureau of weights and measures, referring to its 're-establishment.' I fail to see that this particular correspondence, or any of the correspondence which is in evidence, shows any intention to abandon the office or any ceasing to perform its duties other than had already taken place by reason of the injunction. The sealer uses the word 're-establishment' in his letter and counsel for defendant has argued from this that he considered the office abandoned. I cannot agree with him. Other portions of the letter show that such was not his intention, and, furthermore, the word 're-establishment' may have been used advisedly, for certainly the office was in need of re-estab-

lishment as soon as the injunction which had practically abolished it, would be dissolved.

[4, 5] "Counsel for defendant also argues that the failure of the sealer and his deputies to take up the duties of his office as soon as the decision in Scott v. Boyle was announced shows that he considered his office vacant. I am of the opinion that the argument is not sound. The judgment of the Supreme Court in the Scott Case did not become final until 30 days after its rendition (December 12, 1912); furthermore, the injunction against the sealer was still in force, and, still further, a failure to perform the duties of the office from December 12th to December 31st (the date of the resignation of the sealer) would not constitute a vacancy in the office, for the ceasing to perform the duties of the office must continue for three consecutive months. Counsel for defendant cites in support of his contention that a vacancy occurred in the office, People ex rel. McGarvey v. Hartwell, 67 Cal. 11, 6 Pac. 873. I am of the opinion that the case is not in point with the one at bar. In the case cited, the claimant could, at any time during the two years, have demanded his office, or at least made an attempt to perform its duties. In the case at bar the sealer and his deputies were restrained from performing their duties. In that case the court said: 'Public office is held upon the implied condition of diligently and faithfully executing the duties belonging to it; and a *willful* refusal to perform the duties works a forfeiture.' In the case at bar, it cannot be said that the refusal to perform the duties was willful, for the injunction prevented their performance. In view of the injunction, and in view of the fact that the sealer and his deputies at least made an effort to perform the duties of their respective offices, I am of the opinion that no vacancy occurred in the office, and that they held office until the date of their resignation.

[6] "The only other point to consider is, Are there funds in the treasury of the city and county applicable to the warrants which petitioner demands? The referee is of the opinion that for the purpose of this inquiry it is immaterial whether there are or not. The proceeding now before the court is a proceeding to compel the auditor to issue his warrant, and the only question pertinent to this inquiry is, Is the petitioner entitled to the warrant? If he is, it should be issued. See Ott Hardware Co. v. Davis, 165 Cal. 795, 799, 800, 134 Pac. 973.

[7] "But should the question as to whether there is a specific fund upon which these warrants can be drawn be a material one, I would have to determine that the fund exists. Some $8,000 was appropriated to pay the salaries and expenses of the sealer and his deputies. The evidence shows that this fund was not drawn upon, but that it was merged in the fund known as the general fund at the end of the fiscal year 1912. If the general fund has been enriched by this specific fund, it is to be presumed that this fund still exists and is applicable to the payment of the warrants in question.

"To conclude, the referee is of the opinion that his award should be in favor of the petitioner in both the questions of fact which were submitted to him, and findings and conclusions may be prepared accordingly."

It is therefore ordered that the peremptory writ of mandamus issue from this court to the defendant, as auditor of the city and county of San Francisco, commanding him to deliver to the petitioner warrants for the salary of himself and his assignors due on May 1, 1912, and on the first of each and every month thereafter to and including January 1, 1913, aggregating the sum of $6,212.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 806

SCOTT v. BOYLE, Auditor. (Civ. 1457.)

(District Court of Appeal, First District, California. Sept. 22, 1914.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by M. P. Scott for a writ of mandamus against Thomas F. Boyle, as auditor of the City and County of San Francisco. From an order granting the writ, respondent appeals. Affirmed.

Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for appellant. Pemberton & Pemberton, of San Francisco, for respondent.

PER CURIAM. The parties in the above-entitled cause having stipulated that the appeals from the judgment and order rendered in said cause in favor of the respondent, M. P. Scott, presents questions identical with those presented in the case of No. 1431, McEvers v. Boyle, Auditor, etc., 144 Pac. 308, decided by this court on September 21, 1914; that the facts in both cases are in all respects the same; and that all briefs and arguments filed and made on the appeal from the judgment in favor of the petitioner and respondent, J. W. McEvers (being case No. 1431), may be considered as made and filed in the appeal from the judgment and order in favor of said respondent M. P. Scott: Now, therefore, it is hereby ordered upon the authority of the case of McEvers v. Boyle (No. 1431), and for the reasons stated in the opinion filed therein, that the order and judgment appealed from in the above-entitled cause be, and the same are hereby, affirmed.

25 Cal. App. 528

STOFF v. ERKEN et al. (Civ. 1521.)

(District Court of Appeal, First District, California. Sept. 26, 1914. Rehearing Denied by Supreme Court Nov. 25, 1914.)

1. Husband and Wife (§ 36*)—Contracts—Validity.

Under Civ. Code, § 158, a husband or wife may enter into any transaction with the other, respecting property, which either might have made, if unmarried.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 218; Dec. Dig. § 36.*]

2. Contracts (§ 111*)—Legality of Object.

A contract settling disputed property rights between spouses, both of whom were seeking a divorce, made after the evidence was in and with the advice of counsel, is not void for fraud, or as an agreement to withdraw or abandon a defense to a suit for divorce, where it was also agreed that the case should be submitted to the court on the evidence, although the negotiations were made on the theory that the divorce would be granted to the husband.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515–520; Dec. Dig. § 111.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Louis D. Stoff against Irma M. Erken and others. From a judgment for plaintiff and an order denying new trial, defendant named appeals. Affirmed.

James L. Nagle and P. B. Nagle, both of San Francisco, for appellant. L. H. Brownstone, of San Francisco, for respondent.

KERRIGAN, J. This is an action by the plaintiff, the assignor of Charles H. Erken, to foreclose a mortgage on real property. Judgment went in favor of the plaintiff, and this appeal is from that judgment and from an order denying defendant's motion for a new trial.

There were two defenses interposed to the action: First, that the defendant was induced to sign the note and mortgage by reason of misrepresentations of Charles H. Erken; and, second, that defendant did not receive any consideration for the same. The only way in which it was sought to establish these defenses was by attacking the validity of a settlement of the property rights of the defendant and Charles H. Erken theretofore had in a divorce proceeding pending between them, in which settlement the real property involved in the present mortgage, although standing in the name of the defendant, was claimed by Charles H. Erken to be community property, but was abandoned to the defendant upon her executing the note and mortgage in suit. The validity of that settlement is the only question raised by the appellant in support of her appeal.

Prior to the commencement of the present action the defendant Irma M. Erken had filed a suit against her husband, Charles H. Erken, for a divorce, alleging several grounds. Erken answered, and also filed a cross-complaint, alleging cruelty and adultery. He also sought in a separate action, but which was tried with the action for divorce, to have the real property involved in the present suit, and which was standing of record in the name of his wife, declared to be community property. In due time an answer to the cross-complaint was filed and the case went to trial. Plaintiff had completed her case in chief, and the defendant had introduced considerable testimony to sustain the allegations of his answer and cross-complaint, when the trial of the case was halted by negotiations of settlement of the property rights of the parties. An agreement was reached and executed under the terms of which the real estate above referred to was agreed to be the property of the wife upon her executing to the husband the note and mortgage in suit. An epitome of the testimony on the subject is as follows:

Louis H. Brownstone, the attorney for Charles H. Erken in the divorce suit, testified as to the agreement of settlement between Erken and his wife. In his testimony he states that after the trial had been in progress two or three days, and during an adjournment, Mrs. Erken's attorney, Mr. Eisner, called on him and discussed the testimony already introduced; that he stated to Mr. Eisner that the real property involved would undoubtedly, under the evidence submitted in the case, be assigned to his client absolutely, the testimony as to the wife's adultery being conclusive; that Mr. Eisner practically admitted that such testimony was irrefutable. Continuing, this witness stated:

> "Mr. Eisner at that time tried to prevail on me to dismiss this charge of adultery, and permit Mrs. Erken to get a divorce on the ground of desertion, or some such ground as that; but we absolutely refused to do anything except to submit the case on the testimony as it then stood. I told Mr. Eisner that I was satisfied that if the case was submitted as it then stood, or even if it went further, there wasn't any question about the fact that the judge would grant the divorce on the ground of adultery."

Mr. Eisner also appeared as a witness and testified with regard to the settlement between Erken and his wife. He said:

> "The action was to be submitted on the testimony then in. The cross-complaint was on the ground of adultery. The cross-complainant had put in quite a bit of evidence to sustain the charge. * * * It was then agreed that the case was to be submitted, and, further, it was to be conceded by the cross-complainant that the property was the separate property of Mrs. Erken. The note and mortgage for $5,000 was to be signed by Mrs. Erken. Then Charles Erken was to get the decree of divorce. The case was to be submitted to the court to make its ruling. It was assumed, however, from the evidence then in, that the court could not rule otherwise than to give judgment to Charles H. Erken. * * * In the negotiations we asked for one-half the value of the property; we asked one-half in settlement. The cross-complainant, through Mr. Brownstone, refused to give one-half, and the matter was contested, and was in court for a long time. As a counter proposition, and after some negotiations, and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

after a number of meetings, Mr. Brownstone made the proposition for his client that they were willing to accept $5,000 and Mrs. Erken keep the property. * * * Mrs. Erken said, 'Yes.' In that conversation we spoke purely, as I recall it, about property rights."

[1, 2] Under section 158 of the Civil Code, a husband or wife may enter into any engagement or transaction with the other, respecting property, which either might, if unmarried. The contract in this case seems free from any taint affecting its validity. True, it has been repeatedly held that where an agreement between husband and wife is founded upon a consideration to withdraw or abandon a defense to a suit for divorce, or to do anything to facilitate procuring the same, it is illegal and void (Loveren v. Loveren, 106 Cal. 509, 39 Pac. 801; Beard v. Beard, 65 Cal. 354, 4 Pac. 229); but those cases have no application to the facts in this case; nor do we find that by the agreement of settlement complained of any fraud was practiced upon the court before which the divorce suit was tried.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 548

WESTOVER et al. v. BRIDGFORD et al.

(Civ. 1371.)

(District Court of Appeal, First District, California. Sept. 30, 1914. Rehearing Denied by Supreme Court Nov. 27, 1914.)

1. VENUE (§ 63*)—CHANGE OF VENUE—NOTICE OF MOTION—SUFFICIENCY.

Under Code Civ. Proc. § 395, requiring actions not otherwise provided for to be tried in the county in which defendants or some of them reside, but providing that if none of the defendants reside in the state the action may be brought in any county which plaintiff may designate, and section 396, providing that if the county in which the action is commenced is not the proper county for the trial thereof the action may notwithstanding be tried therein, unless defendant at the time he answers or demurs files an affidavit of merits and demands in writing that the trial be had in the proper county, conceding that a notice of intention to move to change the place of trial on the ground that none of the defendants resided in the county in which the action was commenced, was insufficient, in that, this is not a ground for such a motion if none of the defendants reside in the state. This defect was cured by a further statement that the motion would be based on the demand and affidavit of merits which showed that the ground of the motion was that the moving defendants resided in a county in the state other than that in which the action was commenced.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 104–108; Dec. Dig. § 63.*]

2. VENUE (§ 84*)—CHANGE OF VENUE—NOTICE OF APPLICATION—WAIVER OF DEFECTS.

If a notice of a motion to change the place of trial on the ground that none of the defendants resided in the county in which the action was commenced was defective in that this is not a ground of such motion if none of the defendants reside in the state, this objection was waived by appearing and contesting the motion without raising the objection.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146–148; Dec. Dig. § 84.*]

3. VENUE (§ 66*)—CHARGE OF VENUE—AFFIDAVIT OF MERITS—SUFFICIENCY.

While an affidavit of merits on a motion to change the place of trial averring that defendants have fully and fairly stated the matters of defense to their attorney and that such attorney has advised them that they have a good and legal defense is defective, an affidavit, which in addition to such averment and an averment that the attorney for the moving defendants took part as their legal adviser in the transactions between the parties concerning the subject-matter of the suit, and that his advice was based upon that knowledge, set forth in detail the facts of the case from which it appeared that defendants had a meritorious defense, was sufficient.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 110–113; Dec. Dig. § 66.*]

4. EVIDENCE (§ 83*)—PRESUMPTION AS TO JURISDICTION OF OFFICER.

Where an affidavit of merits on a motion to change the place of trial was sworn to before a notary public appointed for a county other than that in which the venue of the affidavit was laid, it would be presumed, in the absence of a showing to the contrary, that the notary administered the oath within his jurisdiction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

5. VENUE (§ 84*)—CHANGE OF VENUE—AFFIDAVIT OF MERITS—WAIVER OF DEFECTS.

The defect, in an affidavit of merits on a motion to change the place of trial which was sworn to before a notary public of a county other than that in which the venue was laid, was waived where no objection was made in the trial court.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 146–148; Dec. Dig. § 84.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by William Westover and others against H. V. Bridgford and others. From an order changing the place of trial, plaintiffs appeal. Affirmed.

Walter G. Holmes and John J. Roche, both of San Francisco, for appellants. E. A. Bridgford, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from an order granting the motion of certain of the defendants for a change of the place of trial.

The action is one in claim and delivery; and, at the time it was commenced in the superior court in the city and county of San Francisco, several of the defendants resided in the county of Siskiyou, and others of them resided without the confines of the state of California. The defendants residing in the county of Siskiyou filed a demurrer to the complaint, accompanying it with an affidavit of merits, and the demand required by section 396 of the Code of Civil Procedure, and gave notice of their intention to move for a change of the place of trial to the county where they resided. The motion was granted. Plaintiff makes four points for a reversal of the order granting the motion. We will take these up in the order made.

[1, 2] The notice of motion was based upon the ground that none of the defendants at the time of the filing of the complaint or since were residents of the city and county of San Francisco. Section 395 of the Code of Civil Procedure provides that an action like the present one must be tried in the county in which the defendants or some of them reside at the commencement of the action, and if none of the defendants reside in the state that the same may be tried in any county which the plaintiff may designate in his complaint. Plaintiff claims that in order to entitle the defendants to a change of venue, under the provisions of that section of the Code, they should have stated in their notice the particular provision on which they relied as the ground of their motion (Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981); that the notice given being based on the ground that none of the defendants resided in the city and county of San Francisco is consistent with the fact that they all reside out of the state, in which event, under the terms of section 396, the action might be tried in any county the plaintiff should designate in its complaint. Conceding, for the sake of argument only, this point to be well taken, we think the defect is cured by the fact that the notice concludes with the statement that the motion will also be based on the demand and affidavit of merits, which documents show in full the ground upon which the motion will be made, namely, that the moving defendants reside in Siskiyou county. The notice is no more defective than if it had stated that the "motion would be based on the grounds specified in the demand and the affidavit which are served and filed herewith." In such case it seems clear that the notice would be sufficient. Certain it is that the papers served and filed in the proceeding afforded the plaintiff ample notice of the ground of the motion. But even if this were not so, the plaintiff, having appeared and contested the motion without raising this objection, must be deemed to have waived the claimed defect in the notice. Bohn v. Bohn, 164 Cal. 532–538, 129 Pac. 981.

[3] The original affidavit of merits was defective in that it averred that the defendants had fully and fairly stated the matters of defense to the cause of action alleged by plaintiffs to their attorney, and that said attorney had advised them that they had a good and legal defense on the merits to the cause of action set forth in the complaint. Nickerson v. California Raisin Co., 61 Cal. 268; Palmer & Rey v. Barclay, 92 Cal. 199, 28 Pac. 226. While the amended affidavit which was filed repeats the language of the original affidavit just referred to, nevertheless it is not, we think, subject to the objection that it does not appear therefrom that they are advised by their counsel that they have a meritorious defense based upon his knowledge of all the facts of the case. In one part of the amended affidavit it is averred that the attorney for the moving defendants took part as their legal advisor in all the transactions between the parties to this suit, concerning the subject-matter thereof, and that his advice in this matter was based upon that knowledge. This, perhaps, is equivalent to saying that the defendants had stated the facts of the case to their counsel; but, in addition to this, the affidavit also sets forth the facts of the case in detail, from which it is plain that, if the facts are true as averred, the defendants have a meritorious defense on the facts to plaintiffs' alleged cause of action. In other words, to repeat, defendants have averred the facts of the case, and left the question of whether or not they have a meritorious defense based thereon to the consideration of the court.

[4, 5] The venue of the amended affidavit of merits was laid in Siskiyou county, while it was sworn to before a notary public in the city and county of San Francisco. It is doubtless true that a notary is only authorized and empowered to administer oaths in the county for which he was appointed (Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 Pac. 331); but we will presume, there being no showing to the contrary, that the officer complied with the law and administered the oath within his jurisdiction. Where there is a variance between the caption and the jurat of an affidavit, it will be presumed that the officer acted within his jurisdiction. 2 Cyc. 30; Teutonia Loan & Building Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; Goodnow v. Litchfield, 67 Iowa, 691, 25 N. W. 882; Goodnow v. Oakley, 68 Iowa, 25, 25 N. W. 912. Moreover, it appearing that there was no objection to the affidavit in the trial court, the defect therein must be deemed waived. By sufficient averments, the affidavits show that the moving defendants reside in the county of Siskiyou, and that the other defendants reside in British Columbia; in other words, that none of the defendants reside in the city and county of San Francisco. And therefore, under the provisions of section 395 of the Code of Civil Procedure, the defendants are entitled to have the case tried in Siskiyou county.

The order appealed from is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

25 Cal. App. 546

CREDIT CLEARANCE BUREAU v. GEORGE A. HOCHBANN CONTRACTING CO. et al.

(Civ. 1365.)

(District Court of Appeal, First District, California. Sept. 28, 1914. Rehearing Denied by Supreme Court Nov. 27, 1914.)

1. CONTRACTS (§ 238*)—ABANDONMENT—NEW CONTRACT.

Where plaintiff's assignor, having a written contract to do the plastering of a building, threatened to abandon it, whereupon an oral agreement was made that plaintiff's assignor should continue the work as superintendent for defendants, and they would pay him the actual cost of the labor and materials used therein, a finding that such oral agreement superseded, and was not a modification of, the prior written agreement, and was therefore not within Civ. Code, § 1698, providing that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, was proper.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.*]

2. COMPROMISE AND SETTLEMENT (§ 6*) — CONSIDERATION.

Where a dispute arose between defendants and plaintiff's assignor over a written contract for plastering a building, and plaintiff's assignor threatened to abandon the contract, whereupon an oral agreement was entered into that he should continue the work as defendants' superintendent, the settlement of the dispute between the parties constituted a sufficient consideration for the substituted oral contract.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35–50; Dec. Dig. § 6;* Contracts, Cent. Dig. § 329.]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Action by the Credit Clearance Bureau against the George A. Hochbann Contracting Company and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

H. M. Anthony, of San Francisco, for appellants. Edwin H. Williams and L. S. Melsted, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment and from an order denying defendants' motion for a new trial.

The facts of this case are simple, and the questions of law are not difficult of solution. George A. Hochbann Contracting Company had a general contract for the construction of a certain building in San Francisco. This company entered into a subcontract in writing with G. W. Burke, the assignor of the plaintiff, under the terms of which Burke was to do the plastering work on the building. The points in the case involve the questions: (1) Whether or not the work on the subcontract was done under the written contract, or under an alleged oral contract; and (2) if under the oral contract, whether or not that contract was void for lack of consideration.

[1] As to the first of these contentions, it is sufficient to say that we have carefully read the record, and find ample evidence to sustain the finding that the work was done under an oral contract. As to the second point, we find no force in defendants' position that the oral contract, which was substituted for the former written contract, was without consideration, and hence void. It appears, according to the evidence introduced by the plaintiff, that Burke was proceeding very slowly with the work agreed to be done by him in the written agreement, and threatened to abandon the contract, claiming that the work had been misrepresented to him, in consequence of which he had undertaken the contract at too low a price. As a result of these differences Burke and the construction company ultimately entered into an oral agreement, whereby Burke was to continue the work as superintendent thereof, and the defendants were to pay him the actual cost of the labor and materials used therein, "and the contract was to be turned into a day's work job." The court having found, as it did, that the oral agreement was substituted in the place and stead of the old agreement, and that the latter was canceled, the oral agreement is not to be held to be a modification of the prior written agreement, and therefore ineffectual for that purpose under the terms of section 1698 of the Civil Code. Pearsall v. Henry, 153 Cal. 314, 325, 95 Pac. 154, 159.

[2] Nor was the oral agreement void for lack of consideration; it being based, as disclosed by the evidence, "upon the existence and settlement of disputes between the parties." Pearsall v. Henry, supra. The court found on all the material allegations framed by the pleadings.

The judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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25 Cal. App. 519

DAVIES v. STARK et al. (Civ. 1515.)

(District Court of Appeal, Second District, California. Sept. 25, 1914.)

1. APPEAL AND ERROR (§ 706*)—RECORD—SUFFICIENCY.

Where the record does not disclose the grounds upon which a motion for new trial was made, it cannot on appeal be held that the overruling of the motion was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944–2947; Dec. Dig. § 706.*]

2. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.

Where the bill of exceptions does not contain the evidence, it must be presumed that the evidence was sufficient to support the findings of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. FORCIBLE ENTRY AND DETAINER (§ 24*)—COMPLAINT—SUFFICIENCY.

A complaint averring that, while plaintiff was in peaceable possession of a storeroom, defendants forcibly entered and ejected plaintiff, breaking the doors, locks, and windows, is insufficient to state a cause of action of forcible entry, it not showing the defendants retained possession; the purpose of the action, under Code Civ. Proc. § 1174, being to recover possession.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 107-111, 114-120, 146; Dec. Dig. § 24.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action for forcible entry by Henrietta Davies against John Stark and another. From a judgment for plaintiff, defendant H. L. Suydam appeals. Reversed.

M. O. Graves, of Los Angeles, for appellant. Birney Donnell, of Los Angeles (Willoughby Rodman, of Los Angeles, of counsel), for respondent.

SHAW, J. Action for forcible entry. The complaint alleges that plaintiff, on October 31, 1913, was in the peaceable possession of a certain storeroom, at which time defendants forcibly entered therein, and in a forcible manner ejected the plaintiff from the premises, and broke the doors, locks, and windows of said storeroom, all to her damage in the sum of $500; that the monthly rental value of the property is $40. There is an absence of any allegation that any of the defendants detained possession of the property; indeed, from all that appears to the contrary in the complaint, plaintiff may have, immediately upon the commission of the acts attributed to defendants, resumed possession of the premises and held the same at the time of instituting the action. To this complaint Suydam, the appellant, filed a separate answer, admitting that plaintiff was, on October 31, 1913, in the peaceable possession of the property, but denied that he entered the premises in any manner, or ejected the plaintiff therefrom, or did any of the acts charged in the complaint to have been done by defendants. The court found the facts as alleged in the complaint, namely: That defendants forcibly broke the doors and locks of the storeroom, entered therein, and ejected plaintiff, who was in the peaceable possession thereof, all to her damage in the sum of $26.25, for treble the amount of which sum judgment was rendered for plaintiff. Suydam appeals from the judgment and an order denying his motion for a new trial.

[1] The record discloses that a bill of exceptions was prepared and settled, to be used in support of defendants' motion for a new trial, and also shows the motion as made to have been denied. This order must be affirmed, for the reason that the record does not disclose the grounds upon which the motion was made; hence it is impossible to say the court erred in the ruling.

[2] No attack is made upon the findings, and while the bill of exceptions discloses no evidence showing that plaintiff was damaged in any sum whatsoever, or that defendants detained possession of the property, we must, since the bill of exceptions does not purport to contain all of the evidence, but only such parts of the record upon which defendants based their claim for a new trial, indulge in the presumption that there was sufficient evidence adduced to justify the court in making the finding. Every presumption is in favor of the regularity of the judgment and proceedings upon which it is based, and to justify a reversal it devolves upon appellant to affirmatively show error.

[3] The only question to be reviewed upon the record as presented is the sufficiency of the complaint. As to this, we think what was said in the case of Bell v. Haun, 9 Cal. App. 41, 97 Pac. 1126, is determinative of the question. The facts in the case there were almost identical with those here presented. It was there said:

> "An allegation of forcible entry alone, unaccompanied by an allegation showing that defendant detains possession of the premises so forcibly entered, will not warrant an action under the provisions of chapter 4, title 3, Code of Civil Procedure, for forcible entry and detainer. Castro v. Tewksbury, 69 Cal. 562, 11 Pac. 339; Preston v. Kehoe, 10 Cal. 445; Armstrong v. Hendrick, 67 Mo. 542; Merrill v. Forbes, 23 Cal. 379. In the absence of such allegation a fact necessary to constitute the cause of action must be taken as having no existence. Hildreth v. Montecito Creek W. Co., 139 Cal. 22, 72 Pac. 395. While it appears from the complaint that plaintiff was in the actual and peaceable possession of the premises, and that defendants did wrongfully and unlawfully turn the plaintiff out of the possession thereof, it nowhere appears that defendants detained or withheld possession of the premises from plaintiff at the commencement of the action."

It is made the duty of the court, under section 1174, Code of Civil Procedure, if the finding of the court be in favor of plaintiff, to enter judgment for the restitution of the premises; but to warrant such judgment it must appear from the complaint that defendants withheld the premises from plaintiff. It was further said in Bell v. Haun, supra:

> "The real gist of the action is the detention of the premises from the one entitled thereto, and this whether the detainer be forcible, as defined by section 1160 of the Code of Civil Procedure, or unlawful, within the meaning of section 1161, or the retention of possession without force and violence by one who has by force and violence entered upon the possession of another."

In 19 Cyc. p. 1156, it is said:

> "In all actions, brought under forcible entry and detainer statutes, it is necessary to allege a detention of the premises at the time of the institution of the action; for, in the absence of such detention the complaint would amount to no more than a trespass."

As frequently said, pleadings must be construed most strongly against the pleader, and, so regarded, the allegations of the complaint in this case are entirely consistent with the fact that defendants broke the doors and windows, ejected plaintiff from the storeroom, and immediately thereafter departed from the premises.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In our opinion, the complaint is insufficient to sustain the judgment rendered; and it is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 536

SACRAMENTO ORPHANAGE & CHILDREN'S HOME v. CHAMBERS, State Controller. (Civ. 1281.)

(District Court of Appeal, Third District, California. Sept. 26, 1914.)

1. CONSTITUTIONAL LAW (§ 206*)—FEDERAL CONSTITUTION—"PRIVILEGES AND IMMUNITIES" OF CITIZENS.

The "privileges and immunities" of citizens of the United States protected by Const. U. S. art. 14, § 1, providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625–648; Dec. Dig. § 206.*

For other definitions, see Words and Phrases, First and Second Series, Privileges and Immunities.]

2. CONSTITUTIONAL LAW (§ 205*)—RIGHTS OF CITIZENS—"PRIVILEGES"—"IMMUNITIES."

Pol. Code, § 2283, appropriates money from the state treasury to institutions conducted for the support of needy orphan children, and St. 1913, p. 629, amending such section, provides that no child whose parent or parents have not resided in the state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of the state, shall be deemed a minor orphan within such chapter. *Held*, that such amendment, in so far as it withdrew aid from native-born citizen children of alien parents, was violative of Const. art. 1, § 21, providing that no citizen or class of citizens shall be granted privileges or immunities which on the same terms shall not be granted to all citizens; the words "privileges" and "immunities" being nearly synonymous, the term "privilege" signifying a peculiar advantage, exemption, or immunity, and the word "immunity" signifying an exemption or privilege.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591–624; Dec. Dig. § 205.*

For other definitions, see Words and Phrases, First and Second Series, Privilege; Immunity.]

3. ASYLUMS (§ 2*)—ORPHAN CHILDREN—CARE—STATE AID—"CHARITY."

State aid payable to institutions caring for orphan children, authorized by Pol. Code, § 2283, as amended by St. 1913, p. 629, is not a "charity," but should be considered in the light of the performance of a duty by the state to care for its citizens unable to care for themselves.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 1; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, First and Second Series, Charity.]

4. ASYLUMS (§ 2*)—STATE AID — ORPHAN CHILDREN—CARE—ALIEN PARENTS—MANDAMUS.

Pol. Code, § 2283, appropriates state aid to institutions caring for orphan children, and St. 1913, p. 629, amending it, declares that no child whose parent or parents had not resided in the state for at least three years prior to the application for aid, or whose parent or parents had not become citizens of the state, should be deemed a minor orphan within such law. *Held* that, where an institution cared for a native-born orphan child of alien parents, it was entitled to mandamus to compel the State Controller to extend aid for such child, either on the theory that the amendment should be construed not to apply to children of alien parents born within the state, or, if construed to cover such children, then as unconstitutional, leaving the act as it existed prior to amendment in force.

[Ed. Note.—For other cases, see Asylums, Cent. Dig. § 1; Dec. Dig. § 2.*]

Application for a writ of mandamus by the Sacramento Orphanage & Children's Home against John S. Chambers, as State Controller. Writ granted.

White, Miller, Needham & Harber, of Sacramento, and Edward F. Moran and W. H. Barrows, both of San Francisco, for petitioner. John T. Nourse, Deputy Atty. Gen., for respondent.

BURNETT, J. This is an application for a writ of mandate to secure the payment of a claim for the support of a minor orphan.

After setting forth that, from the 1st day of July, 1913, to the 22d day of May, 1914, the Sacramento Orphanage & Farm Association was a corporation, and an institution conducted for the support and maintenance of minor orphans, half orphans, and abandoned children, and that during the same period the Sacramento Children's Home was a like institution and conducted for like purposes, and that, on said May 22d, the said organizations duly consolidated and became vested with all the rights, duties, and powers of said component associations and succeeded to and became vested with all the property thereof, the petition proceeds:

"That for a period of six months immediately prior to the 31st day of December, 1913, that is to say, from the 1st day of July, 1913, to the 31st day of December, 1913, Sacramento Orphanage & Farm Association did have in its care, custody and control one Domeric Juryvich, a minor half orphan under the age of fourteen years, to wit, of the age of seven years or thereabouts. That the parents of said minor half orphan were aliens and had never become citizens of the United States or of the state of California. That the mother of said minor is dead. That the father of said minor, if alive, would have been a resident of the state of California for more than three years prior to the 1st day of July, 1913. That on August 25, 1912, the father of said minor left Sacramento to visit his native country, intending to return to the state of California. That petitioner is informed and believes that said father of said minor died on the journey to his native country. That said minor was born in the state of California and at the time of his birth his parents were residents of the state of California and continued to be residents of said state up to the time of their death."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Then follow allegations as to the proper presentation of petitioner's claim for $37.50 and its approval by the board of control, the availability of sufficient funds in the state treasury appropriated by the Legislature for the purpose of paying for the support and maintenance of said minor, and the application to respondent for the appropriate warrant and his refusal to draw the same.

The statutory authority upon which petitioner relies is found in section 2283 of the Political Code as amended in 1913 (Stats. of 1913, p. 629), as follows:

> "There is hereby appropriated out of any money in the state treasury not otherwise appropriated, to each and every institution in the state conducted for the support and maintenance of needy minor orphans, half orphans, or abandoned children, and to each and every county, city and county, city, or town maintaining such orphans, half orphans, or abandoned children, or any or all of such classes of persons, aid as follows: For each whole orphan supported and maintained in any such institution, not in excess of one hundred dollars per annum; and for each half orphan or abandoned child, not in excess of seventy-five dollars per annum."

Such legislation, it may be observed, does not rest its sanction alone upon the general authority of the legislative department of the state government, but it is expressly authorized by section 22, art. 4, of the state Constitution, as follows:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller; and no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state; provided, that notwithstanding anything contained in this or any other section of the Constitution, the Legislature shall have the power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances—such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions; provided, further, that the state shall have at any time the right to inquire into the management of such institutions."

Since there is no issue as to the facts set out in the petition herein, there would therefore be no difficulty in the way of granting the relief sought were it not for the following provision of section 2289 of the Political Code, as amended by the said statutes of 1913:

> "In order that the provisions of this chapter shall not be abused, it is hereby declared: * * * (4) That no child whose parent or parents have not resided in this state for at least three years prior to the application for aid, or whose parent or parents have not become citizens of the state shall be deemed a minor orphan, half orphan or abandoned child within the intent and meaning of this chapter."

[1] Petitioner herein claims that this particular provision, if construed as contended for by respondent, is void as opposed to the Constitution of the United States and also the Constitution of this state. The sections to which petitioner refers are section 1 of article 14 of the former and section 21 of article 1 of the latter. But as to said provision in the federal Constitution, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," the interpretation by the courts would preclude it from application to the situation here. In Duncan v. Missouri, 152 U. S. 382, 14 Sup. Ct. 571, 38 L. Ed. 485, it was said:

> "But the privileges and immunities of citizens of the United States, protected by the fourteenth amendment, are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the Constitution."

And in United States v. Moore (C. C.) 129 Fed. 632, it is declared:

> "The question is: Is the right or privilege claimed granted in terms by any provision in the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the Constitution does specify and confer upon citizens of the United States as to arise by necessary implication."

The subject is also considered and discussed in the Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; and other decisions of the highest court of the country.

The Slaughter House Cases especially received the most deliberate consideration, and the court announced the rule to be that:

> "The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these which are placed under the protection of Congress by this clause of the fourteenth amendment."

Of course, it is difficult, if not impossible, to draw with precision a line which will separate all the privileges and immunities of the citizens of the United States from those of the citizens of the state as such, but it is entirely clear that no provision of the Constitution of the United States forms the basis or affords legal sanction for the aid and assistance in question in this controversy. The privilege or benefit herein involved does not grow out of, nor does it have any relation whatever to, any grant of right or power by the federal Constitution. It is purely a state question involving only the construction of the said legislative enactment and of the fundamental law of this state. It is similar in principle to the provisions made for the education of the children of the state at public expense. As to that privilege it was said, through Chief Justice Wallace, in Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405:

> "It will * * * be readily conceded that the privilege accorded to the youth of the state,

by the law of the state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship."

This statement was directed to the contention of petitioner therein that by virtue of said fourteenth amendment of the federal Constitution a citizen of the United States must be accorded the same privileges of admission to the public schools here as is granted to a citizen of this state. Other instances of special favors allowable to citizens of a state could be suggested, but sufficient has been said as to this branch of the case.

[2] But the contention of petitioner that said discrimination is obnoxious to section 21 of article 1 of the state Constitution is assuredly entitled to more serious consideration. That section provides:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The child for whose support aid is herein sought is a citizen of this state. He was born in this state while his parents were residents thereof. It is undoubtedlly true, as stated by respondent, that:

> "Every child born here is a citizen of the state if its parents are residents of the state. Thus a child born here whether its parents are citizens or aliens immediately becomes a citizen of the United States, but its second citizenship follows the residence of its parents."

The child is and was an orphan under the age of 14 years and was cared for by such an institution as is contemplated by said statute providing for state aid. What is the basis, then, for discrimination between him and other citizens who are orphans under the age of 14 years and under the care of the same or of similar institutions? Is it any quality or condition affecting him personally, that would make such classification reasonable and just? Is there any "natural intrinsic or constitutional distinction" differentiating him from the other minor orphan citizens who are receiving and who are entitled to receive state aid? The answer, of course, must be in the negative. The distinguishing quality or condition relates, not to him, but to his parents. It would be a strange construction of the constitutional provision that would permit privileges to be conferred upon one citizen of the state and withheld from another for the reason that there was a difference in the political status of the parents. Mentally, morally, and physically, no doubt, the sins and infirmities of the parents are often visited upon their descendants; but in the realm of civil and political rights and privileges no such principle can be recognized or tolerated. To affirm the proposition contended for by respondent, that one citizen is, and another is not, entitled to this privilege in consequence of the difference in the citizenship and residence of their parents, is to deny all efficacy to the constitutional mandate that privileges and immunities must be granted to all citizens upon the same terms.

The purpose of the Legislature is unquestionably a commendable one, but it must be accomplished in a legal and constitutional manner. Restrictions affecting all citizens alike might be imposed which would prevent abuse of the privilege and which would be open to no valid objection.

If the condition of residence or of citizenship related to the minor orphan himself, it probably could be said that the classification was just and reasonable and within the purview of the Constitution. No doubt the Legislature might require the beneficiary to be a citizen of the state and a resident therein for a certain period. If he were not a citizen, said constitutional provision could not, of course, be invoked, and three years might not be an unreasonable requirement as to residence. There would thus be presented in the condition and status of the minor a just basis for valid discrimination. But that is entirely different from the requirement here as to the citizenship and residence of the parents. The injustice of the rule contended for could not be more impressively illustrated than in the present instance. If said provision as thus understood is to be enforced, no aid can ever be granted to said minor for the reason that death has rendered it impossible for either of his parents to become a citizen or resident for the requisite time. No such arbitrary and extraneous discrimination is sanctioned by our fundamental law.

In the foregoing, we have manifestly assumed that a "privilege" or "immunity" within the contemplation of said constitutional provision is involved in this controversy. However, as to this, there may be some ground for difference of opinion. The word "privilege," in common acceptation, means some immunity or advantage. Moore v. Fletcher, 16 Me. 63, 33 Am. Dec. 633. A "privilege" is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. Leader v. Cameron, 3 Okl. 677, 41 Pac. 635. In its natural meaning, the word "privilege" may be defined as a right peculiar to an individual or body. Ripley v. Knight, 123 Mass. 515. The words "privileges" and "immunities" are synonymous or nearly so; and privilege signifies a peculiar advantage, exemption, immunity, and immunity signifies exemption, privilege. Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

Of course, it is not every special favor that may be regarded as a privilege or immunity in the sense of this constitutional provision, but the appropriation of public money would seem clearly to be within the letter and spirit of the expression used. The support and comforts of a home afforded the orphan by these benevolent institutions constitute a peculiar benefit or advantage to the recipients, as probably no one would deny. While the aid is not extended by the state directly to the orphan, half orphan, or abandoned child, it is for his benefit, and there can be no difference in principle because the money is appropriated to and used by the intermediary. The essential thing is that it is for the benefit of the dependent. To the extent of applying this money to the beneficent purpose of the law the institution becomes an agent of the state, and it may be said that the statute provides regulations and safeguards to guarantee the faithful discharge of the stewardship.

If it should be said that the terms "privileges and immunities" apply only to rights and benefits that are of constitutional origin, petitioner may still assert its claim on the ground that the duty of the state to aid these helpless minors is affirmed or, at least, recognized in the Constitution itself (section 22, art. 4), and the Legislature is expressly authorized to make the necessary appropriations.

With much plausibility, also, it might be contended that to give effect to the clause here in controversy as construed by respondent would be in violation of that mandate of said section 22, art. 4, that the aid extended to such institutions must be "granted by a uniform rule, and proportioned to the number of inmates of such respective institutions." It could hardly be said that this requirement is observed if some of the orphans or half orphans who are inmates of such institutions are excluded in making the appropriation.

There is, however, some contention made —worthy of brief notice—that the subject-matter in dispute involves a donation or charity and that a donation or charity is not within the constitutional inhibition. It is declared that:

> "The aid extended by sections 2283–2289 of the Political Code is not given in the exercise of any governmental function or constitutional mandate, but is merely a contribution to a private charity under the constitutional permission. No vested right attaches to the grant of aid. 'No pensioner has a vested right to his pension. Pensions are bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion.' United States v. Teller, 107 U. S. 68 [2 Sup. Ct. 39, 27 L. Ed. 352.]"

Even under this conception of the appropriation, however—whatever may be the rule as to the power of Congress or the authority of the Legislatures of other states—no such discrimination could be made by our Legislature in view of said constitutional prohibition. If it be regarded in the nature of a charity, it would be no less an invidious distinction made between citizens sustaining the same relation to the law.

[3] But the appropriation is not to be regarded in the light of a charity proceeding from merely generous or equitable considerations such as might move a kindly disposed individual to extend a helping hand to one in need of assistance. The modern trend and development of civic ideas is no more emphatically shown than in the unmistakable recognition and expression by statutory and constitutional provisions of the duty of the state to afford assistance and support to the citizens who are not able to support themselves. Whatever may be the condition in other and less advanced countries, the health, comfort, and security of the individual as well as the protection of his property are justly regarded here as proper subjects of legislative promotion. It is the state's duty as the representative of the strong to bear and relieve "the infirmities of the weak." This task cannot be relegated entirely to individual philanthropy. There is no place in our sociology or scheme of government for the brutal philosophy of Nietzsche that "the weak and helpless must go to the wall; and we shall help them to go." The state may honor and glorify the strong and powerful, but it recognizes its duty to assist and champion the weak and helpless. This is rightly considered, not as a benevolent gift, but the fulfillment of a legal and moral obligation growing out of the duties and privileges of citizenship.

It would seem that the only debatable question is whether said provision of the act can be construed so as to harmonize with the Constitution, or, if not, whether with the provision eliminated there is any legislative authority left for this appropriation. The duty of the court is, of course, plain and well settled, to sustain, if possible, any enactment of the Legislature, and, if compelled to declare any portion of an act invalid, to save the balance if it can be done.

"Constitutions, like statutes and private instruments, must be so construed, if possible, as to give some force and effect to each of their provisions. The legal intendment is that each and every clause has been inserted for some useful purpose, and when rightly understood may have some practical operation. For the purpose of harmonizing apparently conflicting clauses, each must be read with direct reference to every other which relates to the same subject, and so read, if possible, as to avoid repugnancy, and, to that end, sections, paragraphs, and sentences may be transposed; elegance of composition may be sacrificed; and the meaning of words and phrases may be restricted or enlarged." French v. Teschemaker, 24 Cal. 540.

It is urged by petitioner that if we apply this principle and regard the whole of the act and the evident purpose of the Legislature, keeping in mind that an attempt to observe the requirement of the Constitution must be presumed, we should read the clause as follows:

> "No child not born in this state whose parent or parents have not become citizens of this state or whose parent or parents have not resided here for three years shall be deemed a minor orphan," etc.

As thus construed the law would it is claimed be reasonable and just and not obnoxious to said constitutional provision.

But we do not deem it necessary to decide whether this construction is permissible.

[4] We are satisfied that respondent's position cannot be maintained, and that one of the three following theories must be adopted, to wit: That the clause should be construed as advocated by petitioner, or that it should be held void and the remainder of the act upheld; or, if that be not possible, then the act in force prior to and at the time of the enactment of the said amendment should be considered as still operative. Upon any of these theories petitioner is entitled to prevail.

We think the peremptory writ should issue, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 510

MILLIKEN v. MEYERS, City Auditor.
(Civ. 1570.)

(District Court of Appeal, Second District, California. Sept. 25, 1914.)

1. Weights and Measures (§ 8*)—Officers—Validity of Appointment.

Where a city by ordinance appointed a deputy sealer of weights and measures and fixed his salary, it was immaterial whether he was appointed under St. 1911, p. 384, § 4, then in force, expressly authorizing the appointment of such officer, since in the absence thereof the ordinance would be a valid exercise of the police power conferred by Const. art. 11, § 11, providing that any city may make and enforce local police regulations not in conflict with general laws.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 10; Dec. Dig. § 8.*]

2. Weights and Measures (§ 8*)—Pay of Officers—Constitutional and Statutory Provisions—"State Office"—"Municipal Affairs."

Const. art. 11, § 14, as amended October 10, 1911 (see St. 1911, p. 1798), authorizes the Legislature by general law to provide for inspection and measurement of commodities, and the appointment of necessary officers. St. 1913, p. 1086, enacted in pursuance thereof, in force August 10, 1913, provided general regulations for measures, by section 17 permitted any city to appoint deputy sealers of weights and measures at $5 per day, and by section 19 provided that the act should not affect any appointment previously made. The defendant city operated under a freeholders' charter adopted under Const. art. 11, § 8, which did not designate such officer, but authorized it to appoint officers not designated in the charter and fix their pay by ordinance, and it had previously appointed a deputy and fixed his salary. *Held*, that the delegation of power to appoint such officers was the same as though the charter had expressly provided therefor; that if he was a municipal officer his appointment and pay were "municipal affairs," whether the duties were imposed by the charter or by the general law; that if his services were to be performed on behalf of the state, the office was a "state office," notwithstanding the duties were restricted to the city, and the Legislature could not direct the appropriation of municipal funds for the payment of a state office—so that after the statute went into effect, he was not entitled to the pay fixed thereby, but only to that fixed by the ordinance.

[Ed. Note.—For other cases, see Weights and Measures, Cent. Dig. § 10; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, Second Series, State Office; also First and Second Series, Municipal Affairs.]

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Mandamus by Joseph C. Milliken against John S. Meyers, auditor of the city of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

George E. Cryer and T. R. Spalding, both of Los Angeles, for appellant. Albert Lee Stephens, City Atty., and Myron Westover, Deputy City Atty., both of Los Angeles, for respondent.

SHAW, J. This was a proceeding for a writ of mandate to compel the defendant, as city auditor of the city of Los Angeles, to audit a warrant in favor of plaintiff upon the treasurer of the city for the sum of $27.69, alleged to be a balance due plaintiff for services rendered during the month of August, 1913, as city deputy sealer of weights and measures. Plaintiff appeals from the judgment rendered in favor of defendant.

In order to properly understand the case, reference is had to various acts of the Legislature and provisions of the Constitution affecting the question. As the Constitution stood in relation to the matter prior to October, 1911, it provided that:

> "No state office shall be continued or created in any county, city, town, or other municipality, for the inspection, measurement, or graduation of any merchandise, manufacture, or commodity; but such county, city, town, or municipality may, when authorized by general law, appoint such officers." Section 14, art. 11, Const.

Pursuant to this authority, the Legislature adopted an act approved March 18, 1911 (Stats. 1911, p. 383), whereby, among other things, it provided that (section 4):

> "The respective counties, incorporated cities, incorporated towns and incorporated cities and counties of the state are hereby authorized to appoint sealers of weights and measures."

While this statute was in force the city of Los Angeles, which operates under a freeholders' charter, adopted an ordinance creating the office of sealer of weights and measures and provided for the appointment of deputies, and by ordinance adopted May 28, 1912, fixed the salary of one of such deputies, it being the position held by plaintiff, at the sum of $90 per month, in full compensation for all services rendered as such deputy or assistant sealer of weights and measures. Subsequently, on October 10, 1911, section 14, article 11 of the Constitution (see St. 1911, p. 1798), under and pursuant to which the act of the Legislature was adopted authorizing cities to create the office of sealer of weights and measures, was amended so as to read as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The Legislature may by general and uniform laws provide for the inspection, measurement and graduation of merchandise, manufactured articles and commodities, and may provide for the appointment of such officers as may be necessary for such inspection, measurement and graduation."

Thereupon the Legislature, pursuant to this amended section of the Constitution, passed an act, approved June 16, 1913 (Stats. 1913, p. 1086), and designated as the "Weights and Measures Act," providing elaborate regulations for the government of the measurement and graduation of merchandise, commodities, and manufactured articles. This act created the office of state superintendent of weights and measures, and authorized him to appoint, upon the request of the counties of the state, deputies for such counties, the salary of each of whom, when actually employed, being fixed at $150 per month, to be paid by such counties. The act also made it the duty of the board of supervisors of each county to appoint a sealer of weights and measures for such county, the compensation of which sealer of weights and measures was fixed at $5 per day for each day actually employed in the service of the county, and provided that in case such board of supervisors should not, within 120 days after the approval of the act, appoint a sealer for such county, it must apply in writing to the state superintendent for the assignment of a deputy superintendent, who, upon such application, was required to make such assignment, and fixed the salary of such deputy so assigned by the superintendent to such county at $150 per month; it being further provided that a violation of any of the various provisions of the act should constitute a misdemeanor.

The provisions of the act here involved are contained in section 17 thereof, which provides:

> "The legislative body of any county, or city and county or of any city or town may appoint a sealer of weights and measures, fix his compensation and provide for the appointment by the sealer of such number of deputies as the said legislative bodies may deem necessary and expedient. Such sealer and deputies shall each receive as compensation the sum of five dollars per day for each day actually employed in the service of such county or city and county or city or town."

It is unnecessary to note the inconsistencies of this section with other provisions of the act, so far as it affects and provides for sealers in counties. While the act makes it mandatory upon the board of supervisors either to appoint a sealer or request the state superintendent to assign a deputy for service in such county, section 17, so far as cities are concerned, merely permits them so to do, it being provided that such city *may appoint* a sealer of weights and measures. It is not required so to do, and in case none be appointed, section 18 of the act provides that the jurisdiction of the county sealer or deputy state sealer assigned to such county shall extend over the entire territorial limits of the county. Section 19 of the act provides that:

> "This act shall not affect the appointment of any sealer of weights and measures heretofore appointed for any city, * * * but such sealers shall perform the duties of the office under the provisions of this act, and shall possess the same powers and duties as sealers appointed under the provisions of this act."

[1] As stated, plaintiff had, prior to this legislative act, under an ordinance duly passed by the city, been appointed deputy sealer of weights and measures for the city of Los Angeles and his salary fixed at $90 per month. Whether appointed under the act of the Legislature of 1911, or in the absence thereof, is immaterial, since it has been held that, even in the absence of such express provision, an ordinance providing for the appointment of such official would constitute a valid exercise of the police power conferred on municipalities by section 11 of article 11 of the Constitution. Scott v. Boyle, 164 Cal. 321, 128 Pac. 941.

[2] The weights and measures act, section 17 of which provides that such deputy shall receive as salary the sum of $5 per day, went into effect August 10, 1913, and the contention of plaintiff is that, while his salary was, under and by virtue of the city ordinance, fixed at $90 per month, such provision continued in force only to the time when the provisions of the statute became effective, to wit, August 10, 1913; that such provision of the statute superseded the ordinance and fixed his salary at $5 per day, the result of which, since he was entitled to salary at the rate of $90 per month up to the 10th of August and $5 per day for the balance of the month, entitled him to compensation for services performed during the month in the sum of $117.69, and having received $90, left a balance due him of $27.69.

The question thus squarely presented is whether or not plaintiff is entitled to compensation under such city ordinance or under and by virtue of the provisions of section 17 of the weights and measures act. As stated, Los Angeles operates under a freeholders' charter, provisions for the adoption of which, as well as the amendment thereof, are found in section 8, article 11, of the Constitution. The office of sealer of weights and measures is not one designated in the charter. By its terms, however, the city is empowered to provide for the election or appointment of officers other than those designated in the charter, and prescribe their duties and fix their compensation. Section 66 expressly provides that:

> "The city council shall by ordinance fix the salary of all other officers herein, or by ordi-

nance hereafter created, whose salaries are not hereby fixed or otherwise provided for."

Appellant insists there must be an express delegation of control as to the powers exercised by the city in order that such exercise should constitute municipal affairs, within the meaning of the term as used in section 6, article 11, of the Constitution. Conceding this to be true, the charter in the clearest terms gives the city the power to fix the compensation of all municipal officers.

> "The compensation of a municipal officer is purely a municipal affair, * * * and the charter provisions upon that subject are exclusive and conclusive." Trefts v. McDougald, 15 Cal. App. 584, 115 Pac. 655.

See, also, Graham v. City of Fresno, 151 Cal. 465, 91 Pac. 147; Popper v. Broderick, 123 Cal. 456, 56 Pac. 53; Fragley v. Phelan, 126 Cal. 386, 58 Pac. 923; Elder v. McDougald, 145 Cal. 740, 79 Pac. 429. This is true whether the duties of the office are exacted by the charter or be imposed by the general law of the state. Matter of Dodge, 135 Cal. 512, 67 Pac. 973. If, therefore, the office, for the performance of the duties of which petitioner seeks compensation, be a municipal office, then he is entitled only to such salary as the city may, by ordinance, have provided. To hold that the Legislature possessed authority to enact laws fixing the compensation of such office to be paid out of the municipal funds would be conceding to such body the power to amend a freeholders' charter contrary to the provisions of section 8, article 11, of the Constitution.

If, on the other hand, the services rendered by petitioner were those required to be performed for and on behalf of the state, such fact would render the position a state office. And, notwithstanding the duties in performance are restricted to the city, they do not, merely by reason thereof, become municipal in character. Fleming v. Hance, 153 Cal. 162, 94 Pac. 620. As to the salary of such office, the Legislature cannot impose the payment thereof upon a city the organic law of which is a freeholders' charter.

> "The Legislature is not empowered to direct the appropriation of municipal funds for the payment of the salary or office expenses of one who is simply a county or township officer." Graham v. City of Fresno, 151 Cal. 465, 91 Pac. 147.
>
> "We are not aware that it has ever been held * * * that the Legislature has power to appropriate the funds of a municipality to the discharge of an obligation against the entire state, or to direct the payment of such funds for any other purpose than pertains to the municipality itself." Conlin v. Board of Supervisors, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 752.

In neither view of the case is petitioner entitled to compensation at the rate of $5 per day for each day actually employed in the service of such city, as provided in section 17 of the weights and measures act.

As we construe the act, it seeks to provide a uniform system for the regulation of the measurement and graduation of merchandise, manufactured articles and commodities sold and manufactured throughout the state, provides for the appointment of a state sealer of weights and measures, and makes it compulsory upon the board of supervisors of the various counties to appoint a sealer of weights and measures or apply to the state sealer to assign a deputy to such county, and delegates to the legislative bodies of the various cities of the state the power, the exercise of which is optional, to appoint a sealer of weights and measures for such city. While not compelled to make such appointment, they may do so, in which case, as provided by section 19 of the act, the officer in the performance of his duties is controlled by the weights and measures act, and any violations of the provisions of the law become misdemeanors to be prosecuted by state officials. The delegation to cities of such power, to be exercised at their discretion, is, as we construe the law, the same as though the charter had in express terms made provision therefor, and it becomes a municipal affair to the extent that the making of such appointment and the fixing of such official's compensation is a matter solely within the control and right of the municipality.

Judgment affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 577

BUCKLEY v. MARIN COUNTY.

(Civ. No. 1235.)

(District Court of Appeal, Third District, California. Oct. 7, 1914.)

1. APPEAL AND ERROR (§ 977*)—REVIEW—ORDER GRANTING NEW TRIAL.

Where an order granting a new trial is general, it will not be reversed unless it appears that the order itself was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

2. APPEAL AND ERROR (§ 979)—REVIEW—ORDER GRANTING NEW TRIAL.

The granting or denying of a new trial for insufficiency of the evidence rests so fully in the discretion of the trial court, where there is a substantial conflict in the evidence, that its action is conclusive upon an appellate court, unless it appears that there has been an abuse of such discretion, and it is immaterial whether the evidence is insufficient to sustain all, or only a portion, of the issues on which the judgment depends.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873, 3877; Dec. Dig. § 979.*]

3. CONTRACTS (§ 294*)—PERFORMANCE—SUBSTANTIAL PERFORMANCE.

To authorize a recovery on a contract which has not been fully performed, there must be a substantial performance, and the contractor must have attempted in good faith to perform the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1352, 1357–1361; Dec. Dig. § 294.*]

Appeal from Superior Court, Marin County; George H. Buck, Judge.

Action by John E. Buckley against the County of Marin. From orders denying defendant's motion for judgment on a special finding, and granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Thos. P. Boyd, of San Rafael (W. B. Crocker, of San Francisco, of counsel), for appellant. Sullivan, Sullivan & Roche, of San Francisco, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CHIPMAN, P. J. This is an action commenced by plaintiff, as assignee of the Dundon Bridge & Construction Company, against the county of Marin, and arises out of a contract entered into between the said company and defendant for the construction of a bridge across the tidal channel separating Belvedere from Tiburon in said county. Two causes of action are set forth in the complaint: First, to recover the sum of $7,000, the contract price for the work described in the complaint. Second, to recover the reasonable value of the work done, not to exceed the sum of $7,000.

It is alleged in the first count of the complaint that plaintiff's assignor commenced the work on September 1, 1903, and prosecuted same "with due diligence, and thereafter duly performed said contract and all the terms and conditions thereof and fully completed the same on the 1st day of February, 1905." In the second count it is alleged that plaintiff's assignor, between the dates above named, performed certain labor and furnished certain materials in and about the construction of said bridge; "that said work in the performance of which said services were rendered and said materials furnished was completed on the 1st day of February, 1905; that said defendant and the public generally are now, and ever since the completion of said bridge have been, using and enjoying the same; that the reasonable value of said services so rendered and said materials so furnished, as aforesaid, was and is $11,000"; and judgment is prayed for the sum of $7,000, the amount fixed by the contract.

Defendant, in its answer, sets up the defense of nonperformance of the contract and specifies numerous particulars in respect of which it is alleged that it has been breached; that the county surveyor has recommended that the work be not accepted; and that the board of supervisors has never accepted said work as completed, nor has it accepted any part thereof. "Defendant denies that ever since the alleged completion of said bridge, or at any other time or at all, it has been using or enjoying the same. Defendant admits that the public generally are now and ever since the alleged completion of said bridge has been using said bridge, but denies that it has been enjoying the same." Denies that the reasonable value of the services rendered or materials furnished as alleged are of the value of $7,000 or any other sum.

The trial was had before a jury, and upon the submission of the case the court directed the jury to find upon the following special issues:

"(1) Did the Dundon Bridge & Construction Company honestly and in good faith endeavor to comply with the terms and conditions of said contract entered into between itself and the defendant in this case; and did said company complete said work substantially in accordance with the terms and conditions of said contract? (2) What is the reasonable value to the defendant of the work performed and materials furnished by said Dundon Bridge & Construction Company in constructing said drawbridge, pile foundation, concrete walls, filling, and sidewalks described in plaintiff's amended complaint?"

To the first question the jury answered, "No." To the second the response was, "$3,000." The jury also returned a general verdict as follows: "We, the jury in the above-entitled cause, find for the plaintiff in the sum of $3,000."

In due time defendant moved the court to direct the clerk to enter judgment, in accordance with special finding No. 1, that plaintiff take nothing by his action and for defendant's costs of suit. Plaintiff also in due time moved the court for a new trial, and both motions were heard by the court at the same time. The court denied defendant's motion and directed the clerk "to enter judgment nunc pro tunc in accordance with the verdict rendered herein," and thereupon granted plaintiff's motion for a new trial. Defendant appeals from the order denying its motion for judgment on the special finding and also from the order granting plaintiff's motion for a new trial.

[1, 2] When the order granting a new trial is general, it is the well-settled rule that such order will not be reversed unless it appears that the order itself was an abuse of discretion. Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515; Estate of Everts, 163 Cal. 449, 452, 125 Pac. 1058. In Domico v. Casassa, 101 Cal. 412, 413, 35 Pac. 1024, the court said:

> "The granting or denying of a new trial on the ground that the evidence is insufficient to justify the verdict (which was one of the plaintiff's grounds for his motion), where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion; and it is immaterial whether the evidence is insufficient to sustain all or only a portion of the issues on which the judgment must depend."

We do not deem it necessary to quote from the testimony of the witnesses relating to the numerous particulars in respect of which defendant claims that the evidence shows a failure on the contractor's part to perform the work in the manner called for by the contract. There is a substantial conflict in the evidence respecting the completion of the contract and there is a like conflict in the evidence concerning nearly every one of the alleged departures from or violations of the contract in the particulars pointed out by defendant in its brief.

[3] Defendant places its chief reliance upon what it claims to be the doctrine in this state:

> "That the owner is entitled to have built in all essential particulars the structure he contracted for, and no other; second, that where there has been departures from the plans in substantial particulars, the court can have no occasion to estimate the deficiencies, and the contractor cannot recover on a quantum meruit."

In support of its contention defendant cites Clark v. Collier, 100 Cal. 256, 34 Pac. 677; Perry v. Quackenbush, 105 Cal. 300, 38 Pac. 740; Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 117, 38 Pac. 635; Marchant v. Hayes, 117 Cal. 669, 49 Pac. 840; and Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391.

Respondent relies upon the rule as found in 3 Page on Contracts, 1385:

> "The original common-law rule required a strict and literal performance as a condition precedent to recovery. The modern rule permits recovery without a strict and literal performance, if there has been a substantial performance, and the contractor has attempted in good faith to perform the contract. If a contract has been performed substantially and deviations from the contract have been made but not willfully and in bad faith, the parties so performing can recover the contract price less the amount of damages caused by such deviation."

The rule is very clearly laid down and the cases examined in Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391. In that case the controversy was between the assignee of the original contractor and the owner, in an action on the contract and also in quantum meruit et valebat, where the contract was "wholly void," under the provisions of section 1183, Code of Civil Procedure, because not recorded. It was held that there could be no recovery because it appeared that "the variance between the work called for and the work done was substantial," citing Perry v. Quackenbush and Marchant v. Hayes, supra.

The jury, as we have seen, found that the contractor did not "honestly" nor "in good faith endeavor to comply with the terms and conditions of said contract"; and did not "complete said work substantially in accordance with the terms and conditions of said contract." Had this finding of the jury rested upon uncontroverted evidence, it would, in our opinion, have justified a judgment in defendant's favor, for all the cases enunciating the more modern rule require, as Mr. Page expresses it, that there should be "a substantial performance and that the contractor has attempted in good faith to perform the contract," precisely the thing which the jury found the contractor did not do in the present case. This finding, however, does not rest upon uncontroverted evidence, and the rule first above adverted to applies equally to "all or only a portion of the issues on which the judgment depends." Domico v. Casassa, supra. There was a substantial conflict upon most of the issues presented in the case, and we cannot say that the court abused its discretion in reaching the conclusion that there should be a new trial.

In denying defendant's motion for judgment in its favor on the first special finding, the court had the power to exercise its own judgment as to the sufficiency of the evidence to support such finding, and there being a substantial conflict in the evidence addressed to the issues by that finding determined the rule applicable to the motion for a new trial is equally applicable to defendant's motion, and unless we can say that the court abused its discretion its action is conclusive upon this court. We cannot so say.

The orders are affirmed.

We concur: HART, J.; BURNETT, J.

25 Cal. App. 572

SHELLER v. LIVINGSTON et al.

(Civ. 1350.)

(District Court of Appeal, First District, California. Oct. 7, 1914.)

1. TENDER (§ 13*)—SUFFICIENCY.

Under Civ. Code, §§ 1496, 1501, declaring that the thing to be delivered need not be actually produced, unless the offer is accepted, and that all objections to the mode of an offer of performance which the creditor could obviate by statement are waived, the tender of storage charges due on the property claimed by plaintiff is sufficient, though the money was not actually offered, where it was refused because defendants claimed other charges.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29–32; Dec. Dig. § 13.*]

2. TENDER (§ 19*) — STATUTES — APPLICABILITY.

Civ. Code, § 1500, declaring that an obligation for the payment of money is extinguished by offer of payment and deposit of the amount in the name of the creditor, has no application to a tender of the storage charges due on goods, necessary to entitle the owner to possession.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 59–64, 67; Dec. Dig. § 19.*]

3. TENDER (§ 13*) — STATUTES — APPLICABILITY.

Code Civ. Proc. § 2074, refers only to an offer in writing to pay, and has no application to a tender of storage charges necessary to entitle the owner of goods to possession.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 29–32; Dec. Dig. § 13.*]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by William J. Sheller against S. Livingston and F. Deutsch, copartners doing business as the Western Machinery Company. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

J. K. Johnson, of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondents.

RICHARDS, J. This is an action for claim and delivery brought to recover the possession of a certain gas engine with appurtenances. The property belonged to the plaintiff and one De Bretteville, as partners, doing business under the name and style of the American San Blast Company. In an action for the dissolution of that copartnership, the property in question was awarded to the plaintiff herein by the court. Prior thereto it had been delivered by De Bretteville to the defendants in this action, for storage at an agreed price of $5 a month. Defendants had sold and also rented certain goods to De Bretteville.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Subsequent to the award of the property to plaintiff in the action for the dissolution of the copartnership, and before the commencement of this action, a demand was made by plaintiff herein upon the defendants for its possession. At the time the demand was made, one of the defendants asserted a claim of lien in the property for the storage charges and also for the goods sold and rented to De Bretteville. Plaintiff offered to pay the amount of the storage charges, but refused to pay the amount claimed to be due for the goods so sold and rented. Defendants refused to deliver up the machinery under this offer, whereupon plaintiff sued defendants in claim and delivery, and the defendants in their answer and by way of counterclaim and cross-complaint set up a lien for the storage and for the goods sold and rented to De Bretteville.

The court below found against the defendants on all the issues tendered by them, except their claim of lien for storage, and found in favor of the plaintiff on all of said issues, but found for the defendants on the issue of tender made by the plaintiff to the defendants of the amount of the storage charges. Judgment was thereupon given for the defendants, plaintiff's motion for a new trial was denied, and this appeal is taken from that order.

[1] The only point therefore involved in this appeal is the question as to the sufficiency of the tender. The evidence upon which the finding was based is brought up on a bill of exceptions. The evidence is without conflict and shows that plaintiff and his counsel called upon defendants with the object in view of obtaining possession of the property, and offered to pay the amount of the storage charges. One of the defendants whom they met stated to them that his firm claimed a lien on the property, not only for the storage charges, but also for goods sold to De Bretteville, and stated that he desired to submit the matter to his attorney and would give an answer later. Subsequently plaintiff's attorney was advised by an agent of the defendants that he was instructed by defendants to inform plaintiff that they refused to deliver up the machinery under the proposal made by plaintiff, and had decided to hold it for the full amount of their claim.

Plaintiff, in offering to pay the storage charges, made no actual production in money of the amount due, and it is mainly for this reason that the sufficiency of the tender is questioned. It appears, however, from the evidence that the offer was not accepted by defendants, and no objection was made by him at the time that there was no actual production of the amount due as storage charges, nor does it appear that any demand was made that the money be produced. In the absence of such objection, the tender was a valid one. Sections 1496, 1501, Civ. Code; Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

[2] The further contention of defendants that section 2074 of the Code of Civil Procedure and section 1500 of the Civil Code provide the method of procedure to be followed in such a case is without merit. Section 1500 of the Civil Code reads as follows:

> "An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this state, of good repute, and notice thereof is given to the creditor."

This section does not prescribe the mode of tender, but rather a method of extinguishing an obligation when that object is sought. Sayward v. Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

[3] Section 2074 of the Code of Civil Procedure relates to an offer in writing to pay, and is a mere rule of evidence. Colton v. Oakland Bank of Savings, 137 Cal. 376, 383, 70 Pac. 225.

For the reasons given, the order denying plaintiff's motion for a new trial is reversed, and a new trial is granted.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 583

PEOPLE v. HORN. (Cr. 266.)

(District Court of Appeal, Third District, California. Oct. 7, 1914. Rehearing Denied Dec. 5, 1914.)

1. Criminal Law (§ 1159*)—Province of Jury—Inconsistencies in Testimony.

In a prosecution for statutory rape alleged to have been committed by a certain third person aided and abetted by defendant, where the stories of the prosecutrix, a child of 11 years, and her younger brother, contained some discrepancies and weaknesses, it was peculiarly a function of the jury to decide whether they were sufficient to impeach her declaration that such third person, aided and assisted by defendant, committed the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

2. Rape (§ 35*)—Issues and Proof—Time of Offense.

Under an information charging the offense of rape on or about the 8th day of February, 1913, and before the filing of the information, it was proper to allow evidence disclosing that the crime was committed on another day; time not being of the essence of the crime of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 42–45; Dec. Dig. § 35.*]

3. Criminal Law (§ 755½*)—Instructions—Facts.

In a prosecution for statutory rape by aiding and abetting a third person in its commission, a requested instruction, which would have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred, was properly refused, as involving an instruction on the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1765; Dec. Dig. § 755½.*]

4. Rape (§ 48*)—Evidence—Corroboration.

The fact that the prosecutrix in a case of rape might have made complaint of the assault to a third person immediately after it took place may be shown for the purpose only of corroborating her testimony of the assault.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67–69; Dec. Dig. § 48.*]

5. Rape (§ 54*)—Corroboration—Necessity.

It is not necessary, to sustain a verdict of guilty of the crime of rape, that the prosecutrix should be corroborated.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83, 84; Dec. Dig. § 54.*]

6. Criminal Law (§ 755½*)—Province of Court—Instructions—Corroboration.

Whether there is corroboration of any character in any case where the law does not expressly require it is a matter upon which argument may be addressed to the jury, but upon which the court cannot instruct without verging closely upon the domain of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731–1765; Dec. Dig. § 755½.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

7. Criminal Law (§ 829*)—Requested Instruction—Given Instruction.

In a prosecution for rape by aiding and abetting its commission by a third party, the refusal to instruct that, in connection with the absence of proof that the prosecutrix complained to others of her treatment by the defendant immediately following the assault, the jury should consider the testimony of the doctors who professionally examined her sexual organs to determine whether there existed therein conditions indicating that she had been subjected to acts of sexual intercourse, was not prejudicial, where the jury were told to consider all the admitted evidence and to be governed entirely thereby in ascertaining the guilt or innocence of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. Criminal Law (§ 785*)—Argumentative Instruction.

In such prosecution, a requested instruction that the jury should "scan the testimony of the prosecuting witness carefully to ascertain if she would be likely to have a design to warp her testimony to the prejudice of the defendant," was objectionable, as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776–1781, 1889–1894; Dec. Dig. § 785.*]

9. Criminal Law (§ 829*)—Requested Instructions—Given Instructions.

In such prosecution, the refusal to give such requested instruction was not erroneous, where the court so fully and clearly instructed as to the jury's duty with respect to the evidence that they could not have misapprehended their discretion as to the credibility and weight thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. Indictment and Information (§ 190*)—Offenses Included in Charge—Conviction of Attempt.

In view of Pen. Code, § 1159, providing that the jury may find defendant guilty of any offense necessarily included in that charged, or of an attempt to commit such offense, and section 663, authorizing conviction of one prosecuted for an attempt to commit a crime, even though the evidence may show that the crime attempted was committed by him, unless the court discharges the jury and directs his trial for the crime itself, defendant in a prosecution for statutory rape, where the jury on the evidence could have concluded that, rather than the crime itself, he was guilty of an attempt to commit it, might be convicted of such attempt.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 596–603; Dec. Dig. § 190.*]

11. Criminal Law (§ 1160*)—Appeal—Conclusiveness of Finding—Misconduct of Juror.

The finding of the trial court upon defendant's affidavits, testimony, etc., that a juror whose misconduct was alleged as a ground for a new trial had not been guilty of such misconduct, was conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Josephine Horn was convicted of an attempt to commit statutory rape, and from the judgment and an order denying a new trial she appeals. Affirmed.

See, also, People v. Bartol (Cal. App.) 142 Pac. 510; People v. Hoosier (Cal. App.) 142 Pac. 514.

E. M. Frost, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information with statutory rape, alleged to have been committed by one Orville Taggart, aided and abetted by her, upon the person of one May Bartol, in the county of Del Norte, on or about the 8th day of February, 1913, and the jury adjudged her guilty of an attempt to commit the crime so charged, and thereupon, as punishment for the crime, the court sentenced her to imprisonment for a term of four years in the state penitentiary. This appeal is by the defendant from the judgment and the order denying her a new trial.

The information charges that, on the day above named, the defendant "did then and there willfully and unlawfully and feloniously help, aid, assist, and abet, one Orville Taggart, in the perpetration and accomplishment of an act of sexual intercourse, then and there committed by the said Orville Taggart, with and upon one May Bartol, who was then and there a female under the age of 16 years, to wit, of the age of 11 years, and not then and there the wife of the said Orville Taggart," etc.

The trial was had in the superior court of Humboldt county, the cause having been removed to said county for trial on the motion of the defendant for a change of venue.

The first point advanced and earnestly urged by the defendant is that the evidence fell so far short of justifying the verdict that it becomes necessary for this court to now hold that, as a matter of law, it is wholly insufficient to support the conclusion of the jury as thus evidenced.

We are unable, after a full and painstaking examination of the record, to assent to that proposition. This case is one of a number growing out of substantially the same set of circumstances and of which two have hitherto been submitted to, heard, and decided by this court. See People v. Bartol, 142 Pac. 510, and People v. Hoosier, 142 Pac. 514. The facts brought out in this case are substantially the same as those developed in the above-mentioned cases, in both of which the evidence is given an extended review. It would involve what is conceived would be unnecessary repetition to reproduce herein in detail the testimony taken at the trial of the present case. It will be enough to say that the testimony in this case shows, as it was incidentally shown in the other cases named, that the defendant's part in the transaction was in deliberately holding the prosecutrix down while Taggart was engaged in the act either of accomplishing or of attempting to accomplish copulation with the child. For further and fuller details of the crime reference is made to the cases above referred to.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] In the Bartol and Hoosier Cases, supra, it was vigorously argued that the testimony of the prosecutrix and that of her brother (younger than she), upon which, largely, convictions were accomplished, was inherently untrue, because of certain inconsistencies and weaknesses appearing therein. We there held that, while there appeared in said testimony some discrepancies, it was a matter entirely within the legal competency of the jury to determine whether, notwithstanding such discrepancies, the testimony of those witnesses was, in the main, entitled to credit and sufficient to generate a conviction, beyond a reasonable doubt, of the guilt of the defendants. In this case, the same is said of the testimony of the same witnesses, and it may be conceded that said testimony is to some extent subject to the criticism so made. We can perceive no reason, however, for forming and entertaining any different view of the testimony of the prosecutrix and her brother in this case from that expressed by this court in the Bartol and Hoosier Cases. As stated, the story of the prosecutrix, implicating the defendant in this case in the crime which was perpetrated upon her, is practically the same as that given by her in the other cases, and it was peculiarly a function of the jury to decide the question whether the inconsistencies developed in her testimony were sufficient to impeach the integrity of her declaration that Taggart, aided and assisted by Josie Horn, committed an act of sexual intercourse with and upon her person at the time specified in the information.

[2] 2. It was proper, under the information, to allow evidence disclosing that the crime was committed on another day than that fixed in said pleading. The complaint is, in effect, that, because the information states that the offense charged was committed on the 8th day of February, 1913, and the proof shows that it was committed on the 13th day of said month, there is a fatal variance between the pleading and proof in that regard, or that a different crime from that alleged was proved.

The information declares, as seen, that the crime charged was committed "on or about the 8th day of February, 1913," and "before the filing of this information." Time is not of the essence of the crime of rape, and, under the allegations of the information as to time, it was competent for the people to show that the crime described in the information was committed on some other day than that specially named as the day in near proximity to which the criminal act occurred. Of course, where, in a rape case, it is claimed that several different felonious acts of sexual intercourse have taken place on as many different days between the defendant and the prosecutrix, it is the duty of the people in the prosecution of the defendant, to select some particular time at which such act was committed and address their proof to the establishment of the crime at such time. This course is necessary in order that the accused may be informed of the particular criminal act against which he will be required to defend himself, and it is the course pursued by the district attorney in this case. In fact, we do not understand that more than one act of intercourse is claimed to have been committed in this case.

3. The action of the court in the giving and the refusal to give certain instructions is assailed. The assignments under this head are so numerous that we feel compelled to refrain from attempting to give each special notice. Indeed, we do not think it is necessary to do so.

[3-6] A careful examination of the entire charge of the court has convinced us that thereby the jury were fully and correctly instructed upon all the principles of the law pertinent to the charge set forth in the information. Some of the instructions which were requested by the defendant and disallowed by the court in effect involved instructions upon the facts, and hence were properly refused. For example, it is claimed that the court committed serious error by rejecting the instruction, proposed by the defendant, which would, if given, have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred. The impression which a jury would likely receive from such an instruction would be that a conviction of the crime of rape could not be legally justified where there was no proof of immediate discovery to some third party by the prosecutrix of the fact of the assault upon her person; that is to say, that the guilt of the accused could not be established beyond a reasonable doubt in the absence of proof of that fact. Of course, such an impression of the law would be obviously unsound and untenable. The fact that the prosecutrix in a case of rape might have made complaint of the assault to a third person immediately after it took place may be shown for the purpose only of corroborating her testimony of the assault. The allowance of such testimony for that purpose is an exception to the general rule against the proof of self-serving declarations. But, although the prosecutrix in this case was in a measure corroborated by the testimony of her brother, Robert, it is not necessary, to justify and sustain a verdict of guilty of the crime of rape, that the prosecutrix should be corroborated, and whether there has or has not been such corroboration of any character in any case where the law does not expressly require it, is a matter upon which argument may be addressed by counsel to the jury, but upon which the court cannot instruct the jury

without verging very closely upon the domain of fact.

The case of People v. Hamilton, 46 Cal. 540, cited by the defendant, does not hold that it is the duty of the court to read to the jury such an instruction as the one under consideration here. The reversal in that case was grounded upon the fact that the prosecutrix, under the age of 13 years when the alleged crime of rape was committed upon her, was the only witness to the alleged assault, and that her story was of such questionable verity as to have justly created a reasonable doubt in the minds of reasonable men of the defendant's guilt. She had testified that she made no outcry at the time of the assault or made the fact of the assault known to any person until two years after it was committed, that she suffered or complained of no bodily pain, and admitted that no flow of blood followed the alleged outrage. Under this testimony, the court said, and which was all that it decided in that case, that "it is almost inconceivable that a jury, free from passion or prejudice, would not, at least, have entertained a reasonable doubt as to the guilt of the defendant."

[7] 4. The court properly refused to allow the defendant's instruction No. 10, whereby the jury would have been told that it was their duty to consider, in connection with the absence of proof that the prosecutrix complained to others of her treatment by the defendant immediately following the assault, the testimony of the doctors who professionally examined the sexual organs of the prosecutrix for the purpose of determining whether there existed therein conditions indicating that she had been subjected to acts of sexual intercourse. The court, in its charge, instructed the jury that it was their duty to consider all the admitted evidence and to be governed entirely by that evidence in solving the question of the guilt or innocence of the accused, and even if the practice of pointing out and thus calling the jury's attention to particular evidence or the want of evidence on some particular point in the charge of the court to the jury were to be commended (and, as a rule, it certainly is not), the general instructions sufficiently covered the proposition sought to be given to the jury through the rejected instruction, and, therefore, in any event, its disallowance cannot be denominated as prejudicial error.

[8, 9] 5. The defendant's refused instruction No. 11 is not only argumentative, but would have instructed the jury that it was their duty to "scan the testimony of the prosecuting witness carefully to ascertain if she would be likely to have a design to warp her testimony to the prejudice of the defendant," and that they were at liberty to disregard her testimony. Argumentative instructions are not permissible and should never be given. As to the duty and right of the jury in the matter of disposing of the testimony of the prosecutrix or as to how they should act thereon, it is to be said that the court's charge contained such full, clear, and correct information upon the general subject of their duty with respect to the evidence that the jury could not have misapprehended the extent of their discretion in the matter of determining the credence and weight to which it was entitled. The instruction was properly disallowed.

The court refused and gave in modified form other instructions proposed by the defendant, and error in such action is assigned. We have examined these assignments carefully, and are upon such examination persuaded to say generally that, as to the instructions refused, they were either objectionable because they involved erroneous statements of the law or unnecessary because the principles therein stated were covered and fully declared in the general charge of the court. Nor do we perceive any error in the action of the court in modifying the instructions proposed by the defendant and, as so modified, given to the jury.

[10] 6. Objection is, however, seriously urged against the given instruction telling the jury that, under the evidence, they were authorized to find the defendant guilty of an attempt to commit rape. The defendant contends that such instruction was not only erroneous, but that the verdict cannot, as a matter of law, be upheld, because, so it is argued, the evidence, if it shows the commission of any crime at all, discloses that the crime of rape itself was committed, and that, where the proofs show that the crime of rape itself has been in fact committed, a verdict finding the accused guilty of an attempt to commit said crime is not sustainable.

In support of that proposition, counsel cite the case of State v. Mitchell, 54 Kan. 516, 38 Pac. 810. In that case, the defendant, who was charged with the crime of rape, was convicted of the crime of an attempt to commit rape upon the testimony alone of the prosecutrix, who positively testified that the defendant forcibly ravished her while they were traveling together in a buggy. The case was reversed for the reason, so it was stated, that the verdict was predicated upon the discredited testimony of the prosecutrix; the court saying, inter alia:

> "There is no other testimony in this case of any fact or circumstance, or of any act or declaration of the defendant, which is inconsistent with his entire innocence of any offense. The conviction therefore rests solely on the testimony of a witness whom the jury by their verdict have discredited and disbelieved as to the most important fact stated by her on the witness stand, and the fact concerning which, above all others, she could not possibly be mistaken. This court will not uphold a judgment resting for its only support on such a foundation. Section 418 of chapter 31 of the General Statutes of 1889, concerning crimes and punishments, provides: 'No person shall be convicted of an

assault with intent to commit a crime, or of any other attempt to commit any offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault, or in pursuance of such attempt.' If this witness told the truth, the section of the statute above quoted has been disregarded. If she was unworthy of belief, the jury should have acquitted altogether."

The above case is not in point here for two reasons, viz.: (1) The testimony of the doctors, so far as we are able to judge it, was sufficient to create considerable doubt —perhaps, a reasonable one—upon the question whether Taggart actually accomplished penetration of the private parts of the prosecutrix. Some doubt would also seem to have arisen from the testimony of the brother of the prosecuting witness as to whether actual penetration was accomplished. We may therefore assume that the jury, while convinced that Taggart, aided by the defendant, got the little girl down on the bed and pulled up her clothes and thereupon, with his pantaloons unbuttoned, got on top of her, entertained a reasonable doubt, from the testimony of the doctors and Robert Bartol, as to whether he succeeded in inserting his privates into those of the prosecutrix. In the Kansas case, supra, it will be kept in mind that there was no testimony showing or tending to show any other crime than that of rape. (2) Our Penal Code (section 1159), unlike and, indeed, the very reverse of the Kansas law upon the subject, provides:

> "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

And, under our law (section 663, Pen. Code), a person prosecuted for an attempt to commit a crime, may be convicted thereof, although the evidence may show that the crime intended or attempted was perpetrated by the accused in pursuance of such attempt, "unless the court, in its discretion, discharges the jury and directs such person to be tried" for the crime itself. This section is evidently the outgrowth of the well-conceived theory, the crystallization of which into practical application can manifestly result only in a convenient and at the same time just administration of the criminal law, that a charge of crime in an indictment or information necessarily includes the charge of an attempt to commit such crime and that evidence of its perpetration necessarily involves evidence of an attempt to perpetrate it, for it is not conceivable that any crime can be committed in the absence of an attempt to commit it. There must be a starting point in the actual commission of crime and obviously such starting point is the attempt. The actual commission of the crime is, in brief, the execution of the attempt. We can therefore perceive no sound reason for holding that the principle stated in section 663 of the Penal Code should not be as well applicable in a case where the charge is of the crime itself and thus a conviction of an attempt to commit it sustainable. But, as before suggested, it is certainly applicable in such a case where there is, as here, evidence from which the jury could have concluded that, rather than the crime itself, the accused has been guilty of an attempt to commit it.

[11] 7. It is lastly contended that the defendant's motion for a new trial should have been granted on the ground of the alleged misconduct of one of the jurors during the progress of the trial. The showing upon this point by the defendant tended to the establishment of the fact that Juror Sutherland had, while the trial of the cause was still in progress, and during the adjournments of the court, referred to the case in a conversation with one Colcord and on another occasion discussed with or expressed to one Sample his conception of the merits of the case and declared his intention of voting for a verdict of conviction. The juror filed a counter affidavit, in which he declared that he had no such conversations with Colcord and Sample as were testified to by them, and that at no time did he express any opinion upon the question of the guilt or innocence of the defendant or state to Sample that he intended to vote to convict the accused. Other affidavits were filed in which the affiants deposed that the general reputation of Juror Sutherland for honesty, honor, and integrity in Humboldt county was of the very best.

Without discussing the question whether the verdict of a jury may be impeached in the manner attempted here, it is enough to say that there exists in the evidence a conflict upon the question whether the juror demeaned himself in the manner imputed to him by the affidavits and testimony presented by the defendant, and that the finding of the trial court in favor of the people upon that question is therefore binding upon this court.

We have now considered and noticed all the points pressed upon us for a reversal which, after a circumspect examination of the record, we have conceived to be entitled to special attention, and have thus encountered no just reason calling for a disturbance of the result reached by the jury or the action of the court in denying the defendant's motion for a new trial.

The judgment and the order appealed from are, accordingly, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

168 Cal. 688

In re KIRKMAN'S ESTATE.

Appeal of JOHNSON.

(Sac. 2207.)

(Supreme Court of California. Nov. 25, 1914.)

1. APPEAL AND ERROR (§ 151*)—PERSONS ENTITLED TO APPEAL—APPLICATION FOR LETTERS OF GUARDIANSHIP—"PERSON AGGRIEVED."

One who was nominated by a minor 17 years old as the guardian of the person and estate of the minor is "aggrieved" by the denial of his application, and may appeal therefrom, under Code Civ. Proc. § 963, subd. 3, giving an appeal from such order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*

For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

2. GUARDIAN AND WARD (§ 19*)—APPOINTMENT—ELECTION OF NEW GUARDIAN BY WARD.

Under Code Civ. Proc. § 1750, providing that, when a guardian has been appointed for a minor under the age of 14 years, the minor may at any time, after arriving at that age, nominate his own guardian, subject to the approval of the court, when read in connection with sections 1748, 1749, providing for the original appointment of guardians for minors under 14 and over that age, a minor, for whom, while under 14, separate guardians of his person and estate had been appointed, may at 17 designate another guardian for both his estate and person, and the nominee must be appointed, if a suitable person.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 72; Dec. Dig. § 19.*]

3. GUARDIAN AND WARD (§ 16*)—APPOINTMENT—NECESSITY—PROPERTY.

Where it appears from the whole record that a minor has an interest in his mother's estate then under administration, although some of his statements might indicate that he had no property, he is shown to be possessed of property, so as to entitle one nominated by him as guardian of his estate to receive letters of guardianship.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 65; Dec. Dig. § 16.*]

Department 1. Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Petition by Albert Laurence Johnson for appointment as guardian of the person and estate of George W. Goodyear Kirkman, a minor, opposed by Singleton Vaughn. Petition denied, and petitioner appeals. Reversed.

Crist, Johnson & Schuhl, of San Francisco, for appellant. C. J. Goodell and T. T. C. Gregory, both of San Francisco, and Joseph M. Raines, of Fairfield, for respondent.

ANGELLOTTI, J. One Vaughn was appointed guardian of the estate of George W. Goodyear Kirkman, a minor, when said minor was under the age of 14 years. At the same time a Mrs. Kirk was appointed guardian of his person. Four years thereafter, when the minor had attained the age of 17 years, Mrs. Kirk resigned as guardian of the person of the minor, and her resignation was accepted by the court and her accounts settled. The minor then nominated in writing Albert Laurence Johnson as the guardian of his person and estate, and Johnson presented to the superior court his petition for appointment as such guardian. After hearing, the court denied Johnson's petition in toto, and the latter appeals from the order of denial.

[1] There is no merit in the claim that Johnson is not a "party aggrieved," within the meaning of that term as the same is used in our statutes relative to appeals. He was an applicant for letters of guardianship, claiming, as matter of right, to be personally entitled to such letters by virtue of the nomination of a minor over 14 years of age, and the statute gives an appeal from an "order * * * refusing to grant * * * letters * * * of guardianship." Code Civ. Proc. § 963, subd. 3. We are not here concerned with the question whether or not the minor might also appeal.

[2] Section 1750 of the Code of Civil Procedure provides that:

> "When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court."

We are of the opinion that, when this section is read in connection with sections 1748 and 1749 of the Code of Civil Procedure, it is clear that it means that a minor over 14 years of age has the absolute right to replace the guardian, appointed by the court when he was under 14 years of age, with one of his own selection, provided always that the person selected by him is, in the estimation of the court, a suitable or proper person. The latter sections prescribe the rules for an original application for letters of guardianship. If the minor is under the age of 14 years, the court may nominate and appoint his guardian. "If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly." If the nominee of the minor over 14 years of age "is not approved by the court, * * * or if, after being duly cited by the court, he (the minor) neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of 14 years." Then follows section 1750, Code of Civil Procedure.

The whole scheme contemplates the absolute right of the minor to have a guardian of his own selection after he is 14 years of age, provided always he selects a person who is, in the judgment of the court, a suitable person to act as guardian. The discretion of the court can be exercised only in the determination of the question whether the nominee is a "suitable person." It does not follow from this conclusion, as suggested by learned counsel for respondent, that a minor over 14 years of age, once having exercised this right and procured the appointment of his nominee, may exercise it a second time.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] It is claimed that there was no necessity for the appointment of a guardian of the estate of the minor in that it was not shown that there was any property belonging to him. This appears to have been the basis of the action of the trial court in denying the application; the learned judge saying that there did not "seem to be any necessity for any guardian at this time further than the one already acting; there is no estate to handle." It sufficiently appears in the record that the minor has property, the same consisting of an interest in the property of his deceased mother's estate, which property is in the possession of the administrator of said estate; the same having been and being now in course of administration. One or two of the answers of the minor when examined as a witness, if taken alone, might indicate that there was no property, but, when his whole testimony is considered, it is obvious that what he meant by these answers was that his property was still in the hands of the administrator of his mother's estate, and that none of it had ever come into the possession of the guardian of his estate. If the minor is to have any guardian of his estate, authorized to receive any of his property from the administrator of his mother's estate, he is entitled to one of his own selection, provided he selects a suitable person.

If the order refusing to appoint Johnson as guardian of the estate of the minor was not erroneous, we would not be called upon to reverse the order of the superior court as to the guardianship of the person. The learned judge offered to appoint such a guardian, and appellant stated that he did not then insist on such appointment, thus waiving his claim in this regard. But, as the order denying the application for appointment of a guardian of the estate was erroneous, the order will be reversed in toto.

The order appealed from is reversed.

We concur: SHAW, J.; SLOSS, J.

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168 Cal. 677

CASSINELLA v. ALLEN et al. (Sac. 2096.)

(Supreme Court of California. Nov. 24, 1914. Rehearing Denied Dec. 24, 1914.)

1. Mortgages (§ 310*)—Different Tracts—Primary Fund.

A mortgagor, being the owner of 10 acres of land and holding 20 other acres in trust for another, mortgaged the whole and then conveyed the 10 acres to his wife, subject to the mortgage. She had knowledge of the trust, and when the mortgage was executed, it was agreed between herself and her husband and the cestui que trust that the 20 acres should not be held liable under the mortgage as security for the debt. *Held*, that in equity the 10 acres were primarily liable for the mortgage debt and, the mortgagee's release of the 20 acres which were worth more than the entire mortgage debt was no defense to the subsequent enforcement of the mortgage against the 10 acres.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 901, 906; Dec. Dig. § 310.*]

2. Mortgages (§ 302*)—Payment—Tender—Attorney's Fees.

Where a mortgage and the note secured by it both provided for the payment of attorney's fees in the event of legal proceedings, a tender, after suit brought, of principal, interest, and costs only, was insufficient.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 882, 883, 886–888; Dec. Dig. § 302.*]

3. Mortgages (§ 302*) — Foreclosure — Action—Pleadings—Attorney's Fees.

Code Civ. Proc. § 580, regulating the action of the court in granting judgment on a default, had no application to a suit to foreclose a mortgage in which a demurrer was filed and pending, so as to render sufficient a tender of the principal, interest, and costs, without the attorney's fees provided for in the note and mortgage, but for which there was no prayer in the complaint, on the theory that at the time of the tender plaintiff could not have recovered attorney's fees under the pleadings on a judgment by default.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 882, 883, 886–888; Dec. Dig. § 302.*]

4. Pleading (§ 246*)—Amendment—Amount Due.

Though plaintiff by praying for less than his due exposes himself to the risk, in case of default, of having to take judgment for limited relief, he does not, by the mere filing of his complaint, irrevocably surrender or release the balance of his demand, since the complaint is subject to amendment, and the answer may enlarge the scope of the relief to any extent consistent with the case made by the complaint and embraced within the issue, as provided by Code Civ. Proc. § 580.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676–683; Dec. Dig. § 246.*]

5. Mortgages (§ 454*) — Foreclosure — Defenses—Tender—Pleadings.

Where, after executing a mortgage on land, the mortgagor conveyed one-third of it to his wife, a defense in favor of the wife that she had tendered one-third of the debt, interest, and costs under an agreement that her portion should be released on her paying one-third of the debt, was unavailable when not specially pleaded.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1319–1328; Dec. Dig. § 454.*]

6. Mortgages (§ 310*)—Partial Discharge.

A mortgagor having conveyed one-third of the mortgaged land to his wife, the mortgagee was not bound by the mortgagor's request to release such portion on payment by the wife of one-third of the mortgage debt, interest and costs.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 901, 906; Dec. Dig. § 310.*]

7. Mortgages (§ 463*)—Debt—Assignment—Evidence.

That a note secured by a mortgage was indorsed in blank by the payee, and evidence by plaintiff's attorney that he had bought the note of the payee for plaintiff with his money established a prima facie case of plaintiff's ownership, though the instrument bore another indorsement concerning which no proof was offered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1361, 1363–1368; Dec. Dig. § 463.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Dan Cassinella against James H. Allen and others. From a judgment for plaintiff, and from an order denying the motion for new trial of defendant Luella F. Allen, she appeals. Affirmed.

L. L. Dennett and J. M. Walthall, both of Modesto, for appellant. Griffin & Carlson and J. B. Jennings, of Modesto, for respondents.

SLOSS, J. Action to foreclose a mortgage of real estate. The defendant Luella F. Allen appeals from a judgment in favor of plaintiff and from an order denying her motion for a new trial.

On September 15, 1900, the defendant James H. Allen made and delivered to C. H. Whitmore his promissory note for $300, payable three years after date, with interest at the rate of 8 per cent. per annum, compounded annually. The note contained a promise to pay all legal expenses and attorney's fees incurred in the collection of the note. At the same time the maker executed, as security for the note, a mortgage of 30 acres of land in Stanislaus county. The mortgage provided for counsel fees of 20 per cent. of the amount found due, in the event of foreclosure.

On July 29, 1904, Whitmore transferred the note and mortgage to the plaintiff. The complaint, filed in September, 1904, after setting forth the note and mortgage in full, and plaintiff's ownership, alleged that nothing had been paid except interest to September 15, 1901, that the defendants, other than the maker, claimed an interest in the land, and that plaintiff had been compelled to employ an attorney, whose services were reasonably worth $76. The prayer was for $300, with interest, for the usual decree of foreclosure and for general relief. There was no specific prayer for counsel fees.

[1] The defendant Luella F. Allen demurred. The case remained in this situation for a number of years, that is, until November, 1911, when she filed an answer and cross-complaint. Her demurrer was then withdrawn. In her answer Luella F. Allen alleged that, prior to the commencement of the action, James H. Allen, the mortgagor, who was then her husband, had conveyed to her 10 acres of the mortgaged property. She alleged that she had tendered to plaintiff the full amount due on the mortgage, which plaintiff had refused, and, further, that after James H. Allen had conveyed to her, the plaintiff had released from the lien of the mortgage, without her consent, the remaining 20 acres, which were worth more than the entire mortgage debt.

With respect to these matters, the court found that at the time of the execution of the mortgage, James H. Allen was the owner of the 10 acres now claimed by Luella F. Allen, and that he thereafter conveyed same to her subject to said mortgage, which had been executed to secure the payment of the purchase price of said land. It was found that, when the mortgage was made, James H. Allen was not the owner of the remaining 20 acres, but held the same in trust for William J. Allen, who is now the owner thereof; that Luella F. Allen at all times had knowledge of said trust, and that it was agreed between James H. Allen, William J. Allen, and Luella F. Allen that said 20 acres should not be held liable under the mortgage as security for the payment of the note.

These findings, which find ample support in the evidence, furnish a complete answer to the contention that the plaintiff's right to enforce his mortgage against the 10 acres conveyed to Luella F. Allen was in any way affected by the release of the remainder of the mortgaged property. (It may be noted that the release in fact covered only 10 of the 20 acres not conveyed to Luella F. Allen.) Under the facts found, the 10 acres of the appellant were, in equity, primarily liable for the mortgage debt, and the court rightly concluded that they should be first sold, and that the 10 acres of William J. Allen still subject to the mortgage should be held only for any deficiency remaining after such first sale.

[2, 3] The evidence on the issue of tender was as follows: In December, 1904, the appellant's attorneys tendered to plaintiff's attorney the full amount of the principal and interest due, together with costs. This tender was refused because it did not include an offer to pay attorney's fees. At this time the appellant's demurrer was on file, but had not been disposed of. The note and mortgage both provided for the payment of attorney's fees in the event of legal proceedings, and the tender did not therefore include everything due the plaintiff. It is contended, however, that since the complaint contained no specific prayer for attorney's fees, and there was no answer on file, the relief which the court was authorized to grant could not, under section 580 of the Code of Civil Procedure, have included a judgment for attorney's fees. See Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073. Therefore, argues the appellant, the tender covered everything to which the plaintiff was entitled, and it operated to extinguish the lien of the mortgage. But we think this conclusion does not follow. Section 580 regulates the action of the court in granting judgment upon a default. It limits the relief which may be awarded against a defendant who does not appear (Winchester v. Howard, 136 Cal. 432, 448, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153), and that is its sole purpose. It is of no importance, in the case before us, to consider the question, debated by counsel in their briefs, whether the word "answer," as used in section 580, is to be construed strictly or is to be given the

broader meaning of a defensive pleading, either by answer or demurrer. Granting that there was here, at the time of the tender, no "answer" which would have justified a judgment for attorney's fees, we are not concerned with the judgment which might have been entered if the case had gone to default without any further pleading on the part of the defendant Luella F. Allen. In the first place, the demurrer was still pending. Until it was disposed of, no judgment could be rendered, and there was no room for the application of section 580. Furthermore, this section has nothing to do with the actual extent of the obligation due from the defendant to the plaintiff.

[4] Although the plaintiff, by praying for less than is his due, exposes himself to the risk, in case of default, of having to take judgment for a limited relief, he does not, by the mere filing of his complaint, irrevocably surrender or release the balance of his demand. The complaint is still subject to amendment, and it is also possible that the defendant, by answering, may enlarge the scope of the relief to any extent "consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580. If the defendant wishes to have the relief limited to that prayed for, he must allow the case to reach the status contemplated by section 580; i. e., that of an application for judgment by default, upon failure to answer. Until that point is reached the obligation which is the basis of the suit is not affected, and it cannot be extinguished by a tender which is not coextensive with it. As we have seen, the tender under discussion did not meet this requirement. It must therefore be held insufficient, even if it be assumed that a mere tender, not kept good, will suffice to release the lien of a mortgage.

[5] Prior to the date of the tender by her attorneys, the appellant had offered to pay the plaintiff one-third of the amount of the mortgage debt, together with one-third of the interest and costs then accrued. The plaintiff was clearly within his rights in refusing this tender, since, as we have seen, the land owned by Mrs. Allen was liable for the entire debt. In this connection it is contended that the lien was discharged by the partial tender, because, as is claimed, James H. Allen, in June, 1903, made a writing authorizing Whitmore, the then holder of the mortgage, to release the 10 acres of appellant upon her payment of one-third of the debt. This attempted ground of defense is fully met by pointing out that it is not suggested in the pleadings, and is therefore not embraced within the issues.

[6] Furthermore, the mortgagee was not bound by the request of the mortgagor in this matter. The contention that Cassinella holds the mortgage as trustee for James H. Allen and is for that reason concluded by the alleged request of the latter is based upon a view of the facts which is not sustained by the evidence.

[7] The only other point made that is worthy of notice is that the evidence does not support the finding of plaintiff's ownership of the note. The note, bearing the indorsement in blank of Whitmore, the payee, was introduced in evidence by the plaintiff. Plaintiff's attorney testified that he had bought the note of Whitmore for plaintiff, paying for the same with money furnished by plaintiff. This was enough to establish, prima facie, plaintiff's ownership. Bank of Cal. v. Mott I. W., 113 Cal. 409, 45 Pac. 674. The chain of title was not impaired by the fact that the instrument bore another indorsement, concerning which no proof was offered.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

168 Cal. 682

PLACERVILLE GOLD MINING CO. v. BEAL et al. (Sac. 2114.)

(Supreme Court of California. Nov. 25, 1914.)

1. Appeal and Error (§ 171*)—Review—Theory in Lower Court.

Where the allegations of a counterclaim in an action to foreclose a mortgage were treated by all the parties and by the court as being still in the case, notwithstanding the sustaining of a demurrer to the answer, such allegations would be treated as in the case on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053–1063, 1066, 1067, 1161–1165; Dec. Dig. § 171.*]

2. Set-Off and Counterclaim (§ 29*)—Action on Other Transaction or Contract—"Cause of Action Arising out of the Transaction" — "Action Arising upon Contract"—"Connected with the Subject of the Action."

In an action to foreclose a mortgage, where no personal judgment was possible or was sought against one of the parties defendant, but only a decree adjudging its interest in the mortgaged property to be subject to the lien of the mortgage, such defendant's counterclaim for a certain amount for water furnished to plaintiff did not set forth a "cause of action arising out of the transaction," set forth in the complaint or "connected with the subject of the action," and as to such defendant plaintiff's action was not "an action arising upon contract," within Code Civ. Proc. § 438, requiring a counterclaim to be a cause of action arising out of the transaction or connected with the subject of the action, or in an action arising on contract, any other cause of action upon contract existing at the commencement of the action.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49–51; Dec. Dig. § 29.*]

3. Set-Off and Counterclaim (§ 54*)—Waiver of Right to Object.

Where, in an action to foreclose a mortgage, one of the defendants, not a party to the mortgage, and against whom no personal judgment was claimed, interposed a counterclaim for water furnished to plaintiff, which counterclaim was not one permissible under Code Civ. Proc. § 438, the mere fact that plaintiff, while objecting to the counterclaim, consented that a certain amount thereof might be deducted from the mortgage debt did not constitute a waiver of the right to object to the counterclaim.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 124, 125; Dec. Dig. § 54.*]

4. STIPULATIONS (§ 14*)—CONSTRUCTION AND EFFECT.

In an action to foreclose a mortgage, one of the defendants, who was not a party to the mortgage and against whom no personal judgment was sought, filed a counterclaim for water furnished under a contract distinct from the mortgage. Plaintiff interposed an objection that the counterclaim was not permissible under Code Civ. Proc. § 438, but consented that a certain amount of the counterclaim should be deducted from the mortgage debt. *Held* that, since the only basis of defendant's recovery of the stipulated amount was plaintiff's consent, it was immaterial that interest was not added to such amount from the time the cause of action accrued thereon.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

5. APPEAL AND ERROR (§ 773*)—BRIEF AND APPEARANCE—REVIEW.

Where a party appealing files no brief and makes no appearance at the oral argument, the court is not called upon to consider his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Department 1. Appeal from Superior Court, El Dorado County; J. E. Prewett, Judge.

Action by the Placerville Gold Mining Company against C. N. Beal and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Gavin McNab and George W. Mordecai, both of San Francisco (Clarence Coonan, of San Francisco, of counsel), for appellants. George H. Thompson, of Placerville, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment foreclosing a mortgage. The mortgage was executed by defendant C. N. Beal to the El Dorado Water & Deep Gravel Mining Company, a corporation, hereinafter designated the El Dorado Company, to secure the payment of three notes in the sums of $40,000, $40,000 and $42,500, respectively. The mortgagee transferred all of its interest in the notes and mortgage to the plaintiff. Beal conveyed the mortgaged property to defendant Sierra Water Supply Company, hereinafter designated the Sierra Company, which, in turn, conveyed to the defendant San Francisco-Oakland Terminal Power Company, hereinafter designated the Power Company. The Power Company never assumed the payment of the mortgage debt. The two $40,000 notes were paid. The $42,500 note not having been paid, plaintiff commenced this action to foreclose against Beal, and the Sierra Company, the Power Company, and the Mechanics' Trust Company, of New Jersey. All the defendants, except Beal, were joined simply as holders under Beal subject to the mortgage, no relief being asked against any of them, except that such interest as it has be adjudged subject to the lien of the mortgage. A deficiency judgment was asked against Beal only.

The joint answer originally filed by the Sierra Company, the Power Company, and the Trust Company contained a further defense and counterclaim on the part of the Power Company only, for $1,989.75, for water furnished by the Sierra Company to plaintiff prior to March 11, 1912, the claim for which had been assigned to the Power Company; and also a further defense and counterclaim on the part of the Power Company only, for $1,012.50, for water furnished by the Power Company to plaintiff. Plaintiff demurred to the "answer" of the defendants, on the ground, among others, "that said answer does not state facts sufficient to constitute a defense." The demurrer was sustained, and said defendants subsequently filed another joint answer which contained no counterclaim. The action was tried upon these pleadings, and judgment was given determining the amount due on the note, adjudging the interest of said three defendants to be subject to the lien of the mortgage, directing a sale of the premises to satisfy plaintiff's claim, and directing the entry of a deficiency judgment against Beal for the amount remaining unpaid, if any, after the sale of the property.

[1] Upon the trial, the allegations of the counterclaim were treated by all parties and by the court as being still in the case, notwithstanding the sustaining of the demurrer to the answer, the plaintiff admitting the allegations thereof, and the court finding thereon. We think they must be so treated here.

Said three defendants have appealed from the judgment; their sole claim on the appeal relating to the counterclaims of the Power Company for water furnished plaintiff. As to this, the lower court, instead of giving the Power Company a judgment against plaintiff, credited the amounts thereof, without interest, as payments on the mortgage debt, thereby reducing the same by the amounts thereof.

[2] It is contended, and the claim is not disputed by learned counsel for said defendants, that no personal judgment being possible or being sought against the Power Company, but only a decree adjudging its interest in the mortgaged property to be subject to the lien of the mortgage, the matter set forth in the attempted counterclaims was not the proper subject of a counterclaim, and that the Power Company was not entitled to obtain relief on account thereof in this action. We are satisfied that this claim is well based. So far as the Power Company was concerned, its causes of action set forth in the counterclaims did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and were

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not connected with the subject of the action. Nor as to such defendants was plaintiff's action one upon contract. Section 438, Code Civ. Proc. Under such statutes as ours, a money demand upon the part of a subsequent grantee of a mortgagor, who has not assumed payment of the mortgage debt and against whom no personal judgment is asked, is not a proper counterclaim in an action to foreclose a mortgage. See Agate v. King, 17 Abb. Prac. (N. Y.) 159; Lipman v. J. A. I. Works, 128 N. Y. 58, 27 N. E. 975.

[3] Appellants' claim in this connection is based on the further claim that no objection was made to the counterclaims in the lower court, and that the objection is made for the first time on appeal. It is said that the authorities sustain the proposition that where a cross-complaint or a counterclaim will not properly lie, but nevertheless the same is treated as proper by the parties throughout the proceedings in the lower court, objection thereto may not be made in an appellate court. The lower court having jurisdiction of the subject-matter and of the parties, all other objections to the manner in which the issue was brought before the court will be deemed waived by the conduct of the parties. See Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075; Riverside Heights v. Trust Co., 148 Cal. 457, 469, 83 Pac. 1003. But the difficulty with appellants' position in this case is that neither plaintiff nor the lower court can be held to have treated the attempted counterclaims of the Power Company as proper counterclaims. There appears to have been no question as to the truth of the allegations contained therein, and plaintiff's attorney frankly admitted their truth, without putting the Power Company to the necessity of proving the same. Plaintiff was not required to interpose a demurrer to the counterclaims in order to preserve its objection. It could object thereto on the trial. Its admission of the truth of the matters alleged therein did not bar subsequent objection, and it did make timely objection by insisting that no judgment should be given in favor of the Power Company against plaintiff on its attempted counterclaims. Recognizing the justice of the Power Company's claim for compensation for the water furnished, it was willing to allow the claim to the extent of $3,002.25, as an offset to the mortgage debt, but it was unwilling to go further, and so distinctly stated on the trial. The learned judge of the trial court also treated the matters presented by the counterclaims as matters to be considered only with plaintiff's consent, finding as to each of the same that the amount thereof "is, by stipulation of the parties and admission of plaintiff entered into in open court, allowed as a further credit and part payment on the promissory note of $42,500, dated June 15, 1907, and mortgage in said plaintiff's complaint mentioned and set forth, * * * making in all, by reason of the allowance and admission by plaintiff of the two counterclaims of the said defendant San Francisco-Oakland Terminal Power Company, the further total sum of $3,012.25 to be credited on said promissory note and mortgage, in addition to the payments in said plaintiff's complaint set forth." It is urged that there is no foundation in the record for the conclusion of the trial judge that, in so far as the Power Company was concerned, there was any stipulation that the counterclaims might be treated simply as an offset on the mortgage debt, instead of the basis for a money judgment against plaintiff. We are of the opinion that, under all the circumstances, the record sufficiently shows a consent on the part of the Power Company's attorneys to support this conclusion of the trial court. While, in the first instance, the attorney representing the Power Company asked for a money judgment against plaintiff on the counterclaims, his demand was at once met by objections on the part of plaintiff's attorney, who stated clearly and explicitly what he was willing to do with respect thereto. Subsequently, when plaintiff's attorney again stated his claim as to the form of decree, the deduction of the amount of the counterclaims as a credit on the mortgage debt, and the amount remaining due on the mortgage debt, the trial court asked the Power Company's attorney if there was any objection. The only statement in reply was, "I do not know whether those figures are correct." The court replied that "that is a matter of detail," and the attorney replied, "A matter of calculation." Neither trial court nor counsel for plaintiff treated the matters alleged in the counterclaims as constituting proper counterclaims entitling the Power Company to a money judgment against plaintiff, and the allowance of the same at all in this action was a matter of grace and consent on the part of plaintiff.

[4] The point was made for the first time on the oral argument of this appeal, nothing having been said regarding it in either of appellants' briefs, that the judgment is erroneous in not allowing interest on the amount of the counterclaims, which would amount to about $165. Interest was asked in the prayer of the original answer, but on the trial, when plaintiff's attorney stated explicitly what he was willing to allow as an offset on the counterclaims, viz., $3,002.25, excluding all mention of interest, no objection was made by the attorney of the Power Company on that score, when asked by the court if there was any objection. In view of what we have said heretofore, the Power Company was entitled in this action only to what plaintiff was willing to allow in the matter of these counterclaims. We are satisfied that the decree should not be disturbed on account of the matter of interest.

[5] There is also an appeal by defendant

Beal from the judgment. No brief, however, has been filed in his behalf, nor was there any appearance on his behalf at the oral argument. Under these circumstances, we are not called upon to give any consideration to his appeal. It may be stated, however, that our examination of the record has disclosed no error in so far as he is concerned.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

168 Cal. 691

In re CAROTHERS' ESTATE.

WALDRON et al. v. WITHERSPOON et al.
(Sac. 2184.)

(Supreme Court of California. Nov. 27, 1914.)

1. Appeal and Error (§ 1195*)—Effect of Decision—Law of the Case—Change in Facts.

A decision construing a will entered on appeal from an order for the partial distribution of the estate is the law of the case as to the final distribution, even though it was based on extrinsic facts, and different facts were developed at the hearing on the petition for a final distribution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. Appeal and Error (§ 1098*)—Effect of Decision—Law of the Case—Change in Parties.

The decision is binding upon all parties who had notice of the hearing from which the former appeal was taken, and upon their grantees and creditors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4369; Dec. Dig. § 1098.*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Petition by John E. Witherspoon, as administrator with the will annexed of the estate of Andrew Carothers, deceased, for an order for the final distribution in said estate. From an order directing distribution, W. B. Waldron and others appeal. Affirmed.

Snook & Church, of Oakland, and Wm. M. Sims, of San Francisco, for appellants. White & Miller and Devlin & Devlin, all of Sacramento, for respondents.

MELVIN, J. This is an appeal from a judgment and decree of final distribution in the estate of Andrew Carothers, deceased. There has been an appeal in this estate which involved the validity of a decree of partial distribution. Estate of Carothers, 161 Cal. 590, 119 Pac. 926. The said decree sought to distribute to Earl D. White a half interest in a small part of the realty of the Carothers estate, claimed by him under a deed to his predecessor from the widow of John Thomas Carothers. This court reversed the order and decree from which the appeal was taken and in its opinion interpreted the will of Andrew Carothers. It was held that a life estate in the realty was given to Eleanor Carothers and William P. Carothers, the wife and eldest son of decedent. The will contained the following words referring to the death of Mrs. Eleanor Carothers:

> "At her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon."

It was held that these words created a defeasible fee in William P. Carothers, and that upon his death without issue, after the death of his stepmother (his brother John Thomas Carothers and his sister Elizabeth Witherspoon also having died), the heirs of Elizabeth Witherspoon were entitled to the real property. The question involved in that appeal was this: Did William P. Carothers take a fee simple absolute and indefeasible under the will of his father? This question was answered in the negative.

The petition for final distribution of the entire real property of the estate to the heirs of Elizabeth Witherspoon was duly filed, and those who appear as appellants here presented their answer to said petition, in which they asserted that Kate A. Carothers, widow of John Thomas Carothers, entitled to have distributed to her a half interest in the said land, had given her deed of trust to W. B. Waldron, trustee, as security for the payment of a promissory note executed by said Kate A. Carothers to Charles E. Snook and Wm. M. Sims. The answer contained averments that Andrew Carothers had intended by his will to devise his real property to Eleanor Carothers, his wife, and William P. Carothers, his son, to be held by them during the lifetime of Eleanor, and that at her death the title should vest absolutely in William P. Carothers; that, if William should die without issue during the lifetime of Eleanor, then the property, after Eleanor's death, should go to John Thomas Carothers for his life, and at his death to Elizabeth Witherspoon or her heirs; and that, in the event of William outliving Eleanor, all of the real property should become his absolutely. There were also allegations in the answer that William outlived Eleanor and took the fee to the realty, charged only with a lien to pay certain specific legacies. It will thus be seen that the contentions made by appellants on this appeal are exactly the same as those of the respondent which were rejected by this court in the appeal from the decree of partial distribution.

Appellants insist: (1) That the former decision is not the "law of the case"; (2) that all the evidence offered by them at the hearing of the contest was proper; and (3) that, under the offered evidence and the true rules of construing wills, the court should have interpreted the will of Andrew Carothers according to the contentions set forth in the answer. Upon the question of the "law of the case" appellants say that the rule should not apply to this appeal, because here the same parties are not concerned as those interested in the appeal from the decree of partial distribution, and because in the hearing of the contest of the proposed final distribution facts and circumstances surrounding the execution of the will were developed which were different from those adduced at the hearing on the petition for partial distribution. Respondents make answer to this point that in both distributions the title of the unsuccessful claimants depended upon the alleged interest of Kate A. Carothers, widow of John Thomas Carothers, and that, a binding and final interpretation of the will having been made on the former appeal, new facts developed at the hearing of the petition for final distribution could in no manner avail to change that interpretation. We think this position is correct.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The interpretation of the will on the appeal from the decree of partial distribution was a determination of a question of law. All such interpretations must be decisions of the law, whether the court construes the will with or without resort to extrinsic facts. Estate of Donnellan, 164 Cal. 19, 127 Pac. 166. The construction of the will made by this court on the other appeal was rendered on an appeal in a proceeding in rem. William Hill Co. v. Lawler, 116 Cal. 362, 48 Pac. 323.

[2] Kate A. Carothers was interested as a party, because she claimed an interest in the estate. The construction of the will made at that time was binding not only upon her grantee and his successor, but upon Kate A. Carothers herself. The appellants now before the court are also her grantees or successors to her supposed interest who took subsequent to the decision in the appeal from the decree of partial distribution. They had not only the constructive notice of that decision which all the world possessed, but two of them (who are the real parties in interest as creditors of Kate A. Carothers) had actual notice of all of the circumstances of the former appeal, because they were attorneys therein for Earl D. White. They occupy, therefore, no better position than that of Mrs. Carothers. She was bound by the former decision as "the law of the case." The decision on appeal from the decree of partial distribution is binding upon all of the parties in the matter of the construction to be given to the will. Hardy v. Mayhew, 158 Cal. 99, 110 Pac. 113, 139 Am. St. Rep. 73. The court of last resort having spoken in the matter of the interpretation of the will, the decree which the lower court was bound to enter under that construction must control, rather than the language of the will. Estate of Horman, 167 Cal. 475, 140 Pac. 11. Any other conclusion might lead to unjust results. Each appeal was made for the purpose of getting a ruling of this court upon the status of Mrs. Kate A. Carothers, under the will of her father-in-law, Andrew Carothers. In the former appeal, which was taken after a hearing at which, having notice, she was entitled to be heard, and at which the successor to a portion of the interest claimed by her actually did appear, it was declared by a majority of the court that the widow of John Thomas Carothers had no interest whatever in any of the realty of which Andrew Carothers died possessed. That was the necessary conclusion from the view taken by the majority of the justices regarding the proper interpretation of the will. It is and ought to be final upon the one vital question involved in both appeals.

The judgment and decree are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; HENSHAW, J.

168 Cal. 700

DONOHOE v. ROGERS et al. (Sac. 2098.)

(Supreme Court of California. Nov. 30, 1914.)

1. VENUE (§ 5*)—ACTIONS RELATING TO REAL PROPERTY — DETERMINATION OF CHARACTER OF ACTION.

Whether an action is one for the determination in some form of a right or interest in real property within Code Civ. Proc. § 392, requiring such actions to be tried in the county in which the subject-matter is situated must be determined from the allegations of the complaint and the character of the judgment which might be rendered against defendants upon their default.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4–11; Dec. Dig. § 5.*]

2. VENUE (§ 5*)—ACTIONS RELATING TO REAL PROPERTY—ACTION TO DECLARE TRUST.

A complaint alleged that plaintiff and R. entered into an agreement by which plaintiff was to devote his time to purchasing land with R.'s money and handling and disposing of the land, title to which was to be taken in R.'s name, who was to hold the land for the benefit of himself and plaintiff, the respective "interests" of the parties to be as therein stated. The agreement provided that from the proceeds of sales R. was to receive all money furnished by him, with interest, and the net profits were to be divided equally, that expenses and losses were to be borne equally, that the land was to be offered for sale on terms fixed by R., but that if plaintiff should not approve such terms, he should be given an opportunity to take the land and pay R. all his "interest" therein, together with profits on the proposed sale. The complaint further alleged that R. had conveyed land to a corporation which executed an agreement acknowledging that it held the land, and agreeing to hold it subject to the agreement between plaintiff and R., but that the corporation and R. denied that certain lands purchased pursuant to such contract were held by them under the conditions of such agreement, or that plaintiff had any right or interest therein. It prayed that it be adjudged that defendants held the legal title for the benefit of plaintiff and defendants under the terms and conditions of the contract, and that the rights of the parties be ascertained and adjudged. *Held*, that whether the contract between plaintiff and R. was one of partnership or one of employment, the action was one to declare a trust in real estate and was one for the determination, in some form, of a right or interest in real property, within Code Civ. Proc. § 392, requiring such actions to be tried in the county in which the subject of the action is situated.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4–11; Dec. Dig. § 5.*]

3. PARTNERSHIP (§ 104*)—ACTIONS BETWEEN PARTNERS—WHEN MAINTAINABLE.

Assuming that the agreement between plaintiff and R. created a partnership between them as to the profits and losses, the action was not within the rule prohibiting certain kinds of actions by one partner against another, based on claims growing out of the partnership transactions, such rule not preventing actions to have it determined that persons holding the legal title to land hold it in trust for the purposes of the partnership.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 156, 161–164, 167; Dec. Dig. § 104.*]

4. QUIETING TITLE (§ 10*)—SUFFICIENCY OF PLAINTIFF'S TITLE—EQUITABLE TITLE.

The action was not one to quiet title within the rule that such an action cannot be maintained by one having only an equitable interest against the holder of the legal title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. § 10.*]

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Charles L. Donohoe against W. J. Rogers and another. From an order refusing to change the place of trial, defendants appeal. Affirmed.

Walter H. Linforth and Linforth & Herrington, all of San Francisco, for appellants. Arthur C. Huston, of Woodland, for respondent.

ANGELLOTTI, J. This is an appeal from an order of the superior court of Glenn county refusing to grant a motion of defendants for an order changing the place of trial of the action from the superior court of Glenn county to the superior court of the city and county of San Francisco.

Defendants were entitled to have the action transferred to the city and county of San Francisco, the place of their residence, if it does not fall within the purview of section 5 of article 6 of the Constitution, or section 392, Code of Civil Procedure. Whether it does or not is the question presented by this appeal.

Section 392, Code of Civil Procedure, provides that:

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, * * * I. For the recovery of real property, or of an estate or interest therein, *or for the determination in any form, of such right or interest*, and for injuries to real property."

The precise question here is whether the action is one for the determination, in any form, of an estate or interest in real property.

[1] Admittedly, the character of the action must be determined from the allegations of the complaint and from the character of the judgment which might be rendered against the defendants upon their default. See McFarland v. Martin, 144 Cal. 774, 78 Pac. 239.

The action was one to have it determined that the defendants hold the legal title to certain real property situate in Glenn county, for the benefit of plaintiff and defendants, under the terms and conditions of certain contracts set forth in the complaint.

[2] The allegations of the complaint are substantially as follows: On December 8, 1908, plaintiff and defendant Rogers entered into an agreement in writing. This agreement recited that Rogers desired to invest $40,000 in the purchase of lands in the Sacramento valley, and that whereas plaintiff was familiar with such lands and with the local situation and was widely acquainted in that section of the state, he could be of great assistance in the purchase of said lands. Rogers agreed to furnish $40,000 for such investment, the lands to be inspected and decided upon and agreed to by both parties before purchase. Plaintiff agreed to devote the necessary time to the selection of said lands, the obtaining of options, the rendition of any legal services that might be required in the purchase, handling, or disposition of the lands, and the looking after and management of the said lands to a certain specified extent while the same were held by Rogers, without other compensation than was provided in the agreement. It was mutually agreed "that the title to said lands shall be taken and vested in the name of W. J. Rogers," and that Rogers "shall hold said lands so taken in his name, for the benefit of himself and the second party hereto [plaintiff] as hereinafter stated, and the respective interests of both parties hereto in and to said land shall be as follows:" Rogers shall first receive from the proceeds of said land, whether as rental or from sales, all money furnished by him and 7 per cent. interest thereon, and the net profits received from rental or sale after such payment to Rogers shall be divided equally between the parties. All expenses connected with any lands so purchased, including taxes, shall be paid equally by the parties. Should a loss be sustained on any particular tract of land, the loss was to be "made up equally" by the parties. It was further agreed that after lands are purchased, they shall be placed on the market for sale, on such terms and for such prices as Rogers shall decide, provided that before any sale is made, Rogers shall submit the terms and conditions of the proposed sale to plaintiff for his approval, and in the event that he does not approve the same he shall have 90 days in which to take the land and pay Rogers all his "interest therein," together with the profits Rogers would make on said proposed sale. The agreement was to remain in force as to lands purchased until the same are finally disposed of.

On March 11, 1909, an agreement in writing was entered into between plaintiff and defendant Central Pacific, etc., Co., reciting the Rogers agreement, the purchase thereunder of certain land in Glenn county, and the taking of the title thereto in the name of Rogers for the benefit of himself and plaintiff pursuant to said agreement, and the conveyance by Rogers to said company of the legal title to said lands. The company acknowledged and agreed that it took and holds said land subject to the terms of the Rogers agreement with plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It was further alleged in said complaint "that pursuant to said contracts" this land was purchased in the name of said Rogers, that the company holds the same subject to all the terms and conditions of said contracts, for the benefit of plaintiff and defendants, and that defendants deny that any of said land is held by defendants or either of them pursuant to or under any of the terms and conditions of said agreements or either of them, or that plaintiff has any right, title, or interest in said lands, and that they assert that they are not so held.

The prayer of the complaint is for a judgment that defendants hold the legal title to all of said property for the benefit of plaintiff and defendants under the terms and conditions of said contracts, and that the rights of the parties be ascertained and adjudged.

We do not see that it is necessary to determine in this action whether or not the agreement between Rogers and plaintiff created a partnership between them as to the profits and losses that might arise in the transactions contemplated thereby. Whether the agreement was one of partnership, or one of employment (see Coward v. Clanton, 122 Cal. 451, 55 Pac. 147) if real property purchased thereunder at once became and remains, while it is held unsold, incumbered in favor of plaintiff by the terms of the agreement, it would seem that the action here was one for the determination in some form of a right or interest in real property. Plaintiff's action is clearly one to obtain a judgment that defendants hold the land in trust for the purposes of the agreements. It is substantially alleged that the real property described in the complaint was purchased under and in pursuance of the agreement, and is so held. If this be true, although standing in the name of Rogers, the property has been set apart for the purposes of the agreement, and Rogers and his codefendant are not the absolute and unqualified owners thereof, but hold the same as trustees for the benefit of plaintiff and themselves. If so purchased, plaintiff has the right to have the property disposed of only in accord with the terms of the agreement, and to share in the proceeds in the manner specified therein. It is distinctly specified in the agreement that land so purchased shall be held for the benefit of plaintiff and Rogers, with a view to the disposition of the proceeds in the manner provided, and an "interest" on the part of plaintiff in the land is expressly contemplated. Plaintiff is given the right to purchase any of the land himself at the price for which Rogers may propose to sell the land to any one else.

It was substantially held in Green v. Brooks, 81 Cal. 328, 22 Pac. 849, that under the terms of a contract of similar character to the one here involved, where the person entitled to a portion of the net profits on the land was promised the same for certain services to be rendered in connection with the proposed acquirement of the land, such person was in effect one of the purchasers of the land, and that in equity he must he regarded as having such an interest in the land as entitled him to see to its proper disposition in accordance with the contract. This was said in response to the claim that such person had no "interest" in the real estate, but only a right to share in the profits. The action was one to declare a trust in land unsold, as well as to obtain an accounting for lands already sold, and it was held that the person holding the legal title "was properly held by the judgment of the court below as a trustee." We see no distinction material here between this case and the case at bar. The allegation that the land was purchased "pursuant to said contracts" sufficiently shows, for all present purposes, compliance by plaintiff with his part of the contract.

Coward v. Clanton, 79 Cal. 23, 21 Pac. 359, relied upon by defendants, was an action for the plaintiff's share of the profits provided for by a contract which had been realized by a sale of land acquired under the contract. The controversy was as to the profits claimed to have been realized. Conceding for the purposes of the appeal that the contract showed a partnership formed for the object of dealing in real estate, in response to a claim that the contract was void because not in writing, the court held that such a partnership could be formed by a contract resting in parol, saying that such a contract, "as between the parties * * * does not in any way affect the title to real estate, nor does the present controversy * * * involve any such question."

In Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133, relied on by defendants, in reply to the defense of the statute of frauds, it was held that a partnership may be formed for the purpose of buying and selling land without a writing, that such a partnership may be formed in the same mode as any other partnership and that its existence may be established by the same character of evidence. But it was further substantially said in the opinion that, though such partnership agreement does not of itself create any interest or estate in land, yet by the subsequent acts of the parties, rights are acquired in reference to land purchased in pursuance of the agreement, which a court of equity will protect by raising an equity superior to the legal title and controlling the legal title in subordination thereto.

The language that we have quoted from section 392, Code of Civil Procedure, is very broad, and there can be no question as to its including an action to declare a trust in real estate, where land is the exclusive subject-matter of the litigation. See Booker v. Aitken, 140 Cal. 471, 74 Pac. 11; McFarland v.

Martin, 144 Cal. 771, 78 Pac. 239. The cases cited by defendants in this regard are all cases in which real and personal actions were joined, and it is well settled that a plaintiff cannot deprive a defendant of his right to a trial of a personal action in the county of his residence by uniting in his complaint a cause of action for the recovery of or the determination of an interest in real property.

[3] Assuming for the purposes of this decision that the agreement between Rogers and plaintiff created a partnership between them as to the profits and losses that might arise in transactions contemplated thereby, we know of no rule of law forbidding the action before us, an action simply to have it determined that certain persons holding the complete legal title to certain land hold it in trust for the purposes of the partnership. The rule prohibiting certain kinds of actions by one partner against another, based on claims growing out of the partnership transactions, does not go so far as to prohibit the action we have before us. In Traphagen v. Burt, 67 N. Y. 30, an action by a copartner to establish the character of certain realty as partnership property, and to compel a conveyance to him of his interest, where the property had been acquired in the name of the other partner, was sustained, the court saying:

> "There is no force in the objection urged that the action should have been for a dissolution of the firm and an accounting."

[4] This action is not one to quiet title and does not fall within the rule laid down in such cases as Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518. On the pleadings it is clearly an action to have it decreed that defendants hold certain property in trust for the benefit of plaintiff and themselves, as their respective rights are declared in certain contracts.

We find no other matter in the briefs that requires notice.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

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168 Cal. 715

COPELIN et al. v. BERLIN DYE WORKS & LAUNDRY CO. (L. A. 3659.)

(Supreme Court of California. Dec. 2, 1914.)

1. Bailment (§ 14*)—Bailment for Hire—Lost Articles.

A cleaner, receiving clothes of a customer to be cleaned, is not under contract to search the clothes and preserve articles carelessly left in the pockets.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. § 14.*]

2. Bailment (§ 14*)—Clothes Cleaner—Care Required—Lost Articles.

That a clothes cleaner, assuming only a slight care in preserving articles which might be left in clothes sent to be cleaned, out of caution had appointed a searcher for lost articles did not make him an insurer, and so liable for jewelry found and stolen by an employé.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45–55; Dec. Dig. § 14.*]

3. Bailment (§ 11*)—Voluntary Bailee—Clothes Cleaner—Lost Articles.

A clothes cleaner is not a voluntary bailee of jewelry left in clothing sent to be cleaned, which comes into the hands of employés without its consent or knowledge.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 33–36; Dec. Dig. § 11.*]

4. Master and Servant (§ 302*)—Torts of Servant—Scope of Employment.

The act of an employé of a clothes cleaner, a corporation, in stealing jewelry which he found in clothes sent to be cleaned, is a willful act not in the scope of his employment, and the corporation is not liable therefor.

[Ed. Note.—For other cases, see Master and Servant Cent. Dig. §§ 1217–1221, 1225, 1229; Dec. Dig. § 302.*]

5. Bailment (§ 11*) — Involuntary Bailment—Clothes Cleaner—Lost Articles—"Involuntary Deposit."

Under Civ. Code, §§ 1815, 1816, providing that an involuntary deposit is made by the accidental leaving or placing of personal property in the possession of any person without negligence on the part of the owner, a clothes cleaner is not an involuntary bailee of articles found in clothes sent to be cleaned, as the owner was negligent in leaving them there.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 33–36; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, Involuntary Deposit.]

In Bank. Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Mamie R. P. Copelin and James M. Copelin against the Berlin Dyeworks & Laundry Company, a corporation. From an order denying defendant's motion for a new trial, defendant appeals. Reversed.

Goldberg & Meily, H. L. Dearing, and George L. Greer, all of Los Angeles, for appellant. Charles Lantz, W. J. Wood, and Davis, Lantz & Wood, all of Los Angeles, for respondents.

MELVIN, J. This is an appeal from the order denying defendant's motion for a new trial.

The action was one for $900, the value of a pair of earrings alleged to have been received by the defendant and converted by it to its own use. Defendant is engaged in the business of cleaning and dyeing clothes. Mrs. Copelin, one of the plaintiffs, sent a suit of clothes belonging to her husband, the other plaintiff, to the establishment of the defendant, for the purpose of having the garments cleaned. The suit was delivered to the driver of one of defendant's wagons. Next morning Mrs. Copelin telephoned to the defendant's office to learn if some bank books, which she believed she had forgotten to remove from one of the pockets of the suit, had been discovered. She was informed that the books had been found. Later, on the same day, she was called on the telephone by one of defendant's employés and asked if she had missed any jewelry. After consultation with her husband she remembered that he had pinned in the watch pocket of the trousers which she had sent to the cleaners, a small bag containing some of her rings and a pair of earrings worth $900. Both plaintiffs testified to Mr. Copelin's custom of carrying his wife's jewelry in this way. Both also testified that the defendant had returned to them the bag and the rings, but that they had never received the earrings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Defendant introduced as witnesses the employés through whose hands the clothes had passed. The driver testified that he had received the clothes and delivered them at the laundry without examining the garments or taking anything from the pockets. The young woman who had searched for and found the bank books swore that she had found nothing else. She passed the suit to another young woman, who marked the garments for identification. The latter said she had neither searched for nor found anything in the pockets, but that she had passed the clothes to Mr. Gray, whose special duty it was to examine all clothing received by defendant, so that articles likely to damage the cloth during the process of cleaning might be removed. According to his testimony, Mr. Gray found the finger rings and nothing else. They were in a small bag, which was loose in the watch pocket of the trousers, not pinned in that pocket as plaintiffs testified it had been. There was a discrepancy in the testimony regarding the number of rings found. Gray said there were three, and plaintiffs insisted that there were four, but this variance is entirely immaterial on appeal, because plaintiffs admitted that all of the rings which had been left in the pocket had been returned to them.

The defendant insists that the evidence was insufficient to sustain the findings of the trial court. Respondents, on the other hand, are of the opinion that the facts of the case bring it within the principles announced by section 2338 of the Civil Code. It appears from the testimony that because frequently articles were left in the pockets of clothes sent to defendant's establishment to be cleaned, dyed, or repaired, defendant employed a man whose special duty it was to search for such articles. Section 2338 of the Civil Code is as follows:

> "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

[1, 2] It is argued that according to the testimony of plaintiffs the bag containing the earrings was securely tied when it was sent to the cleaners; that, as Mr. Gray testified, it was securely tied when he took it from the pocket; that it had been constantly in the possession of the servants of defendant since leaving that of Mrs. Copelin; that even admitting the absence of liability for the loss of anything which might have dropped from the pockets and been so lost in the ordinary handling of the clothes prior to the search for the articles, the fact that the bag was tied precluded such theory; and that therefore the court was justified in assuming the abstraction to have been by one of the agents of the defendant in the transaction of his business and as a part of such transaction. The trouble with this theory is that a search of the clothing of customers and the preservation of articles carelessly left in pockets was no part of the contract between the customer and the cleaner. The defendant (whose duty was merely to clean the clothes of Mr. Copelin and to take slight care in preserving articles which might be left therein) had not assumed the functions of an insurer merely because it had, out of an abundance of caution, appointed a searcher for lost articles.

[3] The defendant was not a voluntary bailee of the jewelry of the plaintiffs which came into the custody of its servants without its consent or knowledge. Because one of those servants was charged with the duty of searching clothing, it cannot be said that defendant must pay for property left in the pocket of Mr. Copelin's garment and stolen by somebody.

[4] There was no jury, and the learned judge of the trial court did not find that any particular employé of defendant stole the earrings. In his written opinion he used the following language: "I am satisfied that some one in the employ of the defendant must have taken the earrings." To sustain the judgment, therefore, we would be compelled to hold that if any person intrusted with the handling of the suit of clothing stole the property left in a pocket, the defendant would be liable. The allegation of the complaint was that defendant, "being in the possession of the said earrings, unlawfully converted and disposed of the same to its own use," and the finding was that the allegations contained in the complaint were true. But it was not shown that the defendant ever personally, or by any of its officers, knew of the presence of the valuables in Mr. Copelin's clothing. Unless, therefore, the wrong of the servant was committed *within the scope of his employment*, the corporation was not bound.

Respondents cite such cases as Chamberlain v. Southern California Edison Co., 167 Cal. 503, 140 Pac. 26, where department 2 of this court adopted with approval the following statement of the rule as contained in 10 Cyc. 1205:

> "Under the rule of respondeat superior a corcorporation is civilly liable for torts committed by its servant or agent while acting within the

scope of his employment, although the corporation neither authorized the doing of the particular act nor ratified it after it was done."

Unquestionably that is the general rule, and we pointed out the additional facts in the Chamberlain Case that the servant who caused the injury was operating the motor car under authority of his principal, and that the defendant ratified his act by repairing, for a consideration, the automobile which the servant was engaged in "towing" to its shop. In that case and in similar ones, there was no doubt about the offending servant acting within the scope of his authority. It is the duty of a servant to drive an automobile on the public street safely, and his negligence is imputable to his principal, who is bound to employ a skilled man for such work. But when a servant whose duty it is to collect, mark, or even search clothes steals valuables left therein without the wish or consent of his principal, he is not acting within the scope of his occupation. The liability of the master does not extend to willful or malicious acts of the servant done while engaged in the master's service, but independent of that service and for the servant's own benefit. And this is true even where the employment furnishes the opportunity for the wrongdoing.

In Walsh v. Hunt, 120 Cal. 47, 52 Pac. 115, 39 L. R. A. 697, this court was considering the act of an agent to whom an executed note and mortgage had been left for delivery. The agent altered the figures evidencing the principal sum and the rate of interest. It was held that while the forger was admittedly the agent of the defendant for certain purposes, he had no implied or ostensible authority conferred upon him to commit a forgery. So, here, the agency of the employés of the Berlin Dyeworks & Laundry Company in no instance extended permission to steal jewelry on behalf of that corporation. In Rahmel v. Lehndorff, 142 Cal. 683, 76 Pac. 660, 65 L. R. A. 88, 100 Am. St. Rep. 154, it was held that an innkeeper was not liable for an assault and battery committed by a waiter in his dining room upon one of his guests. In the opinion, written by the late Chief Justice Beatty, the rule is thus stated:

> "By the general law of master and servant, the master is not liable for the malicious torts of the servant committed outside of the scope of his employment. The wrongful act must be one which the servant is empowered under some circumstances to do. It must be something which his employment contemplated, as, for instance, the ejection of a passenger or intruder from a railroad car. Conductors and brakemen have authority to eject disorderly passengers, or persons who refuse to pay their fare, and it is left to their discretion when such authority shall be exercised. In a proper case they may eject a passenger without incurring any liability themselves or imposing any liability upon their employer, but if they eject him wrongfully and maliciously, the carrier is liable upon the general ground that the act is one which, if lawfully done, could be done in the employer's name, and justified by his authorization. The law on this point is very clearly stated in Cooley on Torts (star pages 535 et seq.), and in none of the decisions of this court has a stricter rule been enforced than as above stated. Under that rule, the defendant cannot be held liable, because there is no finding and no reason to presume that defendant ever authorized his servants to assault his guests, or any other person, under any circumstances."

In Stephenson v. Southern Pacific Co., 93 Cal. 560, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, it was held that defendant's engineer who, to frighten passengers on a street car which was in close proximity to defendant's track, backed his engine towards said street car, was not acting within the scope of his employment, and that defendant was not liable for the injury sustained by a passenger who leaped from the street car to avoid the apparent peril. Familiar examples of nonliability of a person for the torts of his servant committed outside of the scope of the latter's duty are found in the so-called "joy ride" cases wherein owners of automobiles have been held not liable for injuries inflicted by their servants while using the masters' motor cars without authority. We had occasion to cite the leading cases on this subject in Chamberlain v. Southern Cal. Edison Co., 167 Cal. 503, 140 Pac. 25. The same principle is applicable to the facts of this case.

[5] The defendant was not chargeable as an involuntary bailee. At common law one could not be made a bailee without his consent. 9 Am. & Eng. Ency. of Law (2d Ed.) 283. The Civil Code §§ 1815, 1816, modifies this rule by providing that "an involuntary deposit is made: By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner," and that the involuntary depositary is bound to take charge of the property if able to do so. But the plaintiff, Mrs. Copelin was clearly negligent, and there was no evidence that defendant's servants were authorized or directed to accept, on behalf of their master, the care and custody of property left in the clothing which they might handle in the course of their employment. Even if we should concede the correctness of respondent's contention that defendant occupied the position of a gratuitous bailee, we should be compelled to hold that the corporation could not be held for the theft. The relation of master and servant does not appertain to the wrongful acts of the latter committed, outside the scope of his employment, upon the article so bailed. In Merchants' Nat. Bank of Savannah v. Guilmartin, 88 Ga. 798, 15 S. E. 831, 17 L. R. A. 322, it was held that a bank is not liable for the theft by its cashier of valuable securities received from one of its customers as a special deposit to be kept simply for the depositor's accommodation and to be returned to him on demand. It was said by the court, Mr. Justice Lumpkin delivering the opinion, that the cashier had nothing to do with the special deposit except to suffer

it to remain in a safe place, and that consequently, in taking it to himself, he was stepping aside from his employment to do an act for personal gain.

> "Such an act [to quote directly from the opinion] is lacking both in the rendition of and the intent to render any service to the employer."

To the same effect are Scott & Bro. v. National Bank of Chester Valley, 72 Pa. 477, 13 Am. Rep. 711; First Nat. Bank of Allentown v. Rex, 89 Pa. 312, 33 Am. Rep. 767; Comp v. Carlisle Deposit Bank, 94 Pa. 409; Foster v. Essex Bank, 17 Mass. 496, 9 Am. Dec. 168; Glover v. Burbridge, 27 S. C. 306, 3 S. E. 471; and Deihl & Lord v. Ottenville, 82 Tenn. (14 Lea) 191.

It follows that the order denying defendant's motion for a new trial must be reversed; and it is so ordered.

We concur; SULLIVAN, C. J.; HENSHAW, J.; LORIGAN, J.

168 Cal. 706

REED v. WING et al., Town Trustees.
(Sac. 2059.)

(Supreme Court of California. Dec. 1, 1914.)

1. Municipal Corporations (§ 1000*)—Referendum Election on Ordinance—Action to Annul—Necessary Parties.

In an action by a citizen and taxpayer to annul an order of a town board of trustees declaring that by a referendum election an ordinance granting a franchise to a railroad company had been rejected, the railroad company was not a necessary party.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167–2172, 2198; Dec. Dig. § 1000.*]

2. Municipal Corporations (§ 1000*)—Referendum Election on Ordinance—Action to Annul—Parties.

A single citizen and taxpayer of a town may sue to annul an order of the board of trustees declaring that by a referendum election an ordinance granting a franchise has been rejected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167–2172, 2198; Dec. Dig. § 1000.*]

3. Parties (§ 29*)—Necessary Parties.

Persons who will not be affected or concluded by a decree are not necessary parties, though having an interest in the subject-matter of the litigation.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 41, 47–49, 51; Dec. Dig. § 29.*]

4. Municipal Corporations (§ 108*)—Referendum Election—Adjourned Meeting—Validity.

An adjourned meeting, at which a referendum election on an ordinance was called, was invalid, where the hour of assembling was not specified in the resolution to adjourn.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

5. Municipal Corporations (§ 108*)—Referendum Election—Notice—Resolution.

Under Gen. Laws 1909, Act 2348, § 856, requiring that notice of a town election must be in accordance with an ordinance, an election called by a resolution is called without sufficient notice.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 108.*]

6. Parties (§ 51*)—Adding New Parties—Cross-Complaint.

A new party not necessary to the decision of the matter before the court cannot be brought into a case by a cross-complaint authorized by Code Civ. Proc. § 442.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 77–82; Dec. Dig. § 51.*]

7. Municipal Corporations (§ 1000*)—Referendum Election on Ordinance—Action to Annul—Cross-Complaint—Demurrer.

In an action by a citizen and taxpayer of a town to annul an order of the board of trustees declaring that by a referendum election an ordinance granting a franchise to a railroad company had been rejected, a cross-complaint, setting up certain wrongful acts of the railroad company and praying that the action should abate until the company should be made a party, that the company be adjudged to be without a franchise and the franchise ordinance be suspended pending an election, and that plaintiff be adjudged a person without interest in the controversy, was demurrable as seeking relief foreign to the subject-matter of the suit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2167–2172, 2198; Dec. Dig. § 1000.*]

Shaw and Angellotti, JJ., dissenting.

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by A. L. Reed against J. Wing and others, as Trustees of the Town of Fairfield. From judgment for plaintiff, defendants appeal. Affirmed.

J. A. McKenzie, of San Francisco, and W. U. Goodman, of Fairfield, for appellants. T. T. C. Gregory and Theodore W. Chester, both of San Francisco, for respondent.

MELVIN, J. The defendants appeal from a judgment against them and from an order denying their motion for a new trial.

Fairfield is a city or town of the sixth class, organized under the statute of 1883 (St. 1883, p. 93), commonly known as the "Municipal Corporation Law." The defendants are the trustees of the municipality, and the suit was instituted by a citizen and taxpayer of Fairfield to annul an order of the board of trustees declaring that by a certain referendum election an ordinance previously sought to be passed by the trustees had been rejected by the requisite number of voters of the municipality.

On January 13, 1912, the trustees of Fairfield, by a certain by-law known as "Ordinance No. 43," granted, or sought to grant, to the Southern Pacific Railroad Company a franchise to build a spur track over a designated route in said town. Subsequently two petitions, signed by a number of the voters of Fairfield, were presented to the trustees, and they passed "Ordinance No. 44," by which they sought to submit "Ordinance No. 43" to a vote of the citizens of the town. An election was held, and the board of trustees declared that the people had repealed the ordinance in question. It was at this election and at the action of the board of trustees in declaring its result in favor of the objectors to the franchise that plaintiff's attack was directed, and the court gave judgment in his favor to the effect that the election was illegal and void and that the action of the board of trustees in approving and ratifying the said election was similarly a nullity.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] By demurrer and answer the defendants raised the point that there was a fatal nonjoinder of parties because the railroad company was not made one of such parties, and they make the contention here that the effect of the judgment from which they appeal being to reinstate "Ordinance No. 43" and give to the railroad corporation a valuable franchise, that corporation was a necessary party. But the validity of the original ordinance was not necessarily involved in this controversy. The attack was made merely upon the election and the subsequent order of the board. True, the effect of the judgment was to leave "Ordinance No. 43" just where it was before the election, but it was and is still open to attack upon any suitable ground. The judgment before us would preclude no one from a future attack upon the original or "franchise ordinance" as it is called in the briefs. While the railroad company might have some interest in the outcome of the suit, its interest is not and cannot be the same as that of the plaintiff. It is not denied by plaintiff, and cannot be denied, that according to the general rule, all persons interested in a suit ought to be parties to it, but one of the exceptions to this rule is that where a decree with reference to the subject-matter of the litigation may be made without concluding in any way the rights of a person having an interest, such person is not a necessary party to the action. Story v. Livingston, 13 Pet. 375, 10 L. Ed. 200; Lytle Creek Water Co. v. Perdew, 65 Cal. 455, 4 Pac. 426. It is suggested, however, that if the plaintiff has a right to bring an action of this sort without other parties plaintiff being brought in, all of the citizens in turn, as well as the railroad company, may prosecute separate similar actions, much to the inconvenience of the trustees. The obvious answer to this is that if all of the other citizens and the railway corporation are interested, in the sense that they should be made parties, no taxpayer could prosecute such a suit because of the practical impossibility of finding and bringing into court all of such persons. On the other hand, equity would afford relief if the defendants were harassed by a multiplicity of suits. The plaintiff as a citizen and taxpayer had a right to maintain such an action as this. If the election had ratified the action of the trustees and had resulted in voting to the Southern Pacific Company a valuable franchise, no one would doubt the right of the plaintiff to attack such a disposition of something belonging to the citizens, that is to say, a use of the streets different from that common to all. But a citizen may believe that the city of his residence is injured by a refusal to grant certain privileges to a public utility. Such a citizen may attack the method of the refusal. This is the principle which is supported by such cases as Gibson v. Board of Supervisors, 80 Cal. 359, 22 Pac. 225.

Respondent is of the opinion that the statute under which the election was initiated, called, and held, was repealed by a constitutional amendment passed prior to the holding of the election which we are considering. It is recited in "Ordinance No. 44" that said ordinance was passed for the purpose of holding an election under the amendments to the municipal corporation act, and particularly under section 3 thereof (Stats. 1911, p. 362), which was a re-enactment of section 12 of the original act. This section had reference to referendum elections. It provided that no ordinance should go into effect until the expiration of 30 days after its final passage, and prescribed the procedure for inaugurating a referendum election during such period of 30 days. The section also provided that the movement for a referendum must originate in a petition signed by qualified electors equal in number to 25 per cent. of the entire vote cast at the last preceding general municipal election. After the passage and approval of this amendment to the municipal corporation act just cited, an amendment to the Constitution (section 1 of art. 4) was adopted (October 10, 1911). The section, so far as it relates to this discussion, is as follows:

> "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. Until otherwise provided by law, the legislative body of any such county, city and county, city or town may provide for the manner of exercising the initiative and referendum powers herein reserved, * * * but shall not require more than fifteen per cent. of the electors thereof to propose any initiative measure nor more than ten per cent. of the electors thereof to order the referendum. * * * In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of the state, except as * * * otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." (See St. 1911, p. 1655.)

Respondent takes the position that this constitutional provision changed the basis for calculating the number of signers who might effectively petition for a referendum election. The statute specified a number of voters equal to 25 per cent. of the vote cast at the last election; the constitution 10 per cent. of the electors of the municipality. The respondent says that the amendment to the Constitution wrought a fundamental change in the method of calculation and thereby repealed the statute in that regard, and that it cannot be said that 25 per cent. of the vote cast at the last general municipal election held in Fairfield before the referendum election took place would equal 10 per cent. of the electors resident in Fairfield when the referendum petition was signed. It frequently happens that a very small percentage of the electors of a town participate in an election. If the number falls below 40 per cent. of the electors, obviously 25 per cent. thereof would be less than 10 per cent. of the registered voters. It is argued, also, that the increase in registration might be so great between an election and the subsequent circulation of a referendum petition that 25 per cent. of the votes cast at the election would by no means equal or exceed 10 per cent. of the number of qualified electors resident in the town at the time of the circulating and filing of the referendum petition. That the statutory and not the constitutional method was followed in the inauguration of this proposed referendum is quite apparent both from the face of the petition and from the ordinance which called the election. The certificate of the town clerk to the petition was, in effect, that it was signed by qualified voters of the town "equal in number to more than twenty-five per cent. of the entire vote cast" at the last general election, and we have seen that the trustees acted upon the same statute as that upon which the clerk depended. But appellants contend that since the initiative and referendum powers of a town are to be exercised "under such procedure as may be provided by law," the amendment to the Constitution had the effect of continuing in force the statutes ordaining the procedure to be followed in movements for the referendum of ordinances. We need not pass upon the constitutional question thus raised, because even upon the basis of the validity of the petition we would be compelled to sustain some of the objections to the regularity of the election. Our reason for avoiding discussion of the constitutional question is that exactly the same problem will not, in all probability, be presented again as the act of March 14, 1911, was formally repealed by the act approved January 2, 1912 (Stats. 1911, Ex. Sess. p. 131), and a new act was passed providing by general law the manner of exercising the referendum in municipalities of the class of Fairfield. This act was not in effect until after the circulation of the petition which we are here considering. Const. art. 4, § 1.

[4] One of the valid objections to the regularity of the election is that "Ordinance No. 44," calling the election, was not introduced at a regular or an adjourned meeting. It was stipulated that the regular meeting night of the board of trustees was Tuesday of each week. A regular meeting was held on Tuesday, January 23, 1912. The minutes of that meeting show that the "board adjourned to meet January 25, 1912." No hour for the meeting was specified. A meeting was held on the evening of the 25th at or about the hour for holding regular meetings, and "Ordinance No. 44" was introduced at that meeting. Two of the trustees were absent. It seems to be settled that such a meeting is invalid unless the hour of assembling be specified in the motion to adjourn. San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 537; Thompson v. Williams, 76 Cal. 154, 18 Pac. 153, 9 Am. St. Rep. 187; Smith v. Dorn, 96 Cal. 82, 30 Pac. 1024.

[5] But appellants insist that the board could have called the election by resolution and that for the purposes of this case we should regard "Ordinance No. 44" merely as a resolution in spite of its form. There is authority for treating that which is an ordinance in form as a mere resolution under certain conditions, when only a resolution is required by law, but section 856 of Act 2348, which applies to Fairfield, provides that:

> "All elections in such city or town shall be held in accordance with the general election laws of the state, so far as the same may be applicable. * * * The board of trustees shall give such notice of each election as may be prescribed by ordinance, shall appoint boards of election, and fix their compensation, and establish election precincts and polling places, and may change the same." Stats. 1883, p. 268.

The ordinance in question did prescribe the notice which was to be given the voters. It also provided for the expenditure of money for compensation of election officers. It is the general rule that money may be appropriated only by an act of the Legislature and not by a resolution (Mullan v. State of Cal., 114 Cal. 580, 46 Pac. 670, 34 L. R. A. 262); but we need not here determine whether the same doctrine must be applied to the legislative department of a municipality. It is plain that the notice of an election must be in accordance with an ordinance—either a general by-law or one passed, as this was sought to be passed, for the particular election—and such ordinance not having been introduced at a regular or an adjourned meeting was, as we have seen, void. Consequently the election was called without the notice prescribed by law.

[6, 7] A demurrer to the cross-complaint of defendants was properly sustained. The cross-complaint, so called, was for the most part a reiteration of the matters pleaded in the answer. It further set forth some alleged wrongful acts of the Southern Pacific Company in laying its tracks on certain streets of Fairfield. The prayer was that this action abate until the said railroad company should be made a party; that the court adjudge the railroad company to be without a franchise to lay the said tracks; that "Ordinance No. 43" be declared to be of no present effect and the franchise granted thereby be held to be suspended pending an election;

that A. L. Reed be adjudged a person without interest in the controversy; and for general equitable relief. If for no other reason the ruling of the lower court in sustaining the demurrer should be upheld because the cross-complaint sought to bring in a new party not necessary to the decision of the matter before the court. A new party may not be so brought into a case. Code Civ. Proc. § 442; Alpers v. Bliss, 145 Cal. 570, 79 Pac. 171; Merchants' Trust Co. v. Bantel, 10 Cal. App. 76, 101 Pac. 31; Clark v. Kelley, 163 Cal. 209, 124 Pac. 846; Andreson Co. v. Regenold, 166 Cal. 47, 134 Pac. 999.

The relief sought was also foreign to the subject-matter of the suit. Mining Co. v. Mining Co., 83 Cal. 598, 23 Pac. 1102; Lewis v. Fox, 122 Cal. 250, 54 Pac. 823.

No other alleged errors require discussion. The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

SLOSS, J. I concur in the judgment. It is not easy to determine whether the complaint is designed as a petition for certiorari or as a bill in equity. It is clear enough that a writ of certiorari could not properly issue, for the reason that the proceeding sought to be reviewed is not judicial in character. And, if the question were new, I should seriously doubt the power of a court of equity to entertain, in the absence of statutory authorization, a suit brought by an elector to overturn or annul the action of the canvassing board in ascertaining and declaring the result of an election. But the propriety of a suit of this character has been upheld by this court in Gibson v. Board of Supervisors, 80 Cal. 359, 22 Pac. 225. I see no satisfactory ground for distinguishing that case from the one at bar, and, as the question is primarily one of procedure, it seems to me that the precedent should be followed.

I am not entirely satisfied that the Southern Pacific Railroad Company should not have been made a party to the proceeding. But the judgment annulling the referendum election was, so far as it went, in favor of that company's claim under the franchise, and a judgment should not be reversed for want of a party who can only be benefited by the judgment as it stands, provided his absence does not affect the rights of other parties. Under the circumstances of this case, and particularly in view of the conclusion that the election was invalid, it is apparent that the appellants are not in any way injured by the failure to bring in the railroad company. The error, if error there was, should accordingly be treated as nonprejudicial.

SHAW, J. I dissent from the judgment of affirmance herein. In my opinion, the plaintiff has no interest sufficient to enable him to maintain the action. He claims no interest except that of a voter of the town and of an owner of property situated therein.

The effect of the ordinance in question was to give the railroad company a right to lay its tracks in the streets and operate a railroad thereon for public use. A private citizen cannot maintain an action either to remove or establish an obstruction in or interference with a public highway unless such obstruction or interference will cause special benefit or special injury to his private rights or his private property. Blanc v. Klumpke, 29 Cal. 156; Lewiston T. Co. v. Shasta, etc., Co., 41 Cal. 562; San Jose Ranch Co. v. Brooks, 74 Cal. 467, 16 Pac. 250; Hargro v. Hodgdon, 89 Cal. 628, 26 Pac. 1106; Bigley v. Nunan, 53 Cal. 403. The plaintiff does not show that his property or private rights will be in any way benefited, damaged, or affected by the validity or invalidity of the franchise. Consequently, so far as the relief asked concerns the said franchise or the use of said street, the plaintiff clearly shows no actual interest.

The only plausible ground upon which it can be contended that the plaintiff has a right to maintain an action to establish such franchise is that it is an action of the same character as that which was declared to be maintainable by a private citizen in Gibson v. Bd. of Supervisors, 80 Cal. 359, 22 Pac. 225. In that case it was held that a taxpayer of a county could maintain a bill in equity to annul the action of the supervisors in fraudulently and wrongfully declaring that the vote at an election held to determine upon the issuance of county bonds was against the bonds, and to obtain a decree declaring that at said election the vote was really in favor of the bonds. If the two actions were identical, this decision would be authority in favor of the plaintiff. But there are important differences between them. In that case, the bond election merely determined the authority of the county board to issue county bonds; it did not purport to, and did not, vest a right of any character in any person. The county itself, being a local subdivision of the state government, had no interest in the matter. There was no person interested in having the bonds issued and the bridges built from the proceeds, except the citizens and taxpayers. If a citizen or taxpayer did not have the capacity to sue to have the real vote declared, the will of the people expressed by the true vote given would be defeated, because of the fraud or mistake of the supervisors in canvassing and declaring the returns A citizen or taxpayer had no remedy provided by law; he could look to equity alone for relief. It was because of these considerations that it was declared in that case that the action could be maintained by a taxpayer. In this case the franchise, if valid, as the plaintiff claims it to be, was vested in the railroad company. That company, of course, had the right to prosecute or defend any action necessary for the protection of such franchise. If the referendum election was invalid for any reason, and the franchise consequently valid, that company could maintain an appropriate action for a judgment to that effect against any person or public authority interfering with its use of the franchise. If the town authorities, or the state, disputed the company's right and attempted to molest it in its exercise of the franchise, by civil suit or criminal prosecution, the company could, in defense, show the invalidity of the proceedings for the election, precisely as the plaintiff here attempted to do. The citizen, or property owner, as we have seen, had no interest in the matter, and there was in existence a party, the railroad company, competent to protect its rights and assert its claims. Therefore the reason upon which the decision in Gibson v. Board of Supervisors was based does not exist in this case. The case is governed by the well-known rule that courts do not entertain or decide cases presented by parties who have no legal or equitable interest in the subject of the action or in the relief asked.

I concur: ANGELLOTTI, J.

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168 Cal. 695

CULLEN v. BISBEE. (Sac. 2106, 2127.)

(Supreme Court of California. Nov. 30, 1914.)

1. Husband and Wife (§ 208*)—Actions—Necessary Parties.

In a married woman's action on a note which was her separate property, it was not necessary to join her husband as plaintiff, even though the consideration for the note at one time was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 756, 757, 760–764; Dec. Dig. § 208.*]

2. Husband and Wife (§ 116*)—Community Property—Gifts from Husband to Wife—"Sufficient Consideration."

Defendant's intestate executed a note to a married woman in consideration of an agreement signed by her and her husband that he might make his home in their family whenever he desired. The husband, who signed the agreement and witnessed the note and consented to the arrangement, testified that it was his intention that the note should be his wife's property and not community property. *Held*, that the note was the separate property of the wife, under Civ. Code, § 158, providing that a husband or wife may enter into any engagement or transaction with the other or with any other person, respecting property which either might, if unmarried, section 159 providing that a husband and wife cannot by contract with each other alter their legal relations, except as to property, etc., and section 160 providing that the mutual consent of the parties is a sufficient consideration for an agreement mentioned in the last section, as a husband may orally or in writing make a gift to his wife of community property, and, when this is done, it becomes her separate estate, and the effect of the transaction was that the husband, prior to the execution of the note, made a gift to the wife of her services as well as his services in performing the contract constituting the consideration for the note.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 398, 413–417; Dec. Dig. § 116.*

For other definitions, see Words and Phrases, First and Second Series, Sufficient Consideration.]

3. Witnesses (§ 143*)—Competency—Transactions with Decedent—"Assignor."

The note never having been the property of the husband, he was not an incompetent witness, in an action thereon against the maker's administrator, under Code Civ. Proc. § 1880, providing that parties or assignors of parties cannot be witnesses in an action against an executor or administrator as to any matter or fact occurring before the death of the decedent, as the fact that the consideration of the note at one time was community property did not make him plaintiff's "assignor."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 619–624; Dec. Dig. § 143.*

For other definitions, see Words and Phrases, First and Second Series, Assignor.]

4. Pleading (§ 236*)—Amendment—Trial Amendment—Discretion.

In an action on a note by a married woman, the court did not abuse its discretion in refusing to permit defendant, during the course of the trial, to amend his answer by alleging that the note was community property, and that the husband was the real party in interest, where the evidence showed that the note was not community property, and that the defense of nonjoinder, if alleged, would not have been sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

5. Evidence (§ 35*)—Judicial Notice—Laws of Other States.

Judicial notice cannot be taken that there is no such thing as community property in Maine or Massachusetts, or that in those states a note executed to a wife, with the knowledge and consent of her husband, is prima facie her separate property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35.*]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Lottie Currier Cullen against J. G. Bisbee, administrator of Elias S. French, deceased. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Meredith & Landis, of Sacramento, for appellant. Cross & Newburgh, of San Francisco, for respondent.

SHAW, J. The appeal in No. 2106 is from the judgment; that in No. 2127 is from an order denying defendant's motion for a new trial of the action. Both are presented upon a single transcript.

The action is upon a promissory note for $5,000, executed by Elias S. French, in his lifetime, to the plaintiff. The answer denies the execution of the note, and, in effect, it also sets up the defenses of want and failure of consideration. The court found that the note was duly executed and upon a sufficient consideration. After deducting an offset alleged in a counterclaim, which the plaintiff admitted, judgment was given for the balance.

In the course of the trial, it was shown that the plaintiff, at the time the note was executed, was, and ever since has been, the wife of Harry M. Cullen, living with him in that relation. The defendant asked leave to amend his answer by alleging that the note was community property, and that Harry M. Cullen, the plaintiff's husband, was the real party in interest and was not a party to the action. Leave to do this was refused. Harry M. Cullen was allowed to testify as a witness for the plaintiff, over the objection of the defendant that he was a party interested in a claim against the estate of the deceased person, and that, under the provisions of subdivision 3 of section 1880, Code of Civil Procedure, he was incompetent to testify as to any matter or fact occurring before the death of such deceased person. The court below found that the note was the separate property of the plaintiff, and this finding is challenged as contrary to the evidence. The above rulings and findings are assigned as error.

[1] These points each involve and depend upon the one question whether the note, when executed, was the community property of the spouses or the separate property of the plaintiff. If it was her separate property, it would necessarily follow that the nonjoinder of the husband would be no defense to the action, and he would be a competent witness to matters occurring before the death of French.

[2, 3] The note was executed in connection with a certain contract between French and the plaintiff and her husband. The two documents are as follows:

"Skowhegan, Maine, August 25, 1910.

"For value received, I promise to pay Lottie Currier Cullen or order, five thousand dollars ($5000.00) on demand. Elias S. French.

"Witnesses:
"Abner Currier.
"Harry M. Cullen."

"Skowhegan, Maine, Aug. 25, 1910.

"We severally and jointly agree in consideration of note given Aug. 25, 1910, by Elias S. French to Lottie Currier Cullen, to allow Elias S. French to make his home in our family for as long a time or whenever he desires. And we further agree not to present said note for payment until the family home of Abner Currier is for sale, or at the death of Elias S. French.
"Harry M. Cullen.
"Lottie C. Cullen.

"Witness:
"Abner Currier."

These documents were executed at the farm of Abner Currier, in Skowhegan, Me., under the following circumstances: Abner Currier was the uncle of French and the father of the plaintiff. The mother of French had died when he was three years old, and shortly afterwards he was taken into the family of Abner Currier, whose wife was his mother's sister, and there grew up. Shortly after he became a member of the family, the plaintiff was born. Currier and his ancestors had resided on the farm for several generations. When French was about 18 years of age, he went to California, where he married and accumulated the estate now under administration. His wife died, leaving him childless. A few months before these documents were executed, he had returned to Maine with somewhat impaired health and was living at the Currier home. He wanted to buy the farm from Currier and make a gift of it to the plaintiff for her home. Currier said his price was $5,000, but that he would not sell. French then expressed a wish to do something for plaintiff to enable her to buy it whenever it should be for sale. He then negotiated the arrangement evidenced by the foregoing note and contract. Cullen, the husband, was taken into the conference and consented to the arrangement. The papers were then written by the plaintiff, at French's suggestion, in the husband's absence. When they were ready, Cullen was called in to witness the note and sign the contract. A day or two afterwards French went to the Cullen home in Concord, Mass., and there lived, in pursuance of the contract, until November following. Cullen, the husband, testified that his intention was that the note should be the property of the plaintiff and not community property.

[4] Under these circumstances, the court was justified in finding that the note, at the very time of its execution, was the separate property of the wife. The law in this state on this subject is well established. A husband and wife may, by contract with each other, alter their legal relations as to property. Civ. Code, §§ 158, 159, 160. The husband may orally, or in writing, make to his wife a gift of the community property, and when this is done it becomes her separate estate. Peck v. Brummagin, 31 Cal. 446, 89 Am. Dec. 195; Hamilton v. Hubbard, 134 Cal. 607, 65 Pac. 321, 66 Pac. 860; Dow v. Gould, etc., Co., 31 Cal. 653; Woods v. Whitney, 42 Cal. 361; Higgins v. Higgins, 46 Cal. 263; Jackson v. Torrence, 83 Cal. 529, 23 Pac. 695; Kane v. Desmond, 63 Cal. 464; Read v. Rahm, 65 Cal. 344, 4 Pac. 111; Wren v. Wren, 100 Cal. 279, 34 Pac. 775, 38 Am. St. Rep. 287; Kaltschmidt v. Weber, 145 Cal. 599, 79 Pac. 272; Perkins v. Sunset, etc., Co., 155 Cal. 719, 103 Pac. 190. The effect of the transaction and the circumstances attending it were that Cullen, prior to the execution of the note, made a gift to his wife of her future services in performance of the contract and of his own services as well. It is settled that this is a valid transaction between them, under the sections of the Code above cited. Wren v. Wren, supra; Kaltschmidt v. Weber, supra. The con-

sequence of this gift is that the consideration of the note was the separate property of the wife. The execution of the note and the contract in the form above shown clearly indicated an intention on the part of the husband that the note itself should be the separate property of the wife and not the property of the community. The finding to that effect is therefore fully sustained by the evidence. This being the case, it would follow that the court did not abuse its discretion in refusing permission to the defendant to set up the defense of nonjoinder of the husband. The evidence showed that the husband had no interest, and the defense, if alleged, would not have been sustained.

There was no error in allowing the husband to testify. In Kaltschmidt v. Weber, supra, the husband was allowed to testify under similar conditions. The question is not discussed in the opinion, but the case is a precedent for the proposition that the husband is a competent witness under such circumstances. Section 1880 of the Code makes the party, or assignor of the party, incompetent when the action is against an executor or administrator upon a claim or demand against the estate of a deceased person. Inasmuch as this note never was the property of the husband, it is obvious that that section does not apply to him. The mere fact that the consideration of the note at one time was community property does not make him either a necessary party to the action or the assignor of the plaintiff. If the husband should make a gift of property to his wife, and she should thereafter sell it, taking a note for the purchase money, it would not be contended that the husband was her assignor merely because he had previously made a gift to her of the property which constituted its consideration. The case at bar is precisely of the same character. The husband gave the consideration to the wife, and she thereupon bargained it away, taking the note as the price. We find no error in the finding or rulings of the court.

[5] We further suggest that if the plaintiff had seen fit to make proof of the law of Maine, where the transaction took place, and of Massachusetts, where the consideration was rendered, perhaps she could have shown that there is no such thing as community property in those states, and that a note executed to a wife, with the knowledge and consent of the husband, is prima facie her separate property, and not that of the husband. This may be easily ascertainable from the authorities. It would have avoided the necessity of the foregoing discussion. But this court cannot take judicial notice of it, in the absence of proof at the trial.

The judgment and order are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

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25 Cal. App. 613

EUREKA MILL & LUMBER CO. et al. v. ANDRES et al. (Civ. 1375.)

(District Court of Appeal, First District, California. Oct. 20, 1914. Rehearing Denied Nov. 19, 1914.)

MECHANICS' LIENS (§ 281*)—CONTRACT—SUFFICIENCY OF EVIDENCE.

In an action to enforce a mechanic's lien, in which the claims were prorated out of the contract price, evidence *held* to sustain a finding that the written contract for the construction of the house on which the liens were claimed was not abrogated by an executed parol contract for the construction of a different house at a larger cost.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Eureka Mill & Lumber Company, a corporation, and others against Jennie E. Andres and others. From a judgment for plaintiffs, for an insufficient amount, they appeal. Affirmed.

W. B. Rinehart and H. S. Craig, both of Oakland, for appellants. Samuels & Magnes, of Oakland, for respondents.

LENNON, P. J. This is an action to foreclose certain mechanics' liens upon real property owned by the defendant. Judgment was rendered and entered for the plaintiffs, to the effect that the amount of their respective claims of lien should be prorated out of the sum of $550, which the trial court found was the contract price for the erection of a dwelling house pursuant to the terms of a written contract. Plaintiffs, being dissatisfied with the judgment, have appealed.

Originally there were two independent actions instituted for the foreclosure of the liens in controversy, which for the purpose of trial were consolidated.

The causes of action sued upon arose primarily out of the execution of the following contract:

> "The undersigned, W. H. Shaffer, agrees to construct a replica of a three-room bungalow on 14th street, Oakland, on what is known as the Y. M. C. A. property, excepting as follows: the painting inside and out, the sewer; the same to be constructed on Jones street, Oakland, for the sum of $550, and paid for upon conclusion of this agreement or contract.
>
> "Signed this 14th day of July, 1910.
>
> "[Signed] W. H. Shaffer.
>
> "Jennie E. Andres."

In the court below it was the plaintiffs' contention that this contract was abrogated by an executed parol agreement providing for the erection of a different building, the cost of which, it was claimed, exceeded the sum of $1,000, and that, as no memorandum of the latter contract was ever filed or recorded, judgment should have been directed, foreclosing the liens upon the property for their full amount. Upon the evidence adduced at the trial the lower court, in its findings of fact, declared that the written contract was the only one entered into between the parties, and deduced the conclusion of law therefrom that the several lien claimants were limited in their recovery to the contract price therein stated. Counsel for plaintiffs attacks this finding as being contrary to the evidence, and inconsistent with and repugnant to other material findings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Briefly stated, the evidence adduced upon the entire case discloses the following facts: The defendant desired to erect a duplicate of a certain building on Fourteenth street in the city of Oakland, and estimated that this could be done for the sum of $550. With that end in view she had several conversations with a contractor named W. H. Shaffer, which culminated in the execution of the contract above recited. Thereupon a rough plan of the building contracted for was made, and was submitted to the defendant for her approval by the contractor. The defendant discovered that a door had been omitted, and the plan was changed accordingly. The defendant had no further conversations with the contractor concerning the cost and construction of the building. The building was constructed according to the plan prepared by the contractor and approved by the defendant. In substance these are the facts and the only facts of the case; and the finding of the trial court that the building was erected pursuant to the terms of the written contract is therefore the only finding possible under the evidence.

In support of the contention that the written contract was abrogated counsel for plaintiffs insists that the building as erected was not in fact an exact replica of the Fourteenth street house referred to in the contract, and in support of this contention relies upon the testimony of two lien claimants to the effect that certain differences existed between the two buildings. The cross-examination of these witnesses discredited, if it did not destroy, their testimony. As against their testimony the defendants produced an architect, apparently a disinterested witness, who testified that he made an inspection of both buildings, and that one was a copy of the other. All of the testimony adduced upon the entire case tends to the conclusion that the building was erected pursuant to the terms of the written contract, and that it was a replica of the building referred to therein. In our judgment there is no evidence of any kind tending to show that the contract was in any manner or at any time departed from, or that a single alteration was made. The testimony of the contractor's brother that certain conversations were had relative to the building after the execution of the contract was subsequently denied by him when the trial court drew his attention to his conflicting testimony, and he then admitted that all conversations relative to the building were had prior to the execution of the contract. The contractor himself was not called as a witness in the case. The claim that the contract was changed by mutual consent is supported only by the statement of the counsel for the plaintiffs.

There is no merit in the claim that the remaining findings in the case are inconsistent and repugnant in themselves.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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25 Cal. App. 600

HAMBRIGHT & WALSH CO. v. PROVIDENT PLEDGE CORPORATION.
(Civ. 1446.)

(District Court of Appeal, Second District, California. Oct. 9, 1914.)

1. Appeal and Error (§ 931*) — Presumptions.

Any uncertainties in the findings will be construed, if possible, so as to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

2. Judgment (§ 256*) — Findings — Sufficiency.

In an action to recover personal property pledged to defendant, the court found that the goods were delivered to the pledgor by plaintiff, with a memorandum of the property and the price, and that plaintiff agreed with the pledgor to transfer the property to him or his order upon terms and conditions not stated in the memorandum, that said delivery was made with the agreement that the pledgor might dispose of the property, and that plaintiff delivered the property to the pledgor and allowed him to assume the apparent ownership thereof in order to transfer it. *Held* to sustain a judgment that plaintiff was entitled to possession only upon paying to defendant the amount for which the goods had been pledged to him, under Civ. Code, § 2991, providing that one who has given the appearance of title to another, in order that he may transfer it, cannot defeat a pledge of it to one who acted in good faith, in the ordinary course of business, and who gave value.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256.*]

3. Replevin (§ 72*)—Findings—Evidence—Sufficiency.

In an action for the recovery of personal property pledged to defendant, evidence *held* to support findings that plaintiff delivered the goods to the pledgor and agreed substantially to transfer the property to him or his order, with the real intent that the pledgor might dispose of the property upon payment of the price stated.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 292–295; Dec. Dig. § 72.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Hambright & Walsh Company against the Provident Pledge Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Loeb & Loeb, of Los Angeles, for appellant.
Arthur Wright, of Los Angeles, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SHAW, J. This was an action to recover possession of certain personal property, title to which, as alleged, was vested in plaintiff.

Plaintiff was a wholesale dealer or jobber in the sale of jewelry. One C. P. Osgood was engaged in the retail jewelry business and on occasions found customers who desired to purchase goods which he did not carry in stock. From time to time he applied to plaintiff for such articles, which it intrusted to him upon consignment thereof, and if they were sold or retained by him they were either paid for or a charge made against him for the same; otherwise they were returned to plaintiff. About November 7, 1912, Osgood received from plaintiff the goods in question, consisting of two diamonds and one diamond ring. With their delivery there was also delivered to Osgood by plaintiff a memorandum as follows:

> "Memorandum. From Hambright & Walsh, 342 South Broadway, Phone A 3204, Los Angeles, Cal. N. B. These goods are sent for your inspection and are delivered upon the express understanding that the title thereto shall remain in Hambright & Walsh until the purchase price is fully paid. Los Angeles, November 7, 1912. Consigned to C. P. Osgood, City. [Then follows a description of the goods.] Important. When reporting on these goods, please return this bill and see that it is receipted and returned to you."

A few days after receiving the goods from plaintiff, Osgood, without paying for the same, pledged them to defendant to secure the payment of $450. The action is to recover possession of the jewels. The court adjudged that plaintiff was entitled to possession of the goods only upon paying to defendant the amount for which they were pledged. From this judgment plaintiff appeals, adopting the alternative method in presenting the record.

The court found that the goods were delivered to Osgood by plaintiff, as stated, together with the memorandum therewith, stating briefly a description of the property and the price at which it would sell the same, and that plaintiff "agreed with said Osgood * * * substantially that it would transfer and convey to him or to his order said property or any part thereof upon certain terms and conditions not stated in said memoranda, or upon the happening of events not stated in said memoranda." And also found "that said delivery was made in said manner with the real intent and agreement upon the part of the plaintiff that the said Osgood might sell or otherwise dispose of said property provided he paid plaintiff plaintiff's said stated price therefor, or other price that plaintiff might accept, at time or times and upon terms and conditions set out." As a conclusion of law the court found that, in the manner heretofore found, "plaintiff delivered said personal property to the said Osgood and allowed him to assume the apparent ownership of said property for the purpose of making a transfer of it."

[1] Appellant attacks the judgment upon the ground that it is not supported by the findings. The findings are not as clear and explicit as they should be. Nevertheless, it is a rule of law that any uncertainties or ambiguities in findings must be construed, if possible, so as to support the judgment. Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257; People v. McCue, 150 Cal. 195, 88 Pac. 899; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672. The memorandum delivered with the goods does not purport to show the making of a conditional sale to Osgood, or, in fact, that any sale of the goods was made to him; hence the transaction cannot be construed as a conditional sale. While, as stated, the goods were delivered to Osgood for his inspection, the title to remain in plaintiff until the purchase price was fully paid, it was further agreed, as found by the court, that Osgood might sell or dispose of the same, provided he made payment therefor to plaintiff. In other words, while Osgood, as shown, was authorized to sell the goods, plaintiff insists no title could pass unless he paid plaintiff the agreed purchase price of the goods, thus imposing upon the one purchasing from Osgood the duty of seeing that the money paid for the goods so bought was delivered to plaintiff, who was unknown in the transaction. Notwithstanding the findings are awkwardly drawn, it sufficiently appears therefrom that, in the transaction between Osgood and plaintiff, the former was authorized to make a sale and transfer of the goods.

[2] As we view the finding, it brings the case within the provisions of section 2991, Civil Code, as follows:

> "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value."

[3] Thus construed, appellant insists the findings are not supported by the evidence. A brief reference to the evidence shows that this contention is also without merit. According to testimony given on behalf of plaintiff, its business transactions with Osgood commenced about a year before the transaction in question. Osgood, to whom plaintiff extended some credit, carrying his name upon its ledger, received goods from plaintiff on consignment. These goods he would display in his place of business. A witness for plaintiff testified as follows:

> "He (Osgood) sold the goods, * * * on the installment plan, the same as any of these retail houses, at so much down and so much a month. Q. Then how did he report to you, and how did he pay you? Tell us in full. A. Immediately when he had sold a watch or any other item to any person, he would either pay us at once, or we would charge him on the ledger. Our transaction was ended as far as the sale was concerned; then it was a matter of collecting the money. Q. Then whom would you collect the money of? A. C. P. Osgood. Q. You didn't know who the purchaser was, did you? A. No, sir; we had nothing to do, we

did not—we sell only to retail jewelers; we don't sell to the customer direct. Q. You trusted Osgood in those particulars? A. Yes, sir. Q. Now, where he would sell something on the installment plan, would you wait until he had been paid? A. We had nothing to do with that; we charged the goods on our ledger and expected our pay on regular time."

It may be conceded that reading the entire testimony given on behalf of plaintiff discloses inconsistent statements, some of which are made by the same witness. The weight accorded such testimony, however, is for the trial court to pass upon. The evidence, taken as a whole, fairly justifies the inference that plaintiff delivered the goods in question to Osgood, not for his inspection, but for the inspection of his prospective customers to whom it was understood and intended that he should, if possible, at a price fixed by him, sell the goods, in which event he should pay plaintiff the agreed price therefor, otherwise return them. Under the laws of this state one may make a conditional sale, delivering possession of, but retaining title to, the property, in which case the seller may recover possession where a transfer of title is attempted without compliance with the conditions. The case at bar presents no facts bringing it within this rule. The fact that Osgood, instead of selling the goods and paying plaintiff as it was intended he should do, violated the trust reposed in him by pledging them in payment for a loan, does not entitle plaintiff to a recovery from one having no knowledge of the arrangement and who, upon faith of the apparent ownership with which plaintiff had clothed the possessor, parted with his money in exchange for the goods.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 633

PEOPLE v. GALLI. (Cr. 235.)

(District Court of Appeal, Third District, California. Oct. 27, 1914.)

Criminal Law (§ 1182*)—Appeal and Error—Affirmance.

A judgment of conviction will be affirmed, where defendant fails to prosecute his appeal after filing the transcript, and makes no appearance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203–3214; Dec. Dig. § 1182.*]

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

F. Galli was convicted of selling liquors in no-license territory, and appeals. Affirmed.

E. W. Wilson, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted at his trial by a jury upon an information charging him with the crime of selling alcoholic liquors in "no-license" territory in the county of Humboldt, and was sentenced to pay a fine of $400, in default of which he be imprisoned in the county jail of said county for the term of one day for each $2 of said fine.

The judgment was entered on June 9, 1913. Notice of appeal was duly given, and demand to have the phonographic report of the trial written. Such transcript was written, and was filed in this court on June 27, 1913, since which time no further steps have been taken by defendant in the prosecution of his appeal. The Attorney General, on the call of the calendar, moved that the cause be submitted on the record. There was no appearance by defendant.

The judgment is affirmed.

25 Cal. App. 620

HERINGTON v. ALTA PLANING MILL CO. (Civ. 1403.)

(District Court of Appeal, Second District, California. Oct. 23, 1914.)

Corporations (§ 399*)—Authority of Agent—"Actual Authority."

Where a solicitor of a corporation engaged in manufacturing and selling building accessories presented to a building contractor a typewritten order signed by a third person in the employ of the corporation as estimator, to furnish accessories, and the contractor did not accept the order until he had obtained a contract to erect a building, the contractor could only rely on the actual authority of the solicitor in making contracts, within Civ. Code, § 2316, defining "actual authority" as such as a principal intentionally confers on the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess, and not on the theory of ostensible authority, within section 2334, making a principal bound by acts of his agent under a merely ostensible authority, to those persons, who in good faith and without want of ordinary care, incurred liability on the faith thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602–1610; Dec. Dig. § 399.*

For other definitions, see Words and Phrases, First and Second Series, Actual Authority.]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by John Herington against the Alta Planing Mill Company. From a judgment for plaintiff, defendant appeals. Reversed.

Stephens & Stephens, of Los Angeles, for appellant. R. L. Horton, of Los Angeles, for respondent.

JAMES, J. Plaintiff is a building contractor, and was engaged in that business during the year 1911. Defendant corporation was at the same time engaged in the business of conducting a milling establishment and furnishing sash, doors, screens, glass, and other building accessories. Plaintiff, intending to offer a bid upon a contract to construct a certain apartment house, requested of the defendant that it furnish to him an estimate of the cost of screens and cabinetwork, sash, doors, et cetera, which would be required in the construction of that building. The vice president of defendant, who acted generally as its manager, informed plaintiff that a solicitor of defendant named Stum would see him, and subsequently Stum brought to the plaintiff a typewritten offer under the printed bill head of defendant. This document was typewritten, except that it bore in the lower left-hand corner thereof the name of one Thompson, written in longhand. Thompson, it appeared by the evidence, was a man specially employed as an estimator or calculator. After receiving this proposal, plaintiff proceeded to make his bid for the building contract, and was awarded the work, being the lowest bidder. Some days later he held a conversation with Stum in which he brought up the question as to whether the estimate, as furnished, included all wire glass required in the building, and, in order to meet his objection that the offer was not clear upon this point, Stum wrote in longhand over his own signature the words: "This bid includes all wire glass but elevator inclosures." Thereupon plaintiff placed his signature at the foot of the paper under printed words which were a direction to defendant to enter his order for the materials. Upon this paper being returned to defendant by Stum, and within two days thereafter, defendant, by its representative Homann, wrote to plaintiff and called his attention to the fact that the bid of defendant did not include all wire glass, because that glass of itself would amount in value to more than $2,000. The total bid as specified in the typewritten document was for the sum of $2,113. In this letter request was made for a new order to be signed by plaintiff, with a notation to be added as follows: "This bid includes all glass in all wooden sash and doors." It appeared that the metal sash into which the bulk of the wire glass used in the building was to be placed was ordered by the plaintiff from another firm, and was not intended to be included in the merchandise furnished by the defendant. However, plaintiff insisted that he had made a contract with the defendant by which the latter was obligated to furnish all of the wire glass, whether used in wooden sash or metal sash, as needed in the construction of the building. Defendant flatly refused to furnish this glass or any of the merchandise, and the plaintiff purchased the same elsewhere, and brought this action for damages. The trial judge decided the issues in his favor, and this appeal was taken from that judgment and from an order denying a motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The entire case seems to turn upon the one question as to whether Stum, when he indorsed the written paragraph across the face of the typewritten proposal, did so with authority as a representative of his principal. Under the other facts shown in the case this authority must necessarily have been actual authority, which is defined to be such authority "as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." We have said that, necessarily, in order to bind the defendant, the authority of Stum must have been actual, and for this reason the bid, as presented to Herington, amounted to a mere proposal or offer to make a contract. It was not accepted by the plaintiff, nor attempted to be accepted until after he had secured the contract to construct the apartment house. The offer, as counsel for appellant properly states, might have been withdrawn at any time up to the moment of its acceptance. Therefore it cannot be said that, by reason of any act of the defendant in the way of conferring any ostensible authority upon its agent Stum, damage resulted to Herington. In order that a person dealing with an agent may recover damages for breach of a contract resting solely upon authority of ostensible nature, it must have happened that such person, by reason of his reliance upon the ostensible authority, incurred a liability or parted with value. Section 2334, Civ. Code. So all of the argument, so far as it touches upon the question of the claimed ostensible authority of Stum, may be left out of account in determining the questions here involved. It was conceded, or at least it appears by every fair inference to be drawn from the testimony of the plaintiff, that Herington did not understand that the proposal of defendant, as submitted to him, included all wire glass. He insisted upon the clause mentioned being added thereto. He had never accepted the offer up to the time that this clause was attached to the paper. He testified as follows:

> "Q. You didn't sign the order for it until you had that written in? A. No. Q. You would not have signed it until you did have that written in? A. No; I don't suppose I would; not after I took the stand."

We therefore reach the question as to whether actual authority had been conferred by Stum's principal which would entitle Stum to bind the defendant by a contract such as that which the writing added by him to the bid would create. There was no testimony at all in contradiction of that given by officers of the company and by Stum himself, which in positive terms denied that any such authority was conferred. That actual authority which is conferred through the negligence or want of ordinary care on the part of the principal is only such as the principal allows the agent to believe himself to possess. Section 2316, Civ. Code. Whatever strangers may understand to be the limit of actual authority is an immaterial matter, for the implied authority of an agent upon which third persons are authorized to rely is the ostensible authority or that authority arising by want of ordinary care of the principal which causes or allows a third person to believe the agent to possess. As before mentioned, the question of ostensible authority, if any were shown in this case, is wholly immaterial, as it did not appear that through reliance upon any such authority the respondent had suffered damages. The conclusions already suggested are sufficient to indicate that a reversal must be ordered in this case. It may be added that from the evidence it would not seem that Herington was authorized to take it for granted that, by reason of his employment as a solicitor, Stum possessed the authority to change, modify, or add to a bid or proposal such as that which was submitted by the appellant. Upon the face of the written offer it clearly appeared to have been prepared in the offices of appellant and it bore the signature of a person other than the solicitor. It was a proposal covering a variety of material and articles which were offered seemingly in competition with other bidders. The evidence that Stum had made two or more offers to other persons to sell them wire glass and had quoted them figures as to the selling price thereof, would not, to our minds, establish such a condition as to authorize a person in respondent's position to assume that Stum possessed authority to alter the written proposal for a general lot of materials to be used in the performance of a building contract. Moreover, to that written proposal by Stum was attached Stum's signature only, and not the signature of appellant corporation, and it appears that plaintiff himself called Stum's attention to the fact, and asked why the name of the company was not signed. From this it is shown that the plaintiff himself had in mind a question as to the authority of Stum to act for his principal.

For the reasons stated, we conclude that the evidence was insufficient to sustain the findings and judgment made in favor of the plaintiff.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

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25 Cal. App. 630

PEOPLE v. DABNER. (Cr. 268.)

(District Court of Appeal, Third District, California. Oct. 27, 1914.)

LEWDNESS (§ 5*)—INDICTMENT—SUFFICIENCY.

An indictment charging specific acts *held* to charge a violation of Pen. Code, § 288, making it an offense for any person to commit any lewd and lascivious act upon any child under the age of 14 years.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 7–12; Dec. Dig. § 5.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Anton Dabner was convicted of crime, and he appeals. Affirmed.

E. S. Bell, of Napa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. The defendant was convicted by a jury upon an amended indictment in which it was charged that, on or about October 15, 1913, at the county of Napa, he "did then and there willfully, unlawfully and feloniously commit a certain lewd and lascivious act upon and with the body, and certain parts thereof, of one Crystal Davidson, a female child under the age of fourteen years, to wit, of the age of eight years, by the said Anton Dabner then and there inserting and placing his hands up under the clothes and through and inside of the drawers of said Crystal Davidson, with intent then and there of arousing, appealing to and gratifying the lust, passion and sexual desires of him, the said Anton Dabner, contrary," etc.

The crime charged is defined by section 288 of the Penal Code, which reads:

> "Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this Code upon or with the body, or any member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions of sexual desires of such person, or of such child, shall be guilty," etc.

The only point made in defendant's brief is:

> "That the act described does not constitute a lewd and lascivious act under the provisions of section 288 of the Penal Code; that that act could only be committed upon or with the body, or some part or member thereof, of a child under the age of 14 years. There is no allegation in the indictment that the defendant herein ever placed his hands upon or in any way violated or touched the body, or any part or member thereof, of the said Crystal Davidson. It is not even charged that the clothes and the drawers mentioned in said indictment were upon the person of the said Crystal Davidson."

Furthermore, it is claimed that defendant did not waive this infirmity in the indictment by failure to demur to the indictment, for the reason, as is claimed, that where the indictment fails to state a public offense the failure to demur, specially or otherwise, cannot be deemed a waiver of an objection based upon such ground, citing People v. Grinnell, 9 Cal. App. 239, 98 Pac. 681; People v. Smith, 103 Cal. 563, 37 Pac. 516.

There was evidence sufficient to justify the jury in finding that defendant did in fact place one of his hands under the clothing of the child and through an opening in her drawers to a point of her person which we need not designate, while at the same time hugging and kissing her. The act occurred while the child was riding with him in a cart at his solicitation; he having picked her up on the way home from a country schoolhouse. There was also evidence that when he lifted her out of the cart he did so in an unseemly manner and asked her to go with him behind a nearby tree or some bushes. She refused, and he then kissed her, gave her ten cents, and she went on her way home, and shortly after reaching home, made complaint to her mother.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In his argument, at the hearing, defendant's counsel contended that the crime contemplated by the statute was not sufficiently charged if it fell short of alleging that the accused touched the naked body or some part of the body in fondling or manipulating the person of the child; and that by "inserting and placing his hands up under the clothes and through the inside of the drawers of said Crystal Davidson with the intent," etc., was insufficient to charge the crime. We cannot agree with this view of the law. The statute punishes any lewd or lascivious act willfully and lewdly committed upon or with the body, or any member thereof, of a child with intent of arousing or gratifying the lust or sexual desires of either the perpetrator or his victim. It needs no argument to show that what is here alleged might well import the criminal intention mentioned in the statute, even if, what seems almost a physical impossibility, in doing the alleged act defendant did not touch the naked body of the child. It is easily conceivable that there may be lewd and lascivious acts with the body of a child importing the intent contemplated by the statute where the hands of the perpetrator do not touch the flesh. Acts may be committed with the clothed body which may be lewd and lascivious and be committed with intent to gratify or arouse sexual desires.

We think the indictment was sufficient to charge a crime under section 288 of the Penal Code.

It would be a reproach to the law to hold that a person may, with the intent charged, do to a child what is here alleged against defendant and not be guilty of violating this statute.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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25 Cal. App. 624

BORGFELDT v. CURRY. (Civ. 1386.)

(District Court of Appeal, First District, California. Oct. 26, 1914. Rehearing Denied by Supreme Court Dec. 24, 1914.)

1. FRAUDULENT CONVEYANCES (§ 5*)—STATUTES—CONSTRUCTION.

Civ. Code, § 3439, providing that every transfer of property with intent to defraud or delay any creditor is void against all the creditors of the transferror, and section 3442, providing that no transfer shall be adjudged fraudulent solely on the ground that it was not made for a valuable consideration except that a transfer given voluntarily by one who is insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors, should be liberally construed to effectuate their purpose to prevent debtors from placing property which legitimately should be available for the payment of their debts beyond the reach of their creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 4, 6; Dec. Dig. § 5.*]

2. FRAUDULENT CONVEYANCES (§ 297*)—EVIDENCE—CONTEMPLATION OF INSOLVENCY.

In a suit to quiet title to land conveyed to plaintiff by her husband without a valuable consideration, evidence *held* sufficient to show that the conveyance was made in contemplation of insolvency by the husband, and was therefore void as against existing creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. § 297.*]

3. FRAUDULENT CONVEYANCES (§ 61*)—INSOLVENCY OF GRANTOR—CONTEMPLATION OF INSOLVENCY.

Under Civ. Code, § 3442, providing that a voluntary transfer of property made by one who is insolvent or in contemplation of insolvency is void against existing creditors, it is immaterial that a debtor who transferred property in contemplation of insolvency was in fact solvent at the time.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 138–158; Dec. Dig. § 61.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action to quiet title by Anna Borgfeldt against F. H. Curry. Judgment for the plaintiff, and defendant appeals. Reversed, with directions to enter a judgment for the defendant.

Charles W. Slack, of San Francisco, for appellant. Hillyer, Stringham & O'Brien, of San Francisco, for respondent.

RICHARDS, J. The plaintiff brought this suit to quiet her title to two pieces of real property in San Francisco theretofore conveyed to her in consideration of love and affection by her husband, Christoph J. Borgfeldt. F. H. Curry, the defendant, claimed an interest in the property by virtue of the levy of an attachment thereon in an action which he, as assignor of the Banca Svizzera Americana of Locarno, brought upon two joint and several promissory notes theretofore made by said Christoph J. Borgfeldt, and three other persons or corporations, to said bank; it being claimed by said Curry that the transfer of said real property to plaintiff was fraudulent as against the holder and owner of said promissory notes. In the present action Curry answered, setting up the execution of the notes to the bank, and the assignment thereof to him, and pleaded that the said transfer was made by said Borgfeldt while insolvent or in contemplation of insolvency, and was therefore void as to him and his assignor by virtue of the latter's ownership of the promissory notes hereinbefore mentioned at the time of said transfer. Upon the trial the court found the facts in accordance with the allegations of the defendant's answer with the exception of the allegation that the transfer was fraudulent as to creditors, and accordingly quieted plaintiff's title to the real property. It denied the defendant's motion for a new trial, and the appeal is from such order and from the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is contended by the appellant that the evidence does not support the judgment inasmuch as it shows that said transfer was in fact made by the plaintiff's husband while insolvent or in contemplation of insolvency.

[1] The law applicable to the question is found in sections 3439 and 3442 of the Civil Code. Those sections read, respectively, as follows:

> "Sec. 3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."
>
> "Sec. 3442. In all cases arising under section 1227, or under the provisions of this title, except as otherwise provided in section 3440, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

(We need not consider sections 1227 and 3440 referred to in the last-quoted section, as it is not claimed that they have any bearing upon the question before us.)

These sections, in common with the remainder of the Code, should be liberally construed with a view to effecting their purpose. That purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or, in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances for profit. If misfortune should overtake him, he must face it himself, and not attempt to saddle it onto those who have extended him credit and trusted in his commercial integrity.

[2] In the case at bar the transfer of the property involved was made about three weeks after the great earthquake and fire which occurred in San Francisco on April 18, 1906. At the time of the catastrophe Borgfeldt was engaged in a grocery and retail and wholesale liquor business with a brother as partner, and in addition owned an interest in another business. Both of these businesses were entirely wiped out by the fire, and the customers widely dispersed. The books of the grocery and liquor concern showed accounts payable amounting to $10,000, and accounts receivable amounting to about $9,000. It subsequently turned out that the firm collected 90 per cent. of these accounts and also collected a certain amount of insurance; but it is a matter of common knowledge that at the time in question retail merchants in San Francisco whose businesses were located in the burned area did not expect to be able to collect any such percentage of their accounts, to say nothing regarding the uncertainty of collecting fire losses. For three months after the disaster Borgfeldt had no income, and on the day before the transfer embarked in a new business, the future of which in the unsettled condition of San Francisco neither he nor any one else could predict. Of the two promissory notes above referred to, one became due three days after the date of the transfer by Borgfeldt to his wife, and the other eighteen days after said date. The financial condition of his cosigners of the promissory notes was also badly affected by the San Francisco disaster. Every fair inference arising from the testimony as to Borgfeldt's circumstances and financial prospects at the time characterizes the transfer of this real property as one made to save it from the almost certain claims of creditors. We have, moreover, his own admission to the following effect:

> "The real reason why this transfer was made to my wife was this, that a year or so before the fire I began to go into this mining proposition. I stuck in $6,000 first. Then I put in another $2,500; and my wife thought it would be better, if I go to work and put all my money in the mining, and she gets nothing for herself, so it was agreed then that I turn the property over to her, and then when this fire came along and all mine was gone—if the property had been burned out that would have been all gone—so for that reason the transfer was made."

That the object of the transfer was to save the property from the claims of creditors rather than to make an absolute gift of it to the plaintiff may also be legitimately inferred from the fact that six months after the transfer the plaintiff borrowed upon the security of the property the sum of $5,000, which was placed in the business enterprise above mentioned in which her husband had embarked; stock in the concern however being taken in the plaintiff's name.

[3] The principal argument in the briefs of both appellant and respondent is addressed to the question as to whether at the time of the transfer Borgfeldt was actually solvent or insolvent. Appellant constructs from the testimony a table of assets and liabilities, which he contends shows Borgfeldt to be insolvent. Respondent takes the same table, and contends that it proves the contrary. The difference between them arises from the item of $1,000, previously referred to as having been put into a new business on the day preceding the transfer; the appellant contending that this sum should not be regarded as assets, and the respondent contending that it should, and that, so regarding it, the assets of Borgfeldt were superior to his liabilities by the sum of about $300. In the view we take of the case, however, it matters not whether this sum is included in Borgfeldt's assets or not. Admitting that by a small margin he may be shown to have been solvent, it still remains patent from the evidence that the transfer was made in con-

templation of insolvency, and, as such, is equally within the terms of the sections of the Code cited.

For the reasons stated, the finding of the trial court is not supported by the evidence. The judgment is therefore reversed, and the court directed to enter a judgment for the defendant for his costs.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 607

MILLER et al. v. SUPERIOR COURT OF KERN COUNTY et al. (Civ. 1666.)

(District Court of Appeal, Second District, California. Oct. 13, 1914.)

1. Elections (§ 154*) — Primary Election Law — Contest — Construction — "After Completion of the Final Canvass."

Under section 22 of primary election law (St. 1913, p. 1379), providing for the canvass of the returns, and section 28, providing that the contestant may file an affidavit initiating a contest within five days "after the completion of the final canvass," the time for filing the affidavit does not begin to run until the board of canvassers has declared the result, even though they have occupied more than the time limited by law for the canvass.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

2. Elections (§ 154*)—Contest—Votes Considered—Inadmissible Evidence.

In a contest of a primary election, evidence as to the choice of qualified voters who were not permitted to vote because "not upon the great register," or whose affidavit of registration had been lost, is not admissible to determine who received the most votes, but only the legal votes actually cast can be considered.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 136; Dec. Dig. § 154.*]

3. Prohibition (§ 10*)—Grounds—Jurisdiction—Excess of—Evidence.

The improper reception and use of evidence by the court in determining a special proceeding in which no appeal is allowed, is in excess of its jurisdiction, so as to be the proper subject for a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

Petition by I. L. Miller and Jerry Shields against the Superior Court of Kern County and Hon. Milton T. Farmer and others, judges thereof, for a writ of prohibition in election contest. Petition granted in part.

E. J. Emmons, J. R. Dorsey, Matthew S. Platz, and Geo. E. Whitaker, all of Bakersfield, for petitioners. E. L. Foster and E. F. Brittan, both of Bakersfield, for respondents.

PER CURIAM. The petitioners were candidates at the August primary election of 1914 for nomination as candidates for the offices of county clerk and county treasurer, respectively, of the county of Kern. The board of supervisors of that county, having completed its canvass, has declared that petitioners have, respectively, received the highest number of votes cast for said offices. Contests are now pending in the superior court of said county, one against the nomination of petitioner I. L. Miller for the office of county clerk, and the other against petitioner Jerry Shields for the office of county treasurer. These contests, having been consolidated for the purposes of trial, are now being tried in said court.

No alternative writ has been issued, but the petitioners and the respondents are before the court at the time of application for the writ, and by stipulation the court will make its order upon the record before it as upon a return to an alternative writ. The record produced consists of the petition for the writ and a transcript of certain evidence that has been taken in the hearing of said contests in the superior court.

On account of the urgency for immediate disposition of the matter, the court, on October 8, 1914, in open court, made its order as herein stated. It appears that the actual canvassing of the primary election returns, other than the order of the board of supervisors declaring the result of the canvass, all occurred prior to the 18th day of September, 1914, and that the order of said board declaring the result of the canvass was made and entered on the 18th day of September. The affidavits of contest were not filed until the 23d day of September. It further appears that in said affidavits of contest it was alleged by each contestant that a large number of alleged voters within various precincts in the county of Kern were not permitted to vote, and could not vote, because their names were not upon the register; neither were the original affidavits of registration or duplicates thereof at the time in the office of the county clerk of Kern county, where they are required by law to be; and that a large number of voters who had registered in accordance with law had a right to vote in their several precincts, but were denied the right to vote for the reasons above stated, and that said voters intended to and would have voted for the contestants if they had been permitted to cast their ballots in their respective precincts. It is further shown by petitioners that the superior court, in the trial of said contests, will permit said alleged disfranchised voters to testify that they registered as electors of said precincts according to law, notwithstanding the fact that their names were "not upon the Great Register" of the county, and that they would have voted for the contestants if they had been permitted to cast their ballots. It appears that, the offer of such evidence having been objected to by the petitioners, the objections have been overruled, and the court, unless prohibited from so doing, will hear said evidence and admit the same on the hearing of said contests.

[1] Petitioners insist that, upon the facts shown, the contests were not filed within the time provided by the primary election law,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that the court is without jurisdiction to hear the same. It is further contended by petitioners that the superior court is without jurisdiction to consider said contests in so far as they are based upon said alleged facts with regard to electors whose names are not upon the register and who were not permitted to vote.

The court is of the opinion that the five days' time provided by the primary election law for the filing of contests did not begin to run until the board of supervisors had declared the result of the canvass of the returns—that is to say, not until the 18th day of September, 1914—and that the contests, having been filed on the fifth day thereafter, were filed within due time. Section 22 of the primary election law (Stats. 1913, p. 1379) provides that the board of supervisors shall meet at a specified time to canvass the returns. "When begun the canvass shall be continued until completed, which shall not be later than six o'clock in the afternoon of the sixteenth day following such primary election. The clerk of the board must, as soon as the result is declared, enter upon the records of such board a statement of such result," etc. Section 28 of the same act provides that any candidate at a primary election desiring to contest the nomination of another candidate for the same office "may, within five days after the completion of the final canvass, file an affidavit," etc. This affidavit is the basis of a contest in which the ballots may be recounted before the superior court. September 10, 1914, was the sixteenth day following the August primary election, and petitioners contend: First, that for the purpose of fixing the time within which a contest may be instituted, it must be conclusively presumed that the canvass was completed not later than September 10th at 6 o'clock in the afternoon; and, second, that at all events the formal declaration of the result is not a part of the canvass. As part of the first contention petitioners' counsel insist that after the sixteenth day the board of supervisors was without jurisdiction to do any further acts in connection with the canvass of the returns of said election.

The portions of the law to which we have referred contemplate prompt action in order that the names of the persons nominated may be known in due time so that they may be placed upon the ballot for the November election, and a careful compliance with the provisions of the law as to the time within which the several acts should be done is necessary. But this does not compel us to adopt a construction of the statute which, in some instances of neglect or misconduct, would make it impossible to ascertain the candidates between whom the choice must be made at the final election. If, by reason of neglect or misconduct, it should appear, after the expiration of the time named in the statute, that the board of supervisors would not declare the result of the canvass, any elector within the county or district might institute appropriate proceedings to compel action by these officers. The courts are open for such purposes, and are expected to dispose of such matters with such promptness as will meet the emergency. Until the board of supervisors has declared the result of the canvass, no one is in a position to know whether a contest is necessary to protect any interest that he may have in the result. The preliminary examinations of the returns and computations made thereon are merely the evidence upon which the declaration of the result is made to depend. This declaration bears the same relation to the previous proceedings as the findings and judgment bear to the previous record in an action at law. It is therefore our opinion that the words above quoted from section 28, limiting the time for initiating a contest to five days "after the completion of the final canvass," refer to a period of five days after the declaration of the result.

[2] The court is further of opinion that the refusal of the election officers to receive the votes of said electors who were not permitted to vote is not a proper ground of contest, and that the superior court is without right or jurisdiction to receive said offered evidence, or to consider the same as a ground of contest. In contests of this character the question is which candidate received the highest number of legal votes, and not which candidate would have received the highest number if every person claiming the right to a vote had been permitted to do so. It is unfortunate if some electors who made their affidavits of registration in due time before the proper officer were deprived of their right through failure of that officer to preserve those affidavits or any legal evidence of the right of these electors to vote at the election. But a greater evil to the public would follow from the contrary rule. We cannot imagine any rule that would more effectively open the door for successful perjury than a rule which would permit persons to come into court after the apparent result of a close election has been published and allow them to testify that they did make affidavits of registration which have been lost or destroyed, and that, if permitted to vote, they would have voted for the contestant.

[3] Ordinarily, the acceptance of such testimony and the use of it by the court in determining the contest would be merely an appealable error. It would be merely an error of the court in the exercise of its jurisdiction, and not an action in excess of such jurisdiction. But since the contest provided for in said section 28 is a special proceeding concerning which it is provided that "such decision or judgment of the court shall be final in every respect and no appeal can be taken therefrom," it follows that there would be no adequate remedy at law if the superior court, assuming jurisdiction of an alleged contest, should attempt to hear and deter-

mine said contest upon allegations which do not legally constitute a ground of contest. It is reasonable to say that a judgment based upon such alleged facts would be in excess of the jurisdiction of the court and would constitute a proper subject for a writ of prohibition.

In accordance with this opinion, an order has been entered granting the writ of prohibition applied for herein solely and only to the extent that by such writ the superior court of Kern county will be prohibited from considering said ground of contest with respect to the electors above mentioned whose votes were not received at the primary election.

As to any other grounds of contest involved in the affidavits of contest to which reference has been made, the petition has been denied.

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25 Cal. App. 604

HILLGER v. YENRICK. (Civ. 1564.)

(District Court of Appeal, Second District. California. Oct. 10, 1914.)

1. Appeal and Error (§ 1091*)—Presumptions—Appeal from Justice Court.

It will be presumed, in the absence of a contrary showing, that an appeal from a justice court was taken on questions of both law and fact, and the superior court heard the case anew.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4302–4311, 4331; Dec. Dig. § 1091.*]

2. Justices of the Peace (§ 45*)—Jurisdiction—Amount—Counterclaim.

The jurisdiction of a justice's court of an action involving a money demand, within the limit of jurisdiction fixed, cannot be ousted by a counterclaim to recover more than the limit fixed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 173–175; Dec. Dig. § 45.*]

3. Appeal and Error (§ 32*)—Decisions Reviewable—Judgment of Superior Court on Appeal from Justice's Court.

Where an appeal is taken from a judgment of a justice for $100, the limit of its jurisdiction, in an action to recover that sum as money paid on a contract of sale not carried out, and the case is tried anew in the superior court and judgment rendered for the same sum, an appeal to the District Court of Appeal will not lie on the theory that, because defendant in justice court filed a counterclaim, which was abandoned in the superior court, claiming the whole of the purchase money, that the superior court exercised original jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 107–109; Dec. Dig. § 32.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by R. E. Hillger against N. Yenrick. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Theron Stevens, of San Diego, and J. R. Gilliland, of Glendora, for appellant. Young C. Burkhart, of San Diego, for respondent.

PER CURIAM. This action was originally brought in the justice's court to recover $100 alleged to have been paid by respondent as part of the purchase price of certain lots of land in the county of San Diego which appellant agreed to transfer to him. The contract was evidenced by a writing in the form of a receipt which, after setting forth a description of the property and the fact of the payment of $100, provided that the balance of the purchase price should be paid—

> "upon delivery of certificate complete to date of transfer from a responsible abstract company in the city of San Diego; said certificate to show said property free from all incumbrances and execution of good and sufficient deed, on or before 15 days from date. * * * And if the balance of ...... dollars is not paid as stipulated and agreed, the above contract is null and void, and all moneys paid shall be forfeited as agreed damages for failure of purchaser to perform this contract. Should such abstract or certificate show the title to said property as not being free from incumbrances as above stated, the deposit shall be returned to said purchaser."

The respondent alleged in his complaint that he had been ready to perform and had performed all of the obligations required of him, but that more than 15 days had elapsed and that the appellant had failed to deliver to him a deed or furnish the certificate in the manner agreed. In the justice's court appellant filed an answer and counterclaim in which he took issue on the facts alleged in plaintiff's complaint and sought to recover the balance of seven hundred dollars which respondent had agreed to pay upon the conditions of the contract in his favor being performed. This answer and the counterclaim as filed in the justice's court were verified, appellant seeking thereby to raise a question as to the title or right to possession of real property which would oust the justice's court of jurisdiction. However, the justice of the peace proceeded to try the action and, notwithstanding a motion to have it certified to the superior court, judgment was rendered for $100 as prayed for in the complaint, and an appeal was then regularly taken to the superior court.

[1] We must assume that the appeal was taken on questions of both law and fact, for the contrary does not appear, and the superior court proceeded to hear and determine all of the issues in the case, both law and fact, anew. A demurrer to the complaint was sustained, and an amended complaint was filed, which set out with more detail the circumstances of the contract and the actions of the parties had in connection therewith, and again repeated the prayer for judgment in the sum of $100. A demurrer stating general grounds was filed to the amended complaint and overruled. Appellant then filed an answer and what he termed a cross-complaint, repeating in effect all of the allegations set up by his alleged counterclaim in the justice's court. The respondent made no

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

answer to the cross-complaint, and the action went to trial as to the issues made up on the amended complaint and the denials contained in the answer. Again judgment was rendered in favor of the plaintiff for the sum of $100 and costs. This appeal, taken from that judgment, followed.

[2, 3] The action was an action at law for the recovery of money only and involving an amount within the jurisdiction of the justice's court. No question concerning the matter of title or possession of real property was shown to be involved from the contents of the answer as filed, or the counterclaim. The fact that the defendant sought by counterclaim to recover more than the amount fixed as the limit of the jurisdiction of the justice's court could not oust that court of jurisdiction. The justice of the peace might have stricken the alleged counterclaim from the files, but he did not commit error in proceeding to the trial without taking such action. In the superior court the alleged cross-complaint seems to have been ignored by both the respondent and the trial judge. It was improperly on the files of the court, and it must be assumed, if it is necessary so to do to support the judgment, that it was so disregarded and treated as of no effect. We do not think that the superior court attempted to exercise original jurisdiction at the trial of the action, as it rendered judgment for only the amount of $100 and attached costs thereto as part of the recovery, which could not have been done had the action been one of original jurisdiction with that court. Such a state of facts being disclosed it is manifest that no appeal could properly have been taken from the judgment last entered to this court, as the judgment of the superior court was final.

It is ordered that the appeal be dismissed, with costs to the respondent.

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25 Cal. App. 616

POETKER v. LOWRY. (Civ. 1518.)

(District Court of Appeal, Second District, California. Oct. 22, 1914.)

1. Bills and Notes (§ 470*)—Action on—Demurrer—Insufficient Allegations in Complaint.

In a complaint on a note, an allegation that "defendant has refused, and still refuses, to pay the same" is not a sufficient allegation of nonpayment of a matured debt as against a general demurrer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1462; Dec. Dig. § 470.*]

2. Pleading (§ 207*)—Special Demurrer—Complaint.

Where the allegation of nonpayment in a suit on a note is in the form of a conclusion, or is such that nonpayment is implied, the attack must be by special demurrer, pointing out the defect, and a general demurrer is insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 511, 512; Dec. Dig. § 207.*]

3. Contracts (§ 108*)—Consideration.

Under Civ. Code, § 197, giving the father the right to the custody and services of his minor child, an agreement by the mother alone, while living with the husband and father, to continue to keep, care for, and support the child, instead of giving it away, as she desired to do, is not a valid consideration for a contract by a third person to compensate the mother therefor; as it would be compensating her for refraining from doing what she could not legally do without her husband's consent, and also for performing the duty which the law lays on parents to care for their children.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498–503, 505, 507–511; Dec. Dig. § 108.*]

4. Contracts (§ 108*)—Against Public Policy.

An agreement by a third party to pay a mother for the care and support of her minor child while they are living with the husband and father, as it is against public policy, will not be enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498–503, 505, 507–511; Dec. Dig. § 108.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by F. W. Poetker against Rosa B. Lowry. Judgment for plaintiff, and defendant appeals. Reversed.

Gray, Barker & Bowen, of Los Angeles, and George A. Skinner, of Long Beach, for appellant. Bicksler & Smith, of Los Angeles, for respondent.

SHAW, J. Action upon a promissory note alleged to have been made by defendant to plaintiff. Judgment went for plaintiff, from which, and an order denying her motion for a new trial, defendant appeals.

[1] Defendant interposed a general demurrer to the complaint, which was overruled. This ruling is assigned as reversible error. The demurrer was directed to the absence of any allegation in the complaint showing nonpayment of the note. The only statement purporting to constitute such allegation is "that defendant has refused, and still refuses, to pay the same." That a party suing upon a contract to pay money must allege a breach thereof—that is, nonpayment of the money which he seeks to recover—otherwise his complaint is subject to general demurrer for failure to state a cause of action, is fundamental, and must be conceded. The question presented is whether the statement above quoted constitutes a sufficient allegation of such fact, when tested by general demurrer. While respondent concedes the complaint to be defective, he insists there is not a total lack of essential allegation, and that such defect is cured by the judgment.

[2] We conceive the rule to be that, where the statement, though defective, is in the form of a conclusion, or is of a character from which the fact of nonpayment is implied, it is sufficient when measured by general demurrer. In such case the attack must be made by special demurrer, pointing out the defect. Thus, while there are au-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thorities in this state to the contrary, it has been held that, in the absence of special demurrer, a complaint based upon contract and alleging a breach thereof by stating the sum demanded was due and owing contains a sufficient allegation of nonpayment. Stewart v. Burbridge, 10 Cal. App. 623, 102 Pac. 962; Penrose v. Winter, 135 Cal. 289, 67 Pac. 772. See, also, Knox v. Buckman Contracting Co., 139 Cal. 598, 73 Pac. 428, and cases there cited. The words "due and owing," while a mere conclusion, nevertheless imply a debt matured, and therefore a breach by reason of its nonpayment, and, unless the defect be pointed out by special demurrer, it is cured by verdict or judgment. No conclusion, however, of nonpayment is implied from the allegation that "defendant has refused, and still refuses, to pay," etc. It is impossible to construe such statement as an allegation of nonpayment of a matured indebtedness. Indeed, the alleged refusal of defendant to pay the note is consistent with the prior payment thereof. Since failure to pay constitutes the breach, the complaint must, in order to state a cause of action, negative payment. This rule is too firmly established in this state to be disregarded in order to meet the exigencies of a particular case. The court erred in overruling the general demurrer interposed.

[3] The only defense interposed to the action upon the note was stated in a cross-complaint filed by defendant, wherein she alleged that she had the mothering care and custody of a child which John Leggett and wife expressed a wish to take, receive, care for, and maintain, and that she was anxious to surrender the child to them in compliance with such expressed wish and desire, but that plaintiff, with whom she advised, counseled her against so doing, and agreed that, if she would keep the child and continue to care for and support it, he would compensate her therefor; that, in reliance upon such promise, she retained and continued to care for and support said child, the reasonable value of such care and support of which was $1,800.

The evidence offered under the allegations of the cross-complaint conclusively showed that the child was that of defendant, born to her while living in lawful wedlock with her husband, George Lowry, with whom, so far as shown by the record, she continued to live during all the times in question. It does not appear that her husband, the father of the child, was a party to the alleged agreement, or that he was willing or would have consented, had plaintiff not made the alleged promise, to surrender the care and custody of the child to the Leggetts in accordance with their expressed wish to take and adopt it. So far as shown by the record, he was ignored in the matter. At the close of plaintiff's evidence the court instructed the jury to bring in a verdict for plaintiff, and defendant assigns such ruling as error.

The contention of cross-complainant is that the alleged promise of plaintiff to compensate the mother for supporting her own child constitutes a valid contract, the consideration therefor being the refusal of the mother to avail herself of an opportunity to get a stranger to assume the burden. Section 197, Civil Code, provides that:

> "The father of a legitimate unmarried minor child is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement. If the father be dead, or be unable, or refuse to take the custody, or has abandoned his family, the mother is entitled thereto."

There is no evidence establishing any of the conditions under which the mother could deprive the father of the custody, services, and earnings of his son by giving the child to John Leggett and wife. The father being entitled to its custody, the mother had no right and could not, in the absence of the father's consent, transfer the custody, care, and services of the child to a stranger. That which she refrained from doing in consideration of plaintiff's promise was the nonperformance of an act which, under the law, she could not do. Moreover, the law imposes upon parents the duty of caring for, maintaining, and supporting their children, and that which defendant did in consideration of plaintiff's promise is exactly that which, under the law, and independent of the agreement, she was bound to do.

> "Any prejudice suffered, * * * other than such as he is at the time of consent lawfully bound to suffer, * * * is a good consideration for a promise." Section 1605, Civ. Code.

The agreement on the part of defendant to suffer the burden which the law imposed upon her of looking after and caring for her child constituted no valid consideration for the alleged contract made with defendant.

[4] Aside from the fact that there was no sufficient consideration for the contract, to enforce an agreement of this character would, in our opinion, contravene public policy. There was no error in giving the instruction of which defendant complains.

The judgment is reversed, with instructions that the trial court sustain defendant's demurrer to the complaint and grant plaintiff leave to amend his complaint, if the court be so advised.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 594

McRAE v. PINE et al. (Civ. 1619.)

(District Court of Appeal, Second District, California. Oct. 9, 1914.)

1. COUNTIES (§ 55*)—ORDINANCES—UNIFORM OPERATION—LICENSES.

The constitutional requirement of uniformity in operation of all laws of a general nature does not apply to ordinances enacted in pursuance of a legitimate exercise of the police power, as one in regard to granting liquor licenses, where courts will interfere only for manifest unjust discrimination.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. § 55.*]

2. INTOXICATING LIQUORS (§ 10*)—LICENSES—POWER OF COUNTY BOARD.

As under Const. art. 11, § 11, providing that any county may make and enforce such local police regulations as are not in conflict with general laws, a county board may prohibit generally the carrying on of the liquor business, so it, by refusing to grant a license, may prohibit it in a certain precinct, unless an ordinance prevents it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7–12; Dec. Dig. § 10.*]

3. INTOXICATING LIQUORS (§ 40*)—LICENSES—COUNTY ORDINANCE.

The provision of a county ordinance that the county board shall not grant a liquor license, unless, at the last election on the question of granting licenses, the majority vote in the precinct for which the license is sought was in favor of granting them, does not prevent the board, notwithstanding such a vote, from refusing in its discretion, a license for such precinct.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.*]

4. INTOXICATING LIQUORS (§ 70*)—LICENSES—HEARING BY COUNTY BOARD—JUDICIAL NOTICE.

A county board in its hearing on an application for a liquor license for a certain precinct may take judicial notice of the geographical location and surroundings of the precinct.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 68–70, 72; Dec. Dig. § 70.*]

5. MANDAMUS (§ 154*)—PETITION—CONCLUSION.

The statement in the petition for mandamus that the action of the county board in refusing application for a liquor license was arbitrary and without cause is petitioner's conclusion or opinion, not to be accepted as a statement of fact, unless the statement of actual facts necessarily supports it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

6. INTOXICATING LIQUORS (§ 74*)—ISSUANCE OF LICENSE—"MANDAMUS"—DISCRETION.

The writ not being wholly one of right, but largely of judicial discretion, mandamus to a county board to issue a liquor license will be refused, where it could be granted only on a technical construction of an ordinance, contrary to the spirit of the law, which intends such matters shall remain in the power of regulation by the county through its authorized officers.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*

For other definitions, see Words and Phrases, First and Second Series, Mandamus.]

Application of Al McRae for mandamus to Samuel Pine and others. Petition denied.

G. M. Pittman, of San Bernardino, for petitioner. R. B. Goodcell, of San Bernardino, for respondents.

CONREY, P. J. In this proceeding the petioner seeks to obtain a writ of mandate requiring the board of supervisors of the county of San Bernardino to issue to him a license to carry on the business of a retail liquor establishment in the town of Daggett, Daggett voting precinct, in that county.

Ordinance No. 110 of the county of San Bernardino is an ordinance regulating and providing for the licensing of various kinds of business. It is provided that, before a license may issue for carrying on the business of a retail liquor establishment, as defined in the ordinance, an application shall be filed with the clerk of the board of supervisors. It is required that after the publication of certain notices the board of supervisors "shall thereupon proceed to hear any testimony offered, either in support of or against such application for license, and may refuse to allow a license to issue thereunder, if, on such hearing, it shall appear to the satisfaction of the board * * * that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, * * * or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business or otherwise." "No application for either a wholesale or retail liquor license shall be granted, unless the application shows that, at the last general election at which the question of granting retail and wholesale liquor licenses was submitted to the vote of the people in the county of San Bernardino, a majority of the votes cast upon the question in the voting precinct in which the business is to be carried on, was in favor of the granting of retail and wholesale liquor license."

This case is submitted for decision upon a general demurrer to the petition, with the understanding that, after ruling upon the demurrer, the court shall proceed to a judgment on the merits by either granting or refusing the peremptory writ demanded by the petition. The petition shows that the petitioner duly presented his application to the clerk of the board of supervisors and the required notices were given. The matter came regularly before the board of supervisors and a hearing was had as hereinafter stated. At the last general election preceding the filing of said application a majority of the votes cast in Daggett voting precinct upon the question of granting retail and wholesale liquor licenses was in favor of the granting thereof. At the hearing of petitioner's application before the board no evidence whatever was offered against said application for the license;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nevertheless the board of supervisors rejected the application, and still refuse to grant the same. In taking such action the board of supervisors took no exception whatever to the form, substance, or sufficiency of the application, or to the personal character or standing in the community of the petitioner. Petitioner was a fit and proper person to be granted a license for the purpose of carrying on the business of a retail liquor establishment. These being the facts, the petitioner alleges that the action of the board was purely arbitrary, and entirely without cause, and was not in the exercise of any right conferred on the board by ordinance, and was without lawful right or authority. A stipulation has been filed that a certain copy of portions of the minutes of the board of supervisors pertinent to the issues raised herein may be considered as a part of petitioner's petition. These minutes show that, when the application was taken up for hearing and consideration, no testimony was offered against the issuance of the license. Al McRae, the applicant, was duly sworn and examined, "and gave testimony in favor of the issuance of said license in accordance with the terms of said application." No further testimony was given, and thereupon the board denied the application "upon the ground that, in the judgment of this board, it would not be for the welfare of the people residing within said Daggett voting precinct or of the county to have the business mentioned in said application—to wit, the business of a retail liquor establishment—carried on in said Daggett voting precinct."

[1, 2] That there is a difference between the legal obligation to issue licenses (where such licenses are provided for as a condition to carrying on business) for the carrying on of ordinary commercial occupations and the obligation to issue such licenses for the business here in question is not to be denied. There is no inherent right in a citizen to sell intoxicating liquors. "It is only a calling not in any way injurious to the community which every one has a right to pursue. That the legislative power may prohibit a traffic by retail of intoxicating liquors is conceded. If the governing power can prohibit a thing altogether, it may impose such conditions upon its existence as it pleases, even arbitrary ones. The constitutional requirement with reference to uniformity in operation of all laws of a general nature has no application to ordinances enacted in pursuance of a legitimate exercise of the police power, and only when it is manifest that there is an unjust discrimination do courts interfere." In re Kidd, 5 Cal. App. 159, 89 Pac. 987; In re Cutting, 17 Cal. App. 604, 121 Pac. 304. Under article 11, § 11, of the Constitution of California, any county, city, town, or township has the right to wholly prohibit the carrying on of this business. Ex parte Campbell, 74 Cal. 20, 15 Pac. 318, 5 Am. St. Rep. 418; Reed v. Collins, 5 Cal. App. 494, 498, 90 Pac. 973. The power to prohibit the business includes the power and right to regulate by the imposition of conditions and restrictions. The determination of the places in the county where such business may or may not be carried on is a legal mode of restriction. These rules or principles being established, it follows that the board of supervisors might legally prohibit the proposed business of petitioner in Daggett precinct, unless by the said ordinance the board has established a local law which prevents it from exercising that authority.

[3] The paragraph above quoted from the ordinance would prevent the granting of a license to petitioner if a majority of the votes cast upon the question in Daggett voting precinct had been against the granting of such licenses. But it does not follow that a vote in favor of granting such licenses has imposed on the board of supervisors any duty to grant the license applied for, or has interfered with the discretion lodged in it by law to regulate and restrict the business within the county and at any and all places within the county. The sole object of the provision for a vote by the people of the precinct was that the people might have an opportunity to effectively protest against and prohibit the business in those precincts where a majority of the voters consider that the maintenance of such business is injurious to them. So far as the people of the locality are concerned, the local option clause of the ordinance gives nothing more than a power of veto against the business.

[4, 5] Turning now to the provisions of the ordinance first above quoted, we find that, notwithstanding the absence of any other objection, the board of supervisors may refuse to allow the license, "if on such hearing it shall appear to the satisfaction of the board * * * that in the judgment of said board it would not be for the welfare of the people residing in said precinct or of the county to have the business mentioned in said application carried on in such precinct, * * * or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of business, or otherwise." On the record here presented, we are unable to say that the action of the board was without some sufficient reason arising out of the "location of business or otherwise." As before stated, it appears that at the hearing before the board of supervisors the applicant "was duly sworn and examined, and gave testimony in favor of the issuance of said license in accordance with the terms of said application." This does not necessarily mean that all of the facts elicited by his testimony were such facts as necessarily compelled the exercise of the board's discretion in favor of the granting of the license. The geographical location and surroundings of Daggett precinct are matters of which the board may take judicial notice. The examination of the appli-

cant may have included a cross-examination which may have developed facts unfavorable to the granting of the license. Petitioner's allegation that the action of the board in refusing his petition was purely arbitrary and entirely without cause is a statement of his conclusion or opinion, and is not to be accepted as a statement of fact, unless the statement of actual facts necessarily supports that conclusion.

Taking the license ordinance, and considering it in connection with the section of the Constitution to which we have referred, and with the principles of law specially applicable to those kinds of business which are peculiarly subject to police regulation (as is the business of retailing intoxicating liquors), we arrive at the conclusion that the said ordinance was not intended to, and does not, take away from the board of supervisors its right to refuse to grant a license for such business in any location where, after considering the facts, it is the judgment of the board that the business should not be located in that place.

[6] "The writ of mandamus is not wholly a writ of right, but lies, to a considerable extent, within the sound judicial discretion of the court where the application is made; * * * and no court should allow a writ of mandamus to compel a technical compliance with the letter of the law, where such compliance will violate the spirit of the law." State v. Commissioners of Phillips County, 26 Kan. 419, quoted with approval in Wiedwald v. Dodson, 95 Cal. 450, 454, 30 Pac. 580. Under the circumstances here shown, the writ of mandate applied for by the petitioner could not be granted except upon a technical construction in his favor of the ordinance in question, contrary to the spirit of the law, which intends that such matters shall remain within the power of regulation of the county through its authorized officers.

The petition for the writ is denied.

We concur: JAMES, J.; SHAW, J.

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25 Cal. App. 551

Ex parte SHOEMAKER. (Cr. 278.)

(District Court of Appeal, Third District, California. Sept. 30, 1914. On Petition for Rehearing, Oct. 22, 1914.)

1. Habeas Corpus (§ 92*)—Inquiry—Extradition—Sufficiency of Papers.

The sufficiency of the papers on which the executive warrant in interstate extradition issued may be inquired into and determined on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

2. Habeas Corpus (§ 92*)—Inquiry—Extradition—Fugitive from Justice.

Whether one was a fugitive from justice from the state demanding his extradition, so as to warrant issuance of executive warrant for him, may be inquired into on habeas corpus; and he will be discharged on its being shown he was not there at practically the precise time the indictment charges the crime was committed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

3. Habeas Corpus (§ 92*)—Inquiry—Extradition—Guilt or Innocence.

Inquiry, on habeas corpus, as to whether one held under executive warrant in interstate extradition was in the demanding state at the alleged time of commission of the crime, is not prohibited as involving the question of his guilt or innocence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. § 92.*]

4. Habeas Corpus (§ 103*)—Extradition—Time of Petitioner in Demanding State.

As against right to discharge on habeas corpus of one held under executive warrant in interstate extradition, the indictment alleging, without qualification, commission of the crime on a certain day, it must be shown he was in the demanding state on that day.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 90, 91; Dec. Dig. § 103.*]

5. Extradition (§ 30*)—Interstate—"Fugitive from Justice."

One may have been a principal in a crime committed in another state, and yet never there, and so not a fugitive from justice therefrom, necessary under Const. U. S. art. 4, § 2, and Rev. St. § 5278 (U. S. Comp. St. 1913, § 10,126), for interstate extradition.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*

For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

6. Habeas Corpus (§ 85*)—Extradition—Fugitive from Justice—Evidence.

One held on executive warrant in interstate extradition will be discharged on habeas corpus, the indictment charging commission of the crime on June 8th, the affidavits for the demanding state, though stating he is a fugitive from the justice thereof, and fled therefrom on or about August 28th, merely declaring he was seen there on two days, May 21st and June 28th, and the affidavits for him being that he was not in that state between May 21st and August 22d.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

On Petition for Rehearing.

7. Habeas Corpus (§ 117*)—Rehearing After Judgment.

A habeas corpus proceeding is finally and definitely ended by the judgment, whether denying or granting the writ, and thereafter is not pending; so that thereafter there can be no rehearing therein.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 119, 120; Dec. Dig. § 117.*]

Application by Rean M. Shoemaker for habeas corpus. Petitioner discharged.

Beverly L. Hodghead, of San Francisco (C. E. McLaughlin, of Sacramento, of counsel), for petitioner. J. Charles Jones, Deputy Atty. Gen., for respondent.

HART, J. The petitioner is held in custody and restrained of his liberty, at the city of Sacramento, by one Charles H. Harrington, agent of the state of Illinois, under the alleged authority of an executive warrant issued by the Governor of the state of California on a requisition from the Governor of said state of Illinois, authorizing the removal of the petitioner to the latter state to answer to an alleged indictment purporting to charge him with the crimes of conspiracy, larceny, and receiving stolen goods, alleged to have been committed in the city of Chicago, said state of Illinois, on the 8th day of June, 1912.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is claimed that the petitioner is so restrained of his liberty illegally, and his release from such restraint is asked through this proceeding on habeas corpus on the following grounds: First. That the alleged indictment accompanying the demand of the Illinois executive for his extradition is void. Second. That it is clearly made to appear that, at the time at which the crimes charged in the indictment are alleged to have been committed, the petitioner was not within the borders of the state of Illinois, and that he is not, therefore, a fugitive from justice.

Our conclusion is that the petitioner must be ordered discharged from his present restraint on the ground that the record before us clearly discloses that he was not in the state of Illinois at the time of the alleged commission of the crimes charged in the indictment. It will therefore be unnecessary to consider the point involving the challenge of the sufficiency of the indictment.

The source of the power of interstate extradition is to be found in article 4, § 2, of the Constitution of the United States, which reads:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime."

For the proper execution of said provision, Congress passed an act, providing:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting of such fugitive to the state or territory making such demand, shall be paid by such state or territory." U. S. Rev. St. § 5278, (U. S. Comp. St. 1913, § 10126.)

[1] No question is raised here of the right of the courts, in a habeas corpus proceeding, to go beyond the executive warrant in a case of this character and examine and determine the question of the sufficiency of the papers upon which the executive has acted in complying with the demand of the demanding state or territory. That the courts may make full inquiry into such proceedings for the purpose of ascertaining and determining whether the executive warrant has, without legal justification, been issued, is firmly settled by a long line of decisions. For instance, in the case of Jones v. Leonard, 50 Iowa, 110, 32 Am. Rep. 116, it is said:

> "The Governor of this state is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this state, which provides that his determination is final and conclusive in the case of the extradition of the citizen. In the absence of such a provision, we hold that the decision of the Governor only makes a prima facie case; that it is competent for the courts, in a proceeding of this character, to inquire into the correctness of his decision, and discharge the prisoner."

See, also, In re Terrell (C. C.) 51 Fed. 213; In re Corning (D. C.) 51 Fed. 205; People v. Brady, 56 N. Y. 182; Church on Habeas Corpus, pp. 821–869; Ex parte Tod, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566, 76 Am. St. Rep. 616; In re Cook (C. C.) 49 Fed. 839; Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; Hartman v. Aveline, 63 Ind. 353, 30 Am. Rep. 217; People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706; People ex rel. Jourdan v. Donohue, 84 N. Y. 438; Hyatt v. People ex rel. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; In re Waterman, Nevada Sup. Ct., 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 926.

[2] While some of the cases hold (and we think properly) that, where the evidence adduced before the Governor upon the question whether the prisoner whose extradition is sought is a fugitive from justice of the demanding state is in substantial conflict, the finding of the executive that he is such fugitive will not be set aside by the courts, nevertheless no doubt has ever been entertained that such question of fact is a subject which may be reviewed by the courts and upon which the prisoner may be discharged from custody if it be made to appear that he was not within the borders of the demanding state at practically the precise time at which the alleged crime upon which he is proposed to be extradited was committed. This proposition necessarily follows from the essential conditions upon which alone the executive of one state is authorized to comply with the request of the executive of another state or territory that a citizen or resident of the former state be surrendered to the jurisdiction of the latter, there to undergo

trial for a public offense against the laws of the demanding state. As is said by the Supreme Court of the United States, in the case of Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, in considering the question of the right of the Governor to recognize and honor a requisition for the extradition of a resident of his state and to issue his warrant thereon:

> "It must appear, therefore, to the Governor of the state to whom such a demand is presented, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified or authenticated by the Governor of the state making the demand; and, second, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus."

As to the second prerequisite, which involves a question of fact, the court deemed it unnecessary to go further than to say:

> "How far his (the executive's) decision may be reviewed judicially in proceedings on habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

It will be observed that in that case the court in effect holds that the judicial review of proof offered in rebuttal of the prima facie showing involved in the finding of the executive that the prisoner is a fugitive from the justice of the demanding state will be made, and that, if thereupon it is considered sufficient to overthrow the presumption arising from the decision of the Governor that the prisoner is such fugitive, he will be discharged on habeas corpus. And we are unable to understand how the rule could be otherwise and be just. It is, indeed, a necessary corollary of the second prerequisite as stated in the above opinion and without the existence and showing of which the Governor would be without legal authority to comply with the request of the demanding state for the removal of the alleged fugitive to the latter state. Indeed, if it is proper to review the action of the executive so far as is concerned the question of the sufficiency of the indictment or affidavits to disclose that a crime has been committed, then there is no reason why it is not competent for the courts to review the question whether the decision of the Governor that the prisoner is a fugitive from the justice of the demanding state is well founded or justified. The one prerequisite is as necessary and important as the other. The papers might clearly show that a crime had been committed—that is, they might, both in substance and form and with proper legal precision, state a public offense under the laws of the demanding state —and yet the evidence might be either clearly wanting in a showing that the prisoner was in the demanding state when the alleged crime was committed or affirmatively show beyond a reasonable doubt or even by a marked preponderance of the evidence that he was not in such state at that time. As we understand from counsel in this case, the Governor of this state had some doubt as to whether both the propositions upon which the prisoner relies here for his release, said propositions having been urged before the executive, were or were not legally sound, but conceived that, since it is not strictly within the scope of the duties of the executive head of the government to judicially review and determine purely legal questions, it were better that the legal aspects of the proceedings here be remitted to the courts for their consideration and decision—a very proper view, we think. But, speaking generally, it is to be remarked that if the courts were confined in their review of the action of the Governor in cases of this character to the consideration and determination alone of the question of the legal sufficiency in any respect of the papers—the indictment or affidavits—to state a public offense, if, in other words, the courts were to be concluded by the decision of the executive upon the question whether the prisoner was in fact a fugitive from the justice of the demanding state, it could easily be understood how a citizen or resident of one state could, without a satisfactory showing or upon virtually no showing at all that he had fled from the state requesting his removal thereto, be taken from his own state and transported to another, there to be subjected to a trial for a crime with which he had and could have had no connection whatsoever.

But it appears to be now quite generally conceded that, as the executive, before he can authorize the extradition of a resident of his state to another for trial on a criminal charge, must be shown by competent proof that the person whose extradition is sought is a fugitive from the justice of the demanding state, it is within the legal competence of the courts to review the action of the executive in that respect and to discharge the prisoner if it be found and determined that the exercise of the executive authority, so far as that fact is concerned, was predicated upon insufficient proof of said fact, or in the presence of evidence offered by the prisoner which should be held to be sufficient to destroy the force of the prima facie showing by the state upon that point.

In People ex rel. McNichols v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121, Mr. Justice Harlan, voicing the views of the court, after declaring that a warrant of extradition in itself made out a prima facie case that the prisoner was a fugitive from justice of the demanding state and that the warrant could be reviewed on habeas corpus, said:

> "One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

See Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Hyatt v. New York, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; Katyuga v. Cosgrove, 67 N. J. Law, 213, 50 Atl. 679; Dodge v. Ellis, 195 U. S. 626, 25 Sup. Ct. 791, 49 L. Ed. 350; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217; Tenn. v. Jackson (D. C.) 36 Fed. 259, 1 L. R. A. 370; Wilcox v. Nolze, 34 Ohio St. 520; Ex parte Dennison, 72 Neb. 703, 101 N. W. 1045, 117 Am. St. Rep. 817; Id., 196 U. S. 637, 25 Sup. Ct. 795, 49 L. Ed. 630; State v. Schlachter, 21 S. D. 276, 111 N. W. 566; Ex parte Knowles, 16 Ky. Law Rep. 263; Commonwealth v. Supt. etc., 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939; 19 Cyc. 88; Spear on Extradition, p. 306.

And it has been held that, although the evidence upon the question whether the prisoner was absent or present in the demanding state when the crime charged against him was committed is conflicting, if, nevertheless, the court is convinced from the whole record that the fact that he is a fugitive from justice has not been satisfactorily shown, the prisoner will be discharged. People v. McLaughlin, 145 App. Div. 513, 130 N. Y. Supp. 458, 464.

[3] There is no merit in the contention of the Attorney General in the case at bar that the question whether the petitioner was or was not in the state of Illinois when the crime for which his extradition is requested by the latter state cannot be reviewed upon habeas corpus because it involves the question of his guilt or innocence of said crime; that is, that by this proceeding he thus attempts to set up an alibi, an element which goes directly to the question of his guilt or innocence. The question presented in this proceeding is not whether the petitioner was present at the scene of the alleged crime when it was committed, but whether he was within the borders of the demanding state at the time said crime was committed. Obviously, if he was not in said state at said time, he cannot be a fugitive from justice within the meaning of the Constitution and laws of the United States authorizing the extradition of fugitives from justice (Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657), and, although the investigation of that question necessarily involves the question of alibi, in a proceeding of this character it is a question of overruling importance and is to be considered, as before suggested, not for the purpose or with the view of solving the question of the guilt or innocence of the accused, but solely to determine whether he may lawfully be removed to the demanding state, where, perchance (it may well be suggested), he might be deprived of the privilege or opportunity of establishing an alibi, which might, if proved, exonerate him from the charge, by reason of the fact that witnesses by whom he could show he was not in Illinois when the crime was committed were beyond the jurisdiction of the courts of that state.

Replying, however, to a similar contention urged in the case of People v. McLaughlin, supra, the Supreme Court of New York, upon the authority of a large array of cases therein cited, said:

> "In habeas corpus proceedings (Ryan v. Conlin [15 Misc. Rep. 303], 36 N. Y. Supp. 888) the prisoner gave proof that he was not in the demanding state at the time of the commission of the crime. The court declared that, inasmuch as this proof went to establish an alibi, it was a matter of defense at the trial, and could not be considered on habeas corpus to review the warrant of extradition. The reason given by that court for this conclusion was that it was settled that in proceedings to review a warrant of extradition the guilt or innocence of the prisoner could not be inquired into. Matter of Clark, 9 Wend. [N. Y.] 212. Therefore it is argued, as an alibi is concerned with the question of guilt or innocence, it cannot be considered on habeas corpus. It seems to us that this reasoning is clearly unsound. An 'alibi,' in its general features, consists of proof that the defendant was not at the scene of the crime at the time of its commission. Proof that the prisoner was not in the demanding state at the time of the commission of the crime is necessarily proof that he was not at the scene of the crime. But the question involved in extradition proceedings is not whether the defendant was at the scene of the crime at the time of its commission, but whether he was anywhere within the demanding state when the crime was committed. This latter question had nothing to do with guilt or innocence, but it has all to do with the question whether the prisoner has fled from the demanding state, and is therefore, a fugitive from justice.
>
> "In the Matter of Clark, ut supra, the presence of the prisoner in the demanding state when the crime was committed was not disputed, and hence the question of alibi was not involved. Before a warrant of extradition can be sustained, it must appear as a jurisdictional fact that the prisoner is a fugitive from justice; that is, it must be shown that he was actually present in the demanding state when the crime was committed. Mere constructive presence is not enough."

The proposition as thus stated is clearly expounded and approved by all the cases. Indeed, if the proposition were not sound, the question whether a person is in fact a fugitive from justice, within the contemplation of the Constitution and laws of the United States authorizing interstate extradition, could never be inquired into by the courts. But, as is well suggested by counsel for the petitioner, to sustain the point as urged by the Attorney General would necessitate the declaration and the conclusion that the many cases heretofore passing upon the question were erroneous in their reasoning and conclusion.

Thus we have stated some of the principles governing the exercise of the power of interstate extradition and by the light of which the facts must and will be considered.

[4] The indictment, a copy of which is annexed to the petition for this writ, alleges that the petitioner committed the crimes therein charged against him on the 8th day of June, 1912, in the county of Cook, in the state of Illinois. In other words, that accusatory pleading, without qualification and unequivocally, fixes the 8th day of June, 1912, as the date of the commission of the crimes of which the petitioner is thus accused, and by neither specific nor general language pretends to fix or allege any other date. It follows that it must clearly appear by competent proof, either direct or circumstantial, the latter, equally with the former, sufficient in evidentiary force to produce conviction of the fact, that the petitioner was in the state of Illinois on the 8th day of June, 1912. If it be not thus satisfactorily shown that he was in said state on said day, then, obviously, one of the two essential prerequisites upon which alone the executive is empowered to issue his warrant of extradition and so authorize the removal of the petitioner to the state of Illinois is wanting or not shown to exist, and the prisoner would therefore be entitled to be released from a restraint which, if not intercepted, would ultimately lead to the unlawful removal of his person to another state.

[5] First, it is to be remarked that, manifestly, the indictment itself or the fact that thus the petitioner is charged with having committed certain crimes in the demanding state constitutes, if any at all, very remote evidence of flight or of the fact that the accused is a fugitive from justice. A person may be a principal in the commission of a crime and not be present at the scene thereof at the time of its commission. As a concrete example, one might plan the crime of murder in California, to be committed in the state of New York by his confederates, he remaining and being in the former state at the time of its commission. While he would be a principal in the commission of said crime and could be indicted in New York for it, and the courts of that state have the power or legal right to try and punish him therefor, if ever he came within their jurisdiction, still he would not be a fugitive from justice under the federal constitutional provision and laws establishing the authority for interstate extradition.

[6] Now, as to the proofs in this case: In support of the application for the warrant of extradition, the respondent presented to the executive a number of affidavits which declare that at some other time than the 8th day of June, 1912, the petitioner was in the state of Illinois. The first of these affidavits was made by the state's attorney of Cook county, Ill., and all that he therein declares is that the petitioner fled from said state on or about the 28th day of August, 1912. Another is by one Konekamp, who declares that the petitioner, with certain other persons, conspired with others to steal certain property from affiant, which said property was stolen, in pursuance of said conspiracy, "on or about" the 8th day of June, 1912. One Roderick deposes that he is personally well acquainted with the petitioner, and that "he knows of his own personal knowledge that the said Rean M. Shoemaker was personally present in the city of Chicago, county of Cook, state of Illinois, in the months of May and June, 1912." The dates in those months when he declares he saw Shoemaker were the 21st day of May (18 days prior to the alleged date of the larceny) and the 28th day of June, 1912 (20 days after said date).

The affidavits thus referred to constituted all the evidence presented by the respondent to sustain his application for the warrant of extradition. It will be noted that no pretense is made that any person saw the petitioner or had personal knowledge of his presence in the state of Illinois on the 8th day of June, 1912. So far as is concerned the showing made by the demanding state, the whereabouts of Shoemaker on the said 8th day of June were unknown.

It must be admitted that the presence of the petitioner in the state of Illinois 18 days prior and his presence therein approximately 3 weeks subsequent to the day on which the larceny with which he is charged was committed, even assuming it to be true that he was there on those dates, constituted exceedingly slight, and at best unsatisfactory, circumstances by which the conclusion may be supported that he was in Illinois on the 8th day of June. Those circumstances cannot be said to go any further than to tend to show that he "might" have been in Illinois on the 8th of June. But while this is true, they are at the same time perfectly consistent with the hypothesis that he was not present in said state on said day or the few days immediately preceding and succeeding that date.

Thus it must be seen that the probative facts upon which the extradition of the petitioner is requested fall very far short of satisfactorily establishing the all-important ultimate fact that he is a fugitive from the justice of the state of Illinois. But while it may, for the sake of the argument, be conceded that the testimony thus presented, considered in connection with the conclusion stated in the affidavit of the state's attorney that the petitioner "is a fugitive from the justice" of the state of Illinois, is sufficient to make out a prima facie case on that score, it is quite obvious that but a slight adversary showing by the petitioner would suffice utterly to destroy whatever probative value it might possess, standing alone or unchallenged. But the petitioner has made more than a slight showing in rebuttal. The testimony presented by him is direct and positive.

The affidavit of the petitioner's wife, Alice L. Shoemaker, declares that she and her husband resided in California from the month of September, 1902, to December 8, 1911, on which latter date they removed temporarily to the city of New York, where they resided until the 22d day of August, 1912.

> "On the latter date, in company with my husband and family, we left New York for San Francisco, where we arrived on the 28th day of August, 1912, and have been residing in California since the latter date. My husband, the said R. M. Shoemaker, was at home in New York on the 8th day of June, 1912, and was not in the state of Illinois between the 15th day of May, 1912, and the 23d day of August of said year; that on the said 23d day of August we passed through Chicago on the journey from New York to California, and transferred from the Pennsylvania Railway cars to the Chicago, Burlington & Quincy Railroad at the Union Station, in Chicago."

Fred O. Dille deposes that, from about the 1st day of April to the 30th day of June of the year 1912, he resided with his family in the city of Buffalo, state of New York, and was then in the employ of the Western Union Telegraph Company; that he was in Buffalo on the 8th day of June, 1912; that as such employé he was under the supervision of the petitioner, whose office was then in the city of New York.

> "I recall distinctly and so aver," continues Dille's affidavit, "that on the 8th day of June, 1912, about the hour of 11 o'clock a. m., while in the city of Buffalo, state of New York, I called by long distance telephone at Statler Hotel said R. M. Shoemaker at his office in the city of New York, state of New York, in the usual way, by informing the long distance operator of the telephone line, then operating between said cities, that I desired to speak to said R. M. Shoemaker at his office, at No. 9 John street, city of New York, giving the number of his telephone, and at the said time said R. M. Shoemaker answered said telephone from the said city of New York, and I conversed with him over the telephone at that time and on that date and hour. I am familiar with his voice, and for that reason and from the subject-matter of the conversation I know that it was said Shoemaker who answered the 'phone and was talking to me on said occasion."

The petitioner, in his affidavit, after denying any complicity in or connection with or knowledge of the commission of the crimes charged against him in the indictment, states that he continuously resided in the state of California from the month of September, 1902, to the 8th day of December, 1911, when, with his family, he removed to the city of New York, to remain in said city temporarily; that he was in the city of Chicago, county of Cook, state of Illinois, about the middle of the month of May, 1912, remaining there for a period of two or three days, during which time he lived at the Great Northern Hotel, in said city; that he left Chicago not later than the 21st day of May, 1912, and returned to the city of New York, where he remained until the 22d day of August, 1912, on which day he left New York city with his family and returned by continuous trip to the state of California, where he arrived on the 28th day of August, 1912, and where he has ever since resided; that on said journey from New York to San Francisco he passed through the city of Chicago on the 23d day of August, 1912, and left that city on the same day for Portland, Or., thence immediately to the city of San Francisco; that he was not in the state of Illinois on the 8th day of June, 1912, or at any time in the months of June or July of said year, or at any other time or times during said year, except in the months of May and August, as above stated.

From the foregoing, which constitutes a statement in substance of the proofs submitted by the petitioner, the conclusion is inevitable that the petitioner was not in the state of Illinois on the 8th day of June, 1912, or at any time within two weeks of that date. In this declaration we assume that the testimony presented by the petitioner is to be given full credence, and why not, under the circumstances? As shown, the respondent nowhere declares or pretends to say that the petitioner was in said state on the day when the crimes are alleged to have been committed, and it follows therefore that there is no direct proof upon that question save that which comes from the petitioner. If the state had produced affidavits declaring in positive and unequivocal language that the petitioner was in Illinois on the said 8th day of June, a situation precluding a judicial review of the decision of the executive might then be presented, notwithstanding that the proofs presented before the Governor were, as is true here, by affidavits. But the situation confronting us is such that either we must give full weight to the proofs adduced by the petitioner or hold that from such proofs, there being, practically, no showing by the respondent justifying a contrary view, there at least arises so grave a doubt of the presence of the petitioner within the boundaries of the state of Illinois on the date of the alleged commission of the crimes charged in the indictment as to generate and support the conviction that, to lend judicial sanction to his removal under such circumstances, would involve an unlawful and wrongful menace to and invasion of his inalienable constitutional rights.

It is true, as a general proposition, that upon the trial of one charged with crime it is not required that the people shall prove, in order to sustain a conviction, that such crime was committed at the precise date specified in the indictment. The general rule at the trial is that, although the crime may be alleged to have been committed on a specific date, proof that the crime was committed on some date within the period beyond which the prosecution of one charged with the crime would be barred by the statute of limitations, would be sufficient, and a conviction upon such proof, so far as that fact was concerned, properly upheld. But there is no analogy between that proposition and the one here, where, to constitute him a fugitive from justice, it is indispensably necessary to show that the person whose extradition is sought was in the demanding state at the exact time of the commission of the offense with which he is here charged. As is said in the case of Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657:

> "That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof, or offer of proof, to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the state at the times named in the indictments; and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed. * * * It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect, interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not therefore in fact fled therefrom."

From the foregoing considerations, we are persuaded that it is our duty to discharge the prisoner from the custody of the agent of the state of Illinois and from the consequent restraint of his person, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

CHIPMAN, P. J. [7] In an opinion filed September 30, 1914, in the above-entitled cause, by Mr. Justice HART, speaking for the court, the facts and the law were very fully gone into, and the conclusion reached was that the prisoner should be discharged, and it was so ordered. 19 Cal. App. Dec. 470. We are now asked to grant a rehearing upon the ground that:

> "This case, if permitted to stand under the present decision, will be of far-reaching importance as a precedent throughout the states of the Union, and it is highly important that the greatest measure of opportunity of full discussion of every possible feature of the law should be granted."

Some authorities not called to our attention at the argument of the case are cited in the petition, but we cannot see that they cast additional light upon the questions involved. However this may be, we should feel inclined, out of abundant caution, to grant the petition were there not an insuperable objection in view of the nature of the case and the decisions of the Supreme Court upon the question of a right to a rehearing.

In Ex parte Robinson, 71 Cal. 611, 12 Pac. 795, Robinson petitioned the Supreme Court for a writ of habeas corpus and, after due hearing, he was remanded by order of the court. He filed a petition for rehearing and, in refusing to consider his petition, the court made the following order:

> "The Court. Petition for rehearing denied. There is no practice here allowing petitions for rehearing in cases of habeas corpus."

Ex parte Williams was a habeas corpus case decided by this court in July, 1906, and the petitioner was discharged. 7 Cal. Unrep. Cas. 301, 87 Pac. 565. He applied to the Supreme Court for a hearing in that court, under the provisions of article 6, § 4, of the Constitution. The petition was denied.

> "Per Curiam. The application for an order transferring the above-entitled cause from the District Court of Appeal to the Supreme Court for hearing and determination after judgment in the said district court of appeal is denied; a majority of the justices of this court being of the opinion that the constitutional provision with reference to the transfer of cases from the District Court of Appeal to the Supreme Court has no application in matters of habeas corpus."

In Ex parte Zany, 164 Cal. 724, 130 Pac. 710, a petition was filed in this court for a writ of habeas corpus and denied. 20 Cal. App. 360, 129 Pac. 295. Zany petitioned the Supreme Court to have the cause there heard as was done in the Williams Case, supra. The court, speaking through Mr. Justice Angellotti, Justice Shaw alone dissenting, again held that "it had no power to transfer in habeas corpus proceedings." The question was fully examined, the provision of the Constitution carefully analyzed, and the reasons very clearly given for denying the right. It seems to us that the full force of the reasoning is equally applicable where a rehearing is sought in this court, after it has either remanded or discharged the petitioner.

The contention of the Attorney General is that since the decision of the Supreme Court in the Robinson Case, supra, the law has been changed so that the petitioner may be admitted to bail pending the hearing, and hence, the question of his present liberty being no longer involved, he is deprived of no right if after the order of his discharge the court should retain the power and exercise it to the extent of ordering a rehearing on the application of the people.

Both the Williams Case and the Zany Case were decided since the law was so changed as to allow a petitioner to give bail for his appearance pending the hearing on his petition for the writ. The question is whether, under the provisions of the Constitution creating the District Court of Appeal, its judgment in habeas corpus cases is to be regarded the same as its judgments in mandamus, certiorari, and prohibition, which latter, as has been held, do not become final until "the expiration of 30 days after the same shall have been pronounced." Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167.

In Dawson v. Superior Court, 158 Cal. 73, 110 Pac. 479, it was held that in prohibition cases the judgment of a District Court of Appeal may be transferred to the Supreme Court for reconsideration and decision.

The Constitution provides as follows:

> "The said court (District Court of Appeal) shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus. * * * The supreme court shall have power to order any cause pending * * * before a District Court of Appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within thirty days after such judgment shall have become final therein. The judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced." Const. art. 6, § 4.

The Attorney General contends that a judgment of the District Court of Appeal in a habeas corpus case, so far as concerns its finality, does not differ from a judgment in mandamus or prohibition. If it is final in the sense that judgments in prohibition and mandamus cases are final, it must follow that, as in these latter cases, it may be reconsidered in this court before the expiration of 30 days from its rendition and by the Supreme Court before the expiration of 60 days, as are the other cases mentioned. But the Supreme Court, in the Zany Case, supra, distinctly held that the provision of the Constitution declaring that "the judgments of the District Courts of Appeal shall become final therein upon the expiration of thirty days after the same shall have been pronounced" is not applicable to habeas corpus proceedings. Attention is invited to the full discussion of the question and the reasons given for its decision by the Supreme Court, which we do not deem it necessary to here repeat.

It will be observed that the Supreme Court says that:

> "A habeas corpus proceeding cannot fairly be said to be so 'pending' at any time after judgment by such court. Such a proceeding is finally and definitely ended by the judgment, and, if the petitioner be ordered discharged thereby, he is at once restored to liberty."

If, then, our judgment, in this class of cases, remanding the petitioner, is of such nature that he may at once have relief by an original petition to the Supreme Court for a writ without waiting the expiration of 60 days, we can see no reason why our judgment discharging the petitioner should in effect be suspended for 30 days with the right on the part of the respondent during that period to demand a rehearing in this court. The provision of the Constitution under which this right is now claimed must be held to apply equally to a judgment of discharge as well as to a judgment remanding the petitioner. The very object of the Constitution was to give opportunity to have the judgments of the District Courts of Appeal reconsidered by the Supreme Court. But as habeas corpus cases, as has been decided by the Supreme Court, are not of the class which may be thus reconsidered, it would seem to follow that a proceeding of this nature, as the Supreme Court has also decided, "is finally and definitely ended by the judgment," whether it be a judgment denying or granting the writ.

We attach no special significance to the fact that the petitioner may now be allowed to give bail for his appearance pending the hearing of his application. The object of the writ is to test the legality of his restraint and until he is discharged he cannot be said to be at liberty, and when discharged we do not think there is any provision of law, and certainly no rule of practice, whereby he may again be brought before the court and compelled to show cause why the order discharging him should not be vacated and his petition reheard. The object of the writ is not merely to relieve the petitioner from present physical restraint, but from all restraint which is being imposed upon him by his illegal detention. Church on Habeas Corpus, § 87.

We have exercised the power to grant rehearings, in ordinary cases, upon petition filed within the 30 days mentioned in the Constitution, and would probably vacate a judgment upon our own motion within that time if we thought an error had been committed. But we have no such power under the Constitution after our judgments have become final; the only source of relief then open to a party is by petition to the Supreme Court under the rules of that court. Paragraph 3, rule 30 (119 Pac. xiv). As we have seen, neither the provisions of the Constitution nor the rules of the Supreme Court apply to habeas corpus cases. It hence follows that we cannot grant a rehearing in such cases.

The petition is denied.

We concur: HART, J.; BURNETT, J.

25 Cal. App. 634

COLUSA & H. R. CO. v. GLENN et al.
(Civ. 1210.)

(District Court of Appeal, Third District, California. Oct. 27, 1914.)

1. APPEAL AND ERROR (§ 979*)—NEW TRIAL (§ 71*)—RIGHT TO—DISCRETION OF LOWER COURT.

When the evidence is conflicting, the granting or refusing of a new trial rests peculiarly in the discretion of the lower court, and the appellate court will interfere only in a plain case of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873, 3877; Dec. Dig. § 979;* New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. EMINENT DOMAIN (§ 224*)—CONDEMNATION PROCEEDINGS—NEW TRIALS.

The rule that the granting of a new trial rests peculiarly in the discretion of the lower court applies in condemnation suits.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574–579; Dec Dig. § 224.*]

3. EMINENT DOMAIN (§ 96*)—CONDEMNATION SUITS—EVIDENCE—DAMAGES.

Where part of a tract of land is taken for a railroad right of way, the question of damages to the remainder depends upon its depreciation in value, so evidence that the right of way would probably cast flood waters on the land is admissible.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 245–249; Dec. Dig. § 96.*]

4. EMINENT DOMAIN (§ 224*)—PROCEEDINGS—ASSESSMENT OF DAMAGES.

In a proceeding for the condemnation of a right of way, where there was an award of more than $40,000 for consequential damages to the land not taken, on the theory that the railroad embankment would cast flood waters thereon, the granting of a new trial on the ground of excessiveness of damages *held* not error.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 574–579; Dec. Dig. § 224.*]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Condemnation by the Colusa & Hamilton Railroad Company against Charles H. Glenn and others. From an order granting plaintiff a new trial after judgment of condemnation and assessment of damages, defendants appeal. Affirmed.

See, also, 144 Pac. 994.

Ben Geis, of Willows, for appellants. Frank Freeman, of Willows, for respondent.

BURNETT, J. The action was to condemn a right of way 100 feet wide and comprising altogether 12.13 acres of land. The jury found that the value of the said strip was the sum of $250 per acre at the time of the issuance of the summons, or a total of $3,032.50; that the damages to the larger tract of which said strip formed a part by reason of its severance and the construction of the railroad was the sum of $41,400; and that the cost of the necessary fences would be the sum of $1,900, making a total award of $46,332.50. Thereafter findings of fact, conclusions of law, and a preliminary order for condemnation were duly signed and filed by the trial court. In due time plaintiff gave notice of its intention to move for a new trial on all the statutory grounds, and the court made the following order:

> "Plaintiff having heretofore moved for a new trial in this cause, and the same having been argued, submitted, and taken under advisement by the court, and the court having considered the matter and being fully advised in the premises, hereby grants said motion for a new trial, and it is so ordered on the ground that the amount awarded defendant by the jury as damages is excessive."

From this order the appeal is taken.

[1, 2] It would be an utter waste of time and effort to consider the appeal at length as the case comes clearly within the well-established principle that when evidence is conflicting the granting or refusing of a new trial rests peculiarly in the discretion of the court below, and that the appellate court will interfere only in case of a plain abuse of such discretion, and, furthermore, that the party alleging error must show the abuse of discretion. Hall v. Bark "Emily Banning," 33 Cal. 525. The same rule applies to condemnation proceedings as to other civil actions. San Diego Land Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

[3, 4] The evidence here was essentially, emphatically, and irreconcilably conflicting, as shown by the testimony set forth in respondent's brief, with the repetition of which we deem it unnecessary to burden the record. There is nothing to indicate that in the order complained of the court abused its discretion. On the contrary, we must assume that the court acted in good faith upon the conviction that the verdict was unjust, and it must be said that an inspection of the record discloses legal justification for that conviction.

One of the important controverted questions of the trial, to which brief attention will be given, related to probable damages from flood waters that might be held on the severed tract by reason of the construction of plaintiff's proposed railroad. The consideration was suggested by this interrogatory:

> "Would the construction of the railroad as proposed and testified to, cause flood waters of the Sacramento river, when they reach the proposed constructed railroad, to hold the waters back upon the lands of Charles Glenn that would not be held if the railroad wasn't there, or wasn't built in accordance with the proposed plan as testified to?"

This was followed by a question whether thereby damage would be caused to the land of said Glenn not sought to be taken. The court at first sustained an objection to each of these questions, but afterwards changed its ruling and held that such evidence is admissible. The court stated its reasons for so holding, citing many decisions in support of its opinion.

We may refer to only one of these cases in which the rule is undoubtedly correctly stated. In Blunck v. Chicago & N. W. Ry. Co., 142 Iowa, 146, 120 N. W. 737, the Supreme Court of Iowa said:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "The rule of damage is the difference between the value of the land immediately before and after the taking of the right of way. * * * The real question in such cases being how much has the market value of the property been diminished by taking the right of way therefrom, it is manifest that in determining and fixing such damages all matters and conditions which may reasonably be expected to follow the location and operation of the road and affect the value of the land should be considered."

Many illustrations of the rule are given in that and other opinions, but we need not reproduce them. If there is a reasonable probability that the construction of plaintiff's railroad as contemplated will augment the damage to the land caused by flood waters, of course, this is a circumstance to be considered by the jury in arriving at a proper award. Whether there is such reasonable probability is a matter of opinion based upon certain physical facts which are detailed by some of the witnesses.

From plaintiff's showing the inference would follow that no probable damage would ensue from this source and that the market value of the land would not be affected by this circumstance. For instance, H. M. Mitchell testified:

> "When the flood waters reach the railroad embankment it would not check its flow. It would deflect the water to the south and change its direction, but it would not hold the waters back at all. The channel, as it now is on the Glenn place, would not be changed. If there was twice as much water held back on the Glenn place east of the railroad right of way, by reason of the construction of the railroad, the channel could not be narrowed, and it would not take any longer for the water to pass off the Glenn place than it does now, for under that assumption it would have four times the velocity and pass off in the same length of time as now. The trestles that we have located on this road will take care of all the water that comes on the Glenn place, no matter where it comes from."

There was expert evidence, however, on behalf of defendant to the effect that the railroad as intended to be constructed would hold back the water on something like 480 acres of land. On this assumption the opinion was expressed that the market value would be greatly depreciated. We are not prepared to say that there was no basis for such opinion.

The matter is, of course, somewhat speculative, depending upon various contingencies; but if thereby the market value of the land is diminished defendant has the right to make proof of it, and there is no available method by which to show this fact except through the opinion of competent witnesses. The inquiry should, of course, be very carefully conducted, and none but qualified witnesses should be allowed to express an opinion for the assistance of the jury. This character of evidence is generally unsatisfactory and often misleading, but as to this point no different proof seems possible.

We think a new trial may be safely intrusted to the discretion of the learned judge of the lower court without any further suggestions.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 807

COLUSA & H. R. CO. v. GLENN et al.

(Civ. No. 1211.)

(District Court of Appeal, Third District, California. Oct. 27, 1914.)

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Condemnation proceedings by the Colusa & Hamilton Railroad Company against Charles H. Glenn and others. From the judgment, plaintiff appeals. Judgment vacated.

Ben Geis, of Willows, for appellant. Frank Freeman, of Willows, for respondents.

PER CURIAM. This is an appeal from the judgment taken by plaintiff. As we have this day affirmed the order granting the motion for a new trial (No. 1210, 144 Pac. 993), and the effect of that order was to vacate the judgment, it is unnecessary to make any formal disposition of this appeal.

MEMORANDUM DECISIONS

25 Cal. App. 629

PEOPLE v. MANDAL. (Cr. 264.) (District Court of Appeal, Third District, California. Oct. 27, 1914.) Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge. Leo Mandal was convicted of pimping, and he appeals. Affirmed. Martin I. Welsh, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. On this appeal we have not been favored with any argument, oral or written. Nevertheless we have examined the record, and we find that defendant was properly charged with the offense designated in the statute as "pimping," that sufficient evidence of his guilt was received, and that no prejudicial error was committed during the trial. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 628

PEOPLE v. TAGGART. (Cr. 263.) (District Court of Appeal, Third District, California. Oct. 27, 1914.) Appeal from Superior Court, Del Norte County; John L. Childs, Judge. Orville Taggart was convicted of rape, and he appeals. Affirmed. E. M. Frost, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted by a jury of the crime of rape upon one May Bartol, at the time under the age of consent, and was sentenced to imprisonment for the term of five years. It appears from a fragmentary record sent up to this court that the verdict was rendered on November 12, 1913, and upon the motion of defendant's attorney sentence was postponed from time to time until December 8, 1913. The record of that day reads: "Defendant and attorney in court. Defendant informs court he has no further use for an attorney. E. M. Frost, attorney, makes address to court and retires from case." Passing of sentence was postponed from time to time thereafter until February 24, 1914. It appears that on that day defendant withdrew his motion for a new trial and his plea of not guilty and entered a plea of guilty. Thereupon the court passed sentence upon him. We find in the record what purports to be a notice of appeal from the judgment of February 24, 1914, signed, "E. M. Frost, Attorney for Defendant, and Henry L. Ford, of Counsel, for Defendant," to which is attached an affidavit of service upon the district attorney by mail, and marked, "Filed March 6, 1914. W. L. Nichols, Clerk." No transcript of the phonographic report of the trial has been sent up. There is nothing before the court for review, if it be admitted that an appeal was properly taken, except the minute entries of the trial kept by the clerk and the judgment of conviction. No error appearing, the judgment is affirmed.

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In re PIERCY'S ESTATE.
PIERCY v. PIERCY.
(S. F. 6819.)

(Supreme Court of California. Dec. 11, 1914.)

1. Judgment (§§ 670, 739*)—Res Judicata—Identity of Issues and Parties.

It is no bar to assertion against an administrator, on his accounting of claim for use and occupation of land of the estate, that, pending the administration, the heir, asserting title as such, successfully sued to set aside her deed of the land to him; the right of possession until distribution being, under Code Civ. Proc. § 1581, in the administrator so that there could not have been recovery in the action for use and occupation, and, in addition, the action having been against him individually.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1181, 1185, 1267; Dec. Dig. §§ 670, 739.*]

2. Appeal and Error (§ 484*)—Stay Bond—Effect on Scope of Judgment.

The condition of a stay bond to pay the value of the use and occupation pending appeal from a judgment setting aside a deed does not extend the scope, as an adjudication, of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2286; Dec. Dig. § 484.*]

3. Executors and Administrators (§ 499*)—Commissions—Successive Administrators.

An administrator who, pending administration, is removed and succeeded by another is not entitled to the statutory commissions, but, at most, to such part thereof as may be apportioned to him on a consideration of the rights of both.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2130; Dec. Dig. § 499.*]

4. EXECUTORS AND ADMINISTRATORS (§ 501*)—COMMISSIONS—APPLICATION FOR ALLOWANCE—TIME.

Code Civ. Proc. § 1616, as amended in 1911, providing for an application, after a year from granting of letters of administration, for an allowance on commissions, is applicable to successive administrations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. § 501.*]

5. EXECUTORS AND ADMINISTRATORS (§ 501*)—CLAIM FOR COMMISSIONS—DISALLOWANCE.

An administrator, who had been succeeded by another, having merely claimed, by a charge in his account, what he was not entitled to, the entire statutory commission, and not asked for an allowance on the commission ultimately payable for the administration as a whole, there was no error in merely refusing to allow the charge.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2072, 2140, 2142–2148; Dec. Dig. § 501.*]

6. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Finding on accounting by administrator of the rental value of premises chargeable to him for use and occupation, being on conflicting evidence, with testimony supporting the conclusion, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

7. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ADMISSION AND REJECTION OF EVIDENCE.

Sustaining of objection to a question may not be complained of; the substance of the testimony sought thereby being brought out by later questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4204, 4206; Dec. Dig. § 1058.*]

8. EVIDENCE (§ 113*)—RENTAL VALUE.

One testifying in his own behalf as to rental value may not testify to what he had "undertaken to do with reference to renting this out."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259–296; Dec. Dig. § 113.*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of David J. Piercy, deceased. From an order settling his account as administrator, Edward M. Piercy appeals, Andrew J. Piercy being the respondent. Affirmed.

See, also, 145 Pac. 91.

Rogers & Bloomingdale, of San Jose, for appellant. John E. Alexander, of San Francisco, and Beasly & Fry and Fry & Jenkins, all of San Jose, for respondent.

SLOSS, J. This is an appeal by Edward M. Piercy from an order settling his account as administrator of the estate of David J. Piercy, deceased.

David J. Piercy died intestate in February, 1901, leaving as his sole heir his mother, Mary Piercy. Edward M. Piercy was appointed administrator of his estate on April 10, 1901. In March, 1901, Mary Piercy executed a deed conveying to Edward the real estate which had descended to her as heir of David. In September, 1903, Mary commenced an action against Edward to set aside this deed on the ground of fraud and undue influence. Judgment was rendered against her, but thereafter, on motion of Andrew J. Piercy, as administrator of her estate (she having died, and said Andrew having been appointed as such administrator and substituted as plaintiff in the action), a new trial was granted. See Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507. On a retrial the plaintiff secured judgment decreeing that the title to the premises in dispute was vested in him as administrator of the estate of Mary. Edward appealed, giving a stay bond in the sum of $10,000 to secure payment of the value of the use and occupation of the premises pending the appeal. The judgment was affirmed; the judgment of affirmance becoming final in June, 1912. Piercy v. Piercy, 18 Cal. App. 751, 124 Pac. 561. Thereupon steps were taken to compel Edward to file an account and to have him removed as administrator. Before these matters had been disposed of, in October, 1912, Edward agreed to turn over the possession of the real estate in controversy, and possession was delivered. A first account theretofore filed had been disallowed. A second was filed on December 12, 1912. This, too, was disallowed, and the letters of administration of Edward were, on January 16, 1913, revoked. Andrew was appointed administrator of the estate of David on January 31, 1913.

On February 15, 1913, Edward filed a third account, which forms the subject of the present controversy. Considerable testimony was introduced. The court announced its conclusion that Edward M. Piercy had, during his possession of the real estate belonging to the estate, used it and conducted it as his own, in conjunction with adjoining property belonging to him; that he had kept no accounts of his use of the estate's property; that he had mingled the proceeds of the estate with his own funds and had used them for his own purposes and benefit; and that it was impossible to ever find out the true state of the affairs of the estate, and what had been received and disbursed in connection therewith. Accordingly, the court announced Edward should be charged with the reasonable rental value of the land of the estate for his use and occupation thereof. That the evidence fully sustains the foregoing statement of the facts shown cannot be disputed, and the appellant does not question the propriety, under this state of facts, of charging him with the rental value of the land, except that he makes the claim—to be considered later—that the judgment in the action instituted against him by Mary Piercy bars such charge. At this stage the court set a day for hearing evidence of rental value. Such evidence was introduced, and the court made an order fixing the rental value of the real property of the estate during the administration of Edward at $1,740 per annum; 300 acres at $3.30 each, and 750 acres at $1 each. Thereafter the order now appealed from was made. By it the court charged Edward with $1,740 per annum from April 10, 1901, to October 8, 1912. It refused the request of the respondent that the appellant be charged with compound interest on these sums, and refused to allow Edward any counsel fees or commissions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] The first point urged is that the respondent's claim for the value of the use and occupation of the premises might have been litigated in the action brought by Mary Piercy against the appellant, and that the judgment in that action is therefore a bar to a renewal of the same claim. A sufficient answer to this contention is that the value of the use and occupation could not have been recovered from the appellant in the former action. He was there sued as an individual, claiming title to property which, it was alleged, belonged to Mary Piercy. The substituted plaintiff in that case, as administrator of the estate of Mary Piercy, recovered judgment declaring that she (or her estate) was the owner of the property. But the title asserted by her was that of an heir of the estate of David Piercy. That estate had not been administered. During its administration the heir, although succeeding to the legal title, was not entitled to the possession of the property. Until distribution, the right of possession was in the administrator. Code Civ. Proc. § 1581; Meeks v. Hahn, 20 Cal. 620; Washington v. Black, 83 Cal. 290, 23 Pac. 300. So that, whatever may have been the effect of the former judgment as an adjudication in favor of Mary, and against Edward, that the title was in the former, there could have been no recovery of the value of the use and occupation, for the simple reason that, during the entire pendency of the action, the plaintiff therein was not entitled to the possession of the premises. Furthermore, that action was against Edward M. Piercy as an individual. The judgment could not determine his liability to the estate as administrator, and this is the liability upon which the order now before us is based. The fact that he gave a stay bond, conditioned to pay the value of the use and occupation pending the appeal, did not have the effect of extending the scope, as an adjudication, of the judgment appealed from.

[3, 4] The appellant complains of the refusal of the court to allow him administrator's commissions and counsel fees. The appellant had been succeeded as administrator by Andrew J. Piercy and the administration of the estate remained uncompleted. The former administrator was not, therefore, entitled to the statutory commissions, but, at most, to such part thereof as the court might apportion to him upon a consideration of the respective rights of the successive administrators. Prior to the amendment in 1911 of section 1616 of the Code of Civil Procedure, no such apportionment could be made until the estate had been completely administered and was ready for distribution. Estate of Barton, 55 Cal. 87; In re Levinson, 108 Cal. 456, 41 Pac. 483, 42 Pac. 479. The amended section provides, however, for an application, after the expiration of one year from the grant of letters, for an allowance upon commissions. This provision is applicable to successive administrators. Estate of Jones, 166 Cal. 147, 135 Pac. 293.

[5] It does not alter the rule that the statutory commissions are to be paid but once, and are to be apportioned among all the administrators. The appellant did not invoke the power of the court, under the amended section, to make an allowance on account of the commission which would ultimately be payable for the administration as a whole. He simply charged the estate, in his account, with the entire statutory commission. This charge the court refused to allow, and there can be no doubt that it was right in thus refusing. The appellant was clearly not entitled to what he asked, and, if he desired to have the court make a partial allowance on account, he should, in some way, have requested that the court exercise the discretion vested in it by the amended section 1616. This, so far as the record shows, he did not do, and it must accordingly be held that the court did not err in denying the only application made to it. This conclusion is no bar to the right of the appellant to proceed hereafter for a partial allowance under section 1616. The question, much discussed by counsel, whether the misconduct of the appellant as administrator would justify the court in denying him any allowance of commissions need not be here decided. It will remain open for consideration upon any future application that may be made, whether on final distribution or prior thereto. The demand for an allowance for attorney's fees stands upon similar grounds.

[6] Appellant's remaining points have to do with the determination of the rental value of the premises. It is claimed that the evidence does not sustain the court's finding in this regard. But an examination of the record discloses the familiar situation of a conflict in the evidence, and, since there is testimony supporting the conclusion reached, that conclusion cannot be assailed here.

[7, 8] It is further urged that the court below erred in sustaining objections to two questions asked by appellant of witnesses testifying on the matter of value. In one of these instances—that of the witness Dassel—the substance of the testimony sought to be

elicited was brought out by later questions. The other question was put to the appellant himself. He was testifying in his own behalf, and had given his opinion of the rental value of the land. He was then asked what he had "undertaken to do with reference to renting this out." The court properly declined to permit an answer to this question. See Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

168 Cal. 755

In re PIERCY'S ESTATE.
PIERCY v. PIERCY.
(S. F. 6820.)

(Supreme Court of California. Dec. 11, 1914. Rehearing Denied Jan. 9, 1915.)

1. EXECUTORS AND ADMINISTRATORS (§ 478*)—ACCOUNTING—CHARGES—COMPOUND INTEREST.

Where settlement of the estate is long delayed, merely because of the administrator's fraudulent claim to the land and consequent litigation, and he used it for his own benefit, he should be charged compound interest on the rental value.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2063; Dec. Dig. § 478.*]

2. EXECUTORS AND ADMINISTRATORS (§ 478*)—ACCOUNTING—CHARGES—INTEREST.

The rule that interest, as such, cannot be allowed where the amount of damages is unliquidated and incapable of being made certain applies only in an action for damages, and not in fixing, on accounting, the liability of a delinquent administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2063; Dec. Dig. § 478.*]

Department 1. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of David J. Piercy, deceased. From an order settling the account of Edward M. Piercy, as administrator, Andrew J. Piercy, administrator, appeals. Modified and affirmed.

John E. Alexander, of San Francisco, and Beasly & Fry and Fry & Jenkins, all of San Jose, for appellant. Rogers & Bloomingdale, of San Jose, for respondent.

SLOSS, J. This is an appeal by Andrew J. Piercy from the same order which was under review in Estate of Piercy (S. F. No. 6819), 145 Pac. 88, just decided. In the former case the administrator appealed from the order settling his account. Here the opposing party appeals from that part of the order refusing to charge the administrator with compound interest on the rental value of the land of the estate. There is a separate transcript covering the present appeal, but many of the important facts are stated in the opinion filed in S. F. No. 6819, 145 Pac. 88. The record shows further that, with the exception of personal property appraised at $142.50, the entire estate of David J. Piercy consisted of the real estate which was the subject of the litigation between Mary Piercy and Edward M. Piercy. The bill of exceptions sets forth that at the hearing of objections to the account filed by the respondent evidence was introduced showing that, ever since his appointment as administrator, said Edward M. Piercy had been guilty of neglect of the estate; had claimed all the estate as his own; had used and conducted all the business and property thereof as his own; and had used the rents, issues, and profits thereof in his own business and for his own benefit.

[1, 2] We think the appellant is right in his contention that the court should have charged respondent with interest at the legal rate, compounded with annual rests, upon the amount found due from him as the rental value of the real property of the estate. This is the ordinary rule where a trustee has used the trust property for his own benefit. If any loss occurs, the loss must be borne by him, while the beneficiaries are entitled to any profits realized. Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290. "The true rule in equity in such cases is to take care that all the gain shall go to the cestui que trust." 2 Story, Eq. Jur. (13th Ed.) §§ 1277, 1278. Where, as here, the settlement of the estate has been long delayed, and the administrator has himself used funds belonging to the estate, the heirs will not be fully compensated unless they receive compound interest upon the property of the estate thus withheld. These views are sustained by an unbroken current of authority. Estate of Stott, 52 Cal. 403; Estate of Clark, 53 Cal. 355; In re Hilliard, 83 Cal. 423, 23 Pac. 293; In re Eschrich, 85 Cal. 98, 24 Pac. 634; Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639; Estate of Cousins, 111 Cal. 441, 44 Pac. 182; Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561; Estate of Hamilton, 139 Cal. 671, 73 Pac. 578; Glassell v. Glassell, 147 Cal. 510, 82 Pac. 42; Estate of McPhee, 156 Cal. 335, 104 Pac. 455, Ann. Cas. 1913E, 899.

That the distribution of the estate was unjustifiably delayed—a circumstance which has been regarded as having an important bearing on the question of liability for compound interest (In re Hilliard, supra)—can hardly be questioned. There was but one heir. The claims were not of large amount. The necessary proceedings for administration could have been speedily concluded. The only reason for the long delay was that the administrator asserted a claim to the lands against the estate. This claim was adjudged to be based upon his own fraud and undue influence. The fact that he set it up and litigated it cannot entitle him to any special consideration. It is equally clear that the administrator violated his trust by using the property of the estate for his own benefit in conjunction with property belonging to him. There may be cases in which the trial court may, in the exercise of a sound discretion, grant or deny compound interest. Here, however, the misconduct of the administrator was so clearly shown that there was no room for the play of discretion. It is suggested by appellant that the trial court based its conclusion on the view that it could not allow interest, simple or compound, on the rental value, because such value was unliquidated and, until the making of the order, unascertained. But we think this consideration has no bearing on the question. It has often been held that, in actions for damages for tort or breach of contract, interest as such cannot be allowed where the amount of damage is unliquidated and incapable of being made certain. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 Pac. 719; Macomber v. Bigelow, 123 Cal. 532, 56 Pac. 449. But this rule has no application here. It is a rule governing the allowance of interest in actions for damages. Civ. Code, § 3287. Other considerations must govern a court in fixing the liability of a delinquent trustee. In such cases the primary consideration is the equitable one that the trustee must be compelled to fully compensate the beneficiary for the unauthorized use of the trust estate. As we have already indicated, compensation would not be complete if interest were withheld.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The order is remanded, with directions to the court below to modify it by charging the respondent with interest upon the rental value of the land of the estate at the rate of 7 per cent. per annum, compounded annually, from April 10, 1901, to October 8, 1912.

As so modified, the order appealed from will stand affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

(168 Cal. 722)

SHERWIN v. SOUTHERN PAC. CO.
(L. A. 3344.)

(Supreme Court of California. Dec. 3, 1914.)

1. Abatement and Revival (§ 68*)—Death of Party Pending New Trial.

In a personal injury case, the death of plaintiff pending a motion for a new trial after judgment in his favor does not abate the action, but the judgment stands, and is enforceable by the deceased plaintiff's representatives, unless finally vacated on an appeal.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 346–348; Dec. Dig. § 68.*]

2. Appeal and Error (§ 438*) — Effect of Granting New Trial—Vacation of Judgment.

While an appeal from an order granting a new trial is pending, the order is subject to the condition that, if it be reversed, its effect to vacate the judgment is annulled, and the judgment will then stand as though the order had not been made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2196; Dec. Dig. § 438.*]

3. New Trial (§ 140*) — Grounds — Affidavits—Sufficiency.

Where affidavits in support of a motion for new trial because of a juror's false statements on his examination voir dire did not show that the movant and its counsel were ignorant of the facts complained of until the rendition of the verdict, it was error to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284–287, 289, 302, 306; Dec. Dig. § 140.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Ida M. Sherwin, executrix of the estate of B. E. Sherwin, deceased, against the Southern Pacific Company. From an order granting a new trial, plaintiff appeals. Reversed.

Grant Jackson, Wm. L. Jarrott and J. S. Jarrott, all of Los Angeles, for appellant. J. W. McKinley, Frank Karr, R. C. Gortner, Henry T. Gage, W. I. Foley, and W. I. Gilbert, all of Los Angeles, for respondent.

SHAW, J. The appeal is from an order granting the defendant's motion for a new trial. The action was begun by the decedent, B. E. Sherwin, in his lifetime, to recover damages caused by bodily injuries received by him through the negligence of the defendant. There was a trial, resulting in a verdict and judgment in his favor. Proceedings for a new trial were immediately instituted by the defendant, but before the hearing of its motion the plaintiff died, and the present plaintiff, his executrix, was substituted as plaintiff. Thereafter, the court below granted the motion and ordered a new trial. There was no appeal from the judgment.

[1, 2] The respondent makes the preliminary objection that the action abated upon the death of the original plaintiff. The objection is based on the theory that the granting of the new trial vacates the judgment, and upon the familiar rule that a right of action for damages for personal injuries to the plaintiff caused by negligence of the defendant does not survive the death of the plaintiff. It is contended that the order granting a new trial sets the matter again at large without a judgment, to as full extent as if there had been no judgment. We think the objection is untenable. It is well settled that the death of the plaintiff in such an action after a judgment in his favor, and while the judgment stands, does not abate the action or affect the validity of the judgment. Such judgment

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

becomes a part of his estate, and may be enforced by his representatives. Accordingly, it has been held that the death of the plaintiff after such judgment and while a motion for a new trial is pending, or during the pendency of an appeal by the defendant from an order denying a new trial, does not abate the action, and that in such a case the judgment stands until it is vacated on the appeal, and that if the order is affirmed, the original judgment is good. Fowden v. Pacific C. S. Co., 149 Cal. 154, 86 Pac. 178. The question of the effect of an order granting a new trial, in such a case, when the death occurs after the judgment and either before or after the granting of the new trial, has not been heretofore presented to this court, so far as we are advised.

But the right of appeal from the order is given and we think the conclusion is inevitable that if, upon such appeal, the order is reversed, the judgment will remain or be restored to its original condition as if the order vacating it had not been made. The order, in such a case, is vacated, and the original judgment stands. An order granting a new trial does not absolutely vacate the judgment; it is absolutely vacated only when such an order becomes a finality. Puckhaber v. Henry, 147 Cal. 425, 81 Pac. 1105. In Pierce v. Birkholm, 110 Cal. 672, 43 Pac. 205, speaking of an order granting a new trial, the court said:

> "While its ultimate effect, if unappealed from, or if sustained upon the appeal where one is taken, is to vacate the judgment and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. In this respect it is not distinguishable from any other order or judgment from which an appeal is given. Pending an appeal therefrom it is * * * set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. * * * 'The reversal of an order granting a new trial leaves the verdict and judgment standing.' Hayne on New Trial and Appeal, § 229." Rev. Ed., § 3, p. 16.

The effect of these principles is that during the time within which an appeal may be taken from such an order, and while the appeal therefrom, if taken, is pending, the order is subject to the condition that if it is reversed, its effect to vacate the judgment will be annulled, and the judgment will then stand as if no order granting a new trial had been made, or as if the motion had been denied and such denial had become final or had been affirmed on appeal. The appellant is therefore entitled to prosecute this appeal, in order to produce this result and restore the judgment to its original vigor if the appeal is successful.

[3] The only matter urged as ground for a new trial occurred during the examination of the jurors upon the voir dire. One C. C. Horton was called and sworn to answer questions. After having been examined and passed by the plaintiff, the following colloquy occurred during his examination by the attorneys for the defendant:

> "Q. Were you ever injured in a railroad accident? A. No, sir. Q. Any member of your family ever injured in a railroad accident? A. No, sir. Q. Never had any suits against the railroad company? A. No, sir."

After some further questions on other subjects, he was accepted by both parties, sworn as a juror, and sat in the trial of the cause. The defendant exercised its four peremptory challenges upon other persons called to serve as jurors. After the verdict the defendant asked for a new trial on the ground that Horton had given untrue answers to the last two of the aforesaid questions. In support thereof affidavits were filed showing that at the time of the trial an action was pending in that court wherein Harold Johnson, a minor, by C. C. Horton, his guardian ad litem, was plaintiff and the Southern Pacific Company was defendant; that it was an action to recover damages for personal injuries to Johnson alleged to have been caused by the negligence of said defendant; that Johnson was the grandson of the wife of Horton; that the attorneys for the defendant who conducted the trial were ignorant of the fact that Horton was acting as the guardian ad litem of Johnson in said action, or of his relation to Johnson, and did not discover the same until after he was accepted as a juror in the cause, and that if they had been aware of said facts they would have challenged Horton for cause, as a juror, and, if necessary, would have excluded him from the jury by a peremptory challenge, and that they exhausted their peremptory challenges on other jurymen.

The affidavits in support of the motion for a new trial merely show that the attorneys conducting the trial for the defendant were not aware of the facts aforesaid at the time the impanelment of the jury was completed. They do not show that they did not discover said facts afterwards during the trial and before the rendition of the verdict. It may be conceded that the conduct of the juror Horton in giving a false answer to the questions put to him constituted misconduct or irregularity on his part sufficient to warrant the granting of a new trial therefor. See Hayne on New Trial and Appeal (Rev. Ed.) § 45. But where misconduct or irregularity of this character is relied on as ground for new trial, the affidavits of the moving party must show affirmatively that both he and his counsel were ignorant of the facts constituting the misconduct or irregularity charged until the rendition of the verdict. 12 Ency. of Pl. & Pr. 558, and cases there cited; State v. Barrington, 198 Mo. 93, 95 S. W. 235. If the defendant or its attorneys had discovered these facts at any time during the trial, it would have been their duty, if they desired to take advantage thereof, to apply to the court for leave to reopen the examination of the jurors, elicit the facts, and thereupon offer a challenge to the juror guilty of the misconduct.

in failing to show that they did not acquire such knowledge during the course of the trial after the jury was sworn, the defendant failed to present sufficient ground for a new trial for that cause. The order granting a new trial was therefore erroneous.

The order is reversed.

I concur: SLOSS, J.

I concur in the judgment: ANGELLOTTI, J.

168 Cal. 762

SOUTHERN TRUST CO. v. CITY OF LOS ANGELES et al. (L. A. 3264, 3265, 3267, 3271.)

(Supreme Court of California. Dec. 11, 1914. Rehearing Denied L. A. 3271, Jan. 9, 1915.)

LICENSES (§ 7*)—OCCUPATION TAX ON BANKING BUSINESS.

An occupation tax imposed by a city ordinance on the right to do a banking business was invalid under Const. art. 13, § 14, providing for the taxation of the capital stock of all banks doing business within the state and declaring that such tax shall, with certain exceptions, be in lieu of all other taxes and licenses upon the stock and property of such banks.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Actions by the Southern Trust Company, a corporation, the Security Savings Bank, a corporation, the Germania American Savings Bank, a corporation, and the Los Angeles Trust & Savings Bank, a corporation, against the City of Los Angeles, a municipal corporation, and others. From judgments for defendants, plaintiffs appeal. Reversed and remanded.

Haas & Dunnigan, Shankland & Chandler, and Gibson, Trask, Dunn & Crutcher, all of Los Angeles, for appellants. John W. Shenk, Albert Lee Stephens, and Myron Westover, all of Los Angeles, for respondents.

HENSHAW, J. The appeals in the above-entitled cases involve the same question, namely, the validity of the municipal ordinance of the city of Los Angeles imposing an excise or occupation tax upon the right of these banking corporations to conduct their business, which excise or occupation tax is fixed as follows:

> "Sec. 20. For every person, firm or corporation carrying on the business of banking, a monthly license of one and one-half cents for each one thousand dollars of the total amount of loans and discounts of such person, firm or corporation."

The Constitution of this state (article 13, § 14) provides for the taxation of the capital stock of all banks doing business within the state, and declares that the tax in the Constitution prescribed "shall be in lieu of all other taxes and licenses, state, county and municipal, upon such shares of stock and upon the property of such banks, except county and municipal taxes on real estate and except as otherwise in this section provided." It should be said that these cases were decided by the trial courts in advance of the decisions of this court in the cases hereinafter named. Respondents upon these appeals seek to draw the distinction that the occupation tax of the city of Los Angeles imposed upon banking institutions is not a tax or license upon their shares of stock or upon their property. This argument, and, indeed, all of respondents' contentions as to the validity of the tax, are disposed of against their position by the cases of City and County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 Pac. 971, Hartford Insurance Company v. Roberts et al., 142 Pac. 839, and Pacific Gas & Electric Co. v. Roberts, 143 Pac. 700. A reference to these decisions relieves from the necessity of any discussion of the matter. For the reasons therein given this tax is invalid and the judgments are reversed and the causes remanded.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

168 Cal. 764

HUGHES v. CITY OF LOS ANGELES et al. (L. A. 3266.)

(Supreme Court of California. Dec. 11, 1914.)

LICENSES (§ 7*)—OCCUPATION TAX ON INSURANCE AGENTS—VALIDITY.

An occupation tax, imposed by city ordinance on the agents of insurance companies, is invalid under Const. art. 13, § 14, subd. "b," requiring that every insurance company within the state pay a certain tax on the receipts from its business within the state, which tax shall, with certain exceptions, be in lieu of all other taxes or licenses on the property of such companies.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. S. Hughes against the City of Los Angeles, a municipal corporation, and others. From judgment for defendants, plaintiff appeals. Reversed and remanded.

Haas & Dunnigan, of Los Angeles, for appellant. John W. Shenk, of Los Angeles, for respondents.

HENSHAW, J. By the Constitution of this state (article 13, § 14, subd. "b") every insurance company within the state is required to pay an annual tax of 1½ per cent. upon the amount of the gross premiums received by it upon its business done in the state, and the Constitution declares "this tax shall be in lieu of all other taxes or licenses, state, county and municipal upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A revenue ordinance of Los Angeles in sections 82 and 83 declares as follows:

"Sec. 82. For every person, firm or corporation conducting, managing, or carrying on the business of local fire insurance agent, solicitor or broker, whether the insurer be a corporation, mutual company or individual, $10 per quarter for each such insurer represented by such agent, solicitor or broker.

"Sec. 83. For every person, firm or corporation conducting, managing or carrying on the business of a general or local insurance agent, whether for life, accident, plate glass, bicycle, liability, fidelity, automobile, or other insurance except fire insurance, whether the insurer be a corporation, mutual company, or individual, ten dollars per quarter; provided, that one license issued under the provisions of this section shall entitle the licensee to conduct any or all or any part of the businesses in this section enumerated."

Under the authority of Los Angeles Trust Company v. City of Los Angeles (L. A. No. 3271), 145 Pac. 94, this day decided, no doubt can be entertained but that if this privilege tax were imposed upon the insurance companies themselves it would be invalid. The distinction sought to be drawn in this case is that this particular license fee is not imposed upon the companies but upon the agents of the companies. This is true, but upon the other hand it is equally true that every insurance corporation must act through agents and can act only through agents, and that, therefore, in a direct and immediate sense a tax upon such agents for the right to do business is a tax upon the corporation's right to do business. The agents of corporations are the means whereby the corporations live and in opposition to a tax upon their agents the corporations may well be heard to voice Shylock's expostulation:

"You take my house when you do take the prop
That doth sustain my house; you take my life
When you do take the means whereby I live."

But in exposition of the fact that this principle does not rest upon the authority of Shakespeare alone, a reference may be made to McCall v. People of California, 136 U. S. 109, 10 Sup. Ct. 881, 34 L. Ed. 391; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Brown v. Maryland, 25 U. S. (12 Wheat.) 444, 6 L. Ed. 678; Tennessee v. Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; Kansas City v. Oppenheimer, 100 Mo. App. 527, 75 S. W. 174.

It follows, therefore, that the imposition of this occupation tax upon the agents of insurance corporations does violation to article 13, section 14, of the Constitution of this state, and may not be enforced.

The judgment is reversed and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.

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168 Cal. 736

BERRI v. ROGERO et al. (S. F. 6203.)

(Supreme Court of California. Dec. 10, 1914.)

1. JUDGMENT (§ 92*)—DEFAULTS—POLICY OF LAW.
It is the policy of the law to have every litigated case tried on its merits, and default judgments are viewed with disfavor.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. § 92.*]

2. JUDGMENT (§ 162*)—DEFAULTS—VACATION.
Where one in default makes seasonable application to be relieved and files an affidavit of merits alleging a good defense, and plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice by the delay, or that injustice will result from a trial on the merits, very slight evidence is necessary to warrant vacation of the default.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319–322; Dec. Dig. § 162.*]

3. APPEAL AND ERROR (§ 957*)—JUDGMENT (§ 139*)—OPENING DEFAULT.
Trial courts have a wide discretion in vacating defaults, and their ruling will not be reviewed unless an abuse appears.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957;* Judgment, Cent. Dig. §§ 265–268; Dec. Dig. § 139.*]

4. JUDGMENT (§ 143*)—DEFAULT—VACATION—ABUSE OF DISCRETION.
Where plaintiff made no counter showing, it was not an abuse of discretion for the trial court to set aside a default judgment against the defendants, who asserted that they had a good defense, and that their ignorance of the English language and of the necessity for verifying their answer prevented them from calling on their attorney and filing a proper answer.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

5. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.
Where evidence is omitted from the record, the appellate court must presume that the omitted evidence fully justified the order appealed from.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Bernardo Berri against Maria Rogero and another. From an order setting aside and vacating a default judgment, plaintiff appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant. S. J. Hankins and H. J. Hankins, both of San Francisco, for respondents.

SULLIVAN, C. J. Appeal from an order setting aside default and vacating judgment.

Plaintiff, Bernardo Berri, sued Maria Rogero and Pietro Rogero to recover $1,000 for alleged malicious acts of Maria Rogero and malicious prosecution by her of a civil action. The facts alleged in the complaint and out of which the cause of action arose are, in brief, as follows: Berri had commenced an action against Pietro Rogero in the justice court of San Francisco to recover $200 on Pietro's promissory note; a writ of attachment was issued in the case, and a levy was made by the sheriff upon one computing scale and one cash register in the possession of Pietro. In his complaint against the defendants herein the plaintiff alleged that Maria Rogero, maliciously intending and contriving to annoy and injure plaintiff and without probable cause, claimed the property attached as her own, thereby compelling Berri to furnish the sheriff an indemnity bond in the sum of $500 to hold the levy. He further alleged that thereafter Maria Rogero maliciously and without probable cause, in her individual capacity, and as guardian ad litem of four infants, brought an action against himself and the sheriff for the recovery and possession of the property attached, or the value thereof, $200, in case delivery could not be had, and $50 damages. This action, it is alleged, terminated in favor of Berri and his codefendant, the sheriff. By reason of the aforesaid acts, Berri claimed in his complaint that he "was greatly annoyed and was caused great inconvenience and much loss of time and put to considerable money outlay in defending said actions of defendant herein, Maria Rogero," to his damage in the sum of $1,000, for which amount he prayed judgment against both defendants. No cause of action whatever is alleged in the complaint against Pietro. He is not charged with any wrongful act, but, as stated by plaintiff in his complaint, "all of the aforesaid acts were done by the defendant Maria Rogero maliciously, without probable cause," etc. From the affidavits used on motion to set aside the default it appears that Pietro is the husband of Maria, but the plaintiff did not in his complaint allege that fact, nor did he allege any fact from which the relation of husband and wife between defendants could be inferred. The complaint was verified. The summons in the action was duly served on defendants in April, 1911. After time to plead had been repeatedly extended, the defendants, on the 31st day of May, 1911, by their attorney, filed an unverified answer to the complaint, containing a general denial and nothing more. Thereafter the plaintiff moved for an order striking from the files the unverified answer. This motion was met by a counter motion, made through the same attorney, for leave to file a verified amended answer. In support of this motion the attorney filed an affidavit in which he stated that he had written twice to the defendants, requesting them to call at his office to verify their answer; that he had received no reply from them, or either of them, and that defendants failed to call at his office because, as he believed, the letters were lost in the mail, or the defendants, through ignorance of the English language and of the laws of this state, did not realize the necessity for verifying their answer. On the 23d day of June, 1914, the motion to strike out the unverified answer was granted and leave to file a verified amended answer was denied. In the order denying the motion the court ordered a stay of proceedings for 10 days "to allow counsel for defendants to bring defendants into court and show why the order denying leave to file a verified answer should be set aside and vacated." The record does not disclose that counsel for the defendants did within the 10 days specified or at all, bring or attempt to bring his clients into court to show cause as provided in the order, or that he communicated or tried to communicate with them concerning the case. Judgment by default was rendered on July 24, 1911, in favor of plaintiff and against both the defendants for the sum of $500. Thereafter each of the defendants, through substituted attorneys, separately moved the court to set aside the default and judgment taken against them. The motions were heard on the 25th day of August, 1911. In each instance the motion was based upon inadvertence, surprise, and excusable neglect, and in the case of Pietro upon the additional ground that the complaint failed to state any cause of action against him. It appears from the affidavits used on the motion that the defendants are foreigners, Italian-Swiss, and utterly unable to understand, read, or write the English language; that Maria Rogero called once at the office of her original attorney and requested him to defend the action; that the defendants are unacquainted with legal procedure and judicial proceedings, and that they did not know that it was necessary for another call to be made upon the attorney; that they did not know and were not informed that any other act upon the part of either was necessary to present a defense to the action. They each deposed that if their attorney sent any letter to the affiant, the same was not read by either by reason of their ignorance of English; that no letter from him was read to either by any one; and that the contents of any letter from him were not made known to either. The usual affidavit of merits accompanied the moving papers. No counter affidavit was filed by or on behalf of Berri in opposition to the motions. The court set aside the default and judgment and imposed terms upon the defendants by requiring them to pay the plaintiff his costs of action amounting to $27.70. The record comes before this court upon a bill of exceptions. Evidently oral testimony was heard upon the motion, for the order setting aside the default and judgment recites, among other things, that upon a hearing of the motion, "*oral and documentary evidence* being introduced, and the affidavits of the defendants herein and all the records, files and proceedings in said action being duly read and considered, and after argument by respective counsel, said cause was, on the said 25th day of August, 1911, duly submitted to the court for consideration and decision," etc. No evidence, however, appears in the record other than the affidavits above mentioned found in the bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-4] We cannot say that the lower court, upon the showing made by the defendants in their uncontradicted affidavits, committed error in setting aside the default and judgment. The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice, or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default. A broad discretion is allowed to courts in granting relief, against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action. Counsel for appellant and respondents in their briefs agree, and this court agrees with them, that the following is a correct statement of the rule applicable to courts in dealing with defaults:

> "It is largely a matter of discretion, to be liberally exercised by the court in the furtherance of justice, and where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will do so only where it clearly appears that there has been a plain abuse of discretion."

In O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105, this court thus lays down the rule upon the subject:

> "In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. This court will usually sustain the action of the court below upon the same facts, whether that decision is for or against the motion; but it is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made."

In view of the rule thus admitted and declared, if the lower court had before it only the affidavits of the defendants upon the hearing of their motion, this court could not say that it had abused its discretion in setting aside the default and judgment. But it appears from the order itself that, in addition to the affidavits of the defendant, oral evidence was heard upon the motions and that upon this evidence, as well as upon the affidavits, the order was made. That being so, this court must presume, even if it be conceded that the affidavits in themselves were insufficient to sustain the order, that the oral testimony introduced upon the hearing warranted the court in setting aside the default and judgment.

[5] It is a well-settled rule of law that where evidence is omitted from the record this court must presume that the omitted evidence fully justified the order appealed from, although the evidence contained in the record itself is insufficient.

It follows from the foregoing that the order appealed from must be and the same is hereby affirmed.

We concur: HENSHAW, J.; SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

168 Cal. 742

BECKWITH v. SHELDON et al. (Sac. 2063.)

(Supreme Court of California. Dec. 10, 1914.)

1. CONTRACTS (§ 235*)—OPTIONS—PAYMENT OF COMPENSATION.

A contract to convey to the first party "fifty thousand dollars" in bonds at par of a corporation to be formed by the second parties is not an agreement to deliver bonds, but a promise to pay money, with an option to pay in bonds, and on failure to act under the option the money became due, and recovery could be had, without alleging or proving the value of the bonds.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1101–1116; Dec. Dig. § 235.*]

2. NOVATION (§ 10*)—PARTIES — SUBSTITUTED PARTY—EXTENT OF OBLIGATION.

A substituted second party to a contract, who receives the consideration furnished by the first party and undertakes to perform the obligation of the second party, is bound to the same extent as an original party.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 10; Dec. Dig. § 10.*]

3. EQUITY (§ 57*) — PRINCIPLES — THINGS WHICH OUGHT TO BE DONE.

Under the principle that equity will regard as done that which ought to be done, where a party agrees to give a mortgage or lien on a valuable consideration received, and imperfectly attempts to execute the same, equity will create and enforce a specific lien on the property.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 179; Dec. Dig. § 57.*]

In Bank. Appeal from Superior Court, Yolo County; M. T. Dooling, Judge.

Action by B. De La Beckwith, administrator of the estate of Byron D. Beckwith, deceased, against Willard M. Sheldon and others. Judgment for plaintiff, from which he appealed, and it was affirmed, and defendants appeal from an order denying a new trial. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Frank H. Gould, of San Francisco, Frank Freeman, of Willows, and Frank H. Short, of Fresno (Vincent Surr, of San Francisco, of counsel), for appellants. A. L. Shinn, of Sacramento, J. W. Dorsey and R. M. F. Soto, both of San Francisco, E. Weyand, of Colusa, S. C. Denson, of San Francisco, and A. C. Huston, of Woodland, for respondent.

SHAW, J. This action was begun by the decedent, Byron D. Beckwith, in his lifetime, to enforce certain trusts set forth in the complaint. Upon the first trial the defendants recovered judgment. Upon appeal this judgment was reversed. See 154 Cal. 393, 97 Pac. 867. Upon the second trial the plaintiff recovered judgment, declaring a lien upon the property of the Central Canal & Irrigation Company for $50,000, and also a personal judgment against the said company for that sum. The plaintiff, believing he was entitled to greater relief, appealed from the judgment, but it was affirmed. See 165 Cal. 319, 131 Pac. 1049. The present appeal is by the defendants from an order denying their motion for a new trial.

The opinions above referred to contain elaborate statements of the facts involved in the controversy. It will not be necessary here to state them at great length. The sole proposition now urged for reversal is that the decision is against law, because of the failure to find the value of the $50,000 in bonds that were to be issued to Beckwith; the theory being that this issue is material and that the judgment for $50,000 cannot be supported, in the absence of a finding that said bonds were worth that sum.

After the reversal of the first judgment, the plaintiff filed a fourth amended complaint. The second judgment was given after a trial upon this complaint. The judgment for the plaintiff was based on a compromise agreement executed on April 8, 1903, between Beckwith, as first party, and Sheldon and Schuyler, as second parties. Sheldon and Schuyler held certain water rights which had been conveyed to them by Beckwith in trust to be conveyed to a corporation which was to carry on the irrigation enterprise contemplated in the agreement. This agreement first provided that a former agreement should be canceled and annulled. It then proceeded to declare that in consideration of said cancellation, and of certain conveyances by Beckwith to Sheldon, or to a corporation, Sheldon and Schuyler would organize a corporation to be named "Sacramento Canal Company," with a capital stock of $1,000,000, which company should provide for and authorize a bond issue of $1,000,000, secured by a trust deed of all its property. To this corporation, when organized, all the property held by all the parties for the purposes of the scheme was to be conveyed. The agreement then closed with the following clause:

> "And the parties of the second part further promise and agree that they will cause such proceedings to be had as that there shall be paid to party of the first part, in consideration of the rights which he has theretofore conveyed to parties of the second part, and which he will convey to said corporation, the sum of $50,000 in said bonds of the Sacramento Canal Company, at par, which shall be in full extinguishment and payment of all rights and demands of the party of the first part upon the said corporation, or upon the parties of the second part, or upon the property or rights so to be conveyed to the said corporation."

Prior to the execution of this agreement Sheldon and Schuyler had formed the defendant corporation, the Central Canal & Irrigation Company. The parties, including said company, thereupon agreed that it should be substituted for the Sacramento Canal Company, proposed in said agreement as the corporation to carry out the purposes of the agreement of April 8th, and that it should assume the obligations and perform the duties therein imposed on the proposed Sacramento Canal Company, and should take and hold the property agreed to be conveyed to said Sacramento Canal Company. Thereupon the property referred to was conveyed to said defendant, Central Canal & Irrigation Company, and said corporation accepted the same, and in consideration thereof undertook to perform the obligations and carry out the purposes of said agreement, including the issuance of bonds to Beckwith. Thereafter said company, in pursuance of the agreement, provided for a bond issue of $1,000,000 secured by a trust deed of its property, and set apart $50,000 thereof, at face value, duly signed, for delivery to Beckwith in discharge of the obligation of the agreement as above set forth; but it refused to deliver them, neither said bonds nor any other bonds were ever delivered or issued to him, and said obligation remains unperformed and unsatisfied.

The defendants' argument is that the portion of the agreement above quoted was, in effect, an agreement by Schuyler and Sheldon to deliver the bonds of the defendant corporation to Beckwith, and that upon the failure to deliver the bonds of the defendant corporation to Beckwith the measure of damages would be the value of the bonds at the time delivery was due, or afterwards, at plaintiff's option. Civ. Code, §§ 3309, 3336. If this were the true aspect of the case, it would be conceded that a finding of the value of the property to be sold would be essential to a recovery of damages, and such value should be alleged and proved. There is neither allegation nor finding of the value. Mr. Freeman, in his note to Roberts v. Beatty, 2 Pen. & W. (Pa.) 63, in 21 Am. Dec. 425, says that there is some diversity of opinion as to how agreements to pay a sum of money in specific articles at a fixed rate shall be construed, in case of failure to furnish the articles within the time specified; that "one line of authorities holds that such contracts are agreements for the delivery of specific property," in which case the remedy of the promisee is by action for damages, and the value of the articles is material. To this view he cites seven cases. Of these only five are to the point, namely, Mattox v. Craig, 2 Bibb (Ky.) 584, Cole v. Ross, 9 B. Mon. (48 Ky.) 393, 50 Am. Dec. 517, McDonald v. Hodge, 5 Hayw. (Tenn.) 85, Meason v. Philips, Add. (Pa.) 346, and Edgar v. Boies, 11 Serg. & R. (Pa.) 445, to which we add Starr v. Light, 22 Wis. 433, 99 Am. Dec. 55. Of the other two cases cited, Justrobe v. Price, Harper (S. C.) 111, was an agreement to "deliver" rice, not to pay money, and Wilson v. George, 10 N. H. 445, merely decides that, under the technical rules of the common law as to forms of action, a recovery on such contract cannot be had in an action for money had and received. Other New Hampshire cases hold that such recovery may be had in a declaration specially upon the contract. Odiorne v. Odiorne, 5 N. H. 315; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307. In Pennsylvania, Tennessee, and South Carolina, later cases state the doctrine that such contracts become payable in money if the payor fails to deliver the articles. Roberts v. Beatty, supra; Choice v. Moseley, 1 Bailey (S. C.) 136, 19 Am. Dec. 661; Bloomfield v. Hancock, 1 Yerg. (9 Tenn.) 101. Mr. Freeman proceeds to say that the greater weight of authority is in favor of the doctrine that, upon the failure of the payor to deliver the articles within the time provided, the contract becomes an obligation to pay the sum of money mentioned, and may be sued on as such. He cites to this effect cases from the states of Virginia, Connecticut, Indiana, Illinois, New York, Vermont, Texas, Kansas, and Massachusetts. Mississippi, Maine, Ohio, Alabama, North Carolina, Oregon, Louisiana, and Nebraska also follow this doctrine. The citations to the cases may be found in Mr. Freeman's note aforesaid, and in volume 11 of the Century Digest, tit. Contracts, §§ 1105, 1106. In California also this doctrine has been adopted. Marshall v. Ferguson, 23 Cal. 69; Cummings v. Dudley, 60 Cal. 385, 44 Am. Rep. 58.

[1, 2] Looking to the terms of the agreement, it is easily seen that it is not a mere agreement for the delivery of the bonds. The promise is "that there shall be paid to" Beckwith "the sum of $50,000." This is not an agreement to sell or deliver bonds, but a promise to pay money. The addition of the words "in bonds of the * * * company, at par" does not change it into an agreement solely for the delivery of the bonds, but merely gives the payor the option or privilege of making such payment by delivering the bonds as specified when the time of performance arrived. The defendant Central Canal & Irrigation Company, having received the consideration furnished to the enterprise by Beckwith, and having undertaken to perform the obligation to him set forth in the agreement, was bound thereby to the same extent as if it had been a party thereto. When it thereupon refused to perform the obligation, the promise became an absolute money obligation, and the value of the bonds was immaterial, or at all events the payment in money became immediately due (Brown v. Foster, 51 Pa. 173), and the payee could sue thereon as upon a money obligation, and recover without alleging or proving the value of the bonds. Much more is its character as a money obligation apparent when the nature of the thing to be substituted for money in payment is considered. The company was to deliver its own bonds for $50,000, its promises to pay that sum, in satisfaction of the amount which Beckwith was to receive in the settlement. Its debt would remain the same; the only advantage to it would be that the time of payment would be postponed. For these reasons, we are of the opinion that the omission of a finding of the value of the bonds is immaterial.

[3] With regard to that part of the judgment which declares a lien on the property of the company, we need only say that, under the well-established principle of equity that that which ought to have been done will be deemed to have been done, it is held that where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same. Daggett v. Rankin, 31 Cal. 327; Racouillat v. Sansevain, 32 Cal. 389; Love v. Sierra, etc., Co., 32 Cal. 653, 91 Am. Dec. 602; Remington v. Higgins, 54 Cal. 623; Peers v. McLaughlin, 88 Cal. 297, 26 Pac. 119, 22 Am. St. Rep. 306; Higgins v. Manson, 126 Cal. 470, 58 Pac. 907, 77 Am. St. Rep. 192; Hall v. Cayot, 141 Cal. 18, 74 Pac. 299; Kreling v. Kreling, 118 Cal. 419, 50 Pac. 546.

We are therefore of the opinion that the motion for a new trial was properly overruled.

The order denying a new trial is affirmed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.

168 Cal. 747

In re SCHMIERER'S ESTATE. (S. F. 6997.)

(Supreme Court of California. Dec. 10, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 315*)—DISTRIBUTION — INTEREST — CONCLUSIVENESS OF DECREE.

Any claim of right to interest on a legacy prior to the decree of distribution of the estate should be asserted in the proceeding for distribution, so that the decree distributing to one only the amount of her legacy is conclusive against collateral attack, Code Civ. Proc. § 1666, providing it shall state the part of the estate to which each person is entitled, and declaring it conclusive of rights, subject to appeal only.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. § 315.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Gottlieb Schmierer, deceased. From an order in favor of Christina Lee Stourgeon, J. H. Richards and another, executors, appeal. Reversed.

G. Gunzendorfer, of San Francisco, for appellants. Henry G. W. Dinkelspiel, of San Francisco, for respondent.

SLOSS, J. The will of Gottlieb Schmierer bequeathed $300 to Christina Lee Stourgeon. It gave certain other legacies, and contained a devise and bequest of the residue. The testator died on June 4, 1908, and his will was admitted to probate on July 22, 1908, J. H. Richards and George Schmierer being appointed executors. On March 21, 1913, the executors filed their final account and petition for distribution. On April 7, 1913, the court made its decree settling the final account and distributing the estate. By the decree all of the property remaining in the hands of the executors was ordered distributed pursuant to the terms of the will. Various pecuniary legacies were ordered distributed to the respective legatees, and the residue was ordered distributed to the residuary legatees and devisees. To Christina Lee Stourgeon was distributed $300, the amount of her legacy. In her case, as in that of other legatees, there was no mention of interest on the legacy. In August, 1913, Christina Lee Stourgeon filed a petition alleging that her legacy had not been paid, and praying that the executors be cited to appear and show cause why they should not pay the sum of $300, together with interest thereon, from the 4th day of June, 1909, this date being one year after the testator's death. The citation was issued and the executors appeared. Pending further proceedings, the executors paid to petitioner the sum of $300, the principal of the legacy bequeathed, and there was submitted to the court the question of her right to receive from the executors interest on such legacy from the expiration of one year after the death of the testator. This submission took place on January 27, 1914. The court thereafter made its order determining that the petitioner was entitled to interest on the legacy from the 4th day of June, 1909, ordering the executors to pay to her such interest amounting to $96, and directing that she have execution against the executors for said sum. From this order the executors appeal.

It will be observed that the interest claimed, or the greater part thereof, had accrued prior to the making of the decree of distribution. This decree had become final before the making of the order appealed from. If the legatee was entitled to interest on the legacy (Civ. Code, §§ 1368, 1369), her claim could and should have been asserted in the proceeding for distribution.

"The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled." William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Code Civ. Proc. § 1666.

If such decree is erroneous, the remedy is by appeal. Daly v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61. No appeal was taken from the decree of distribution in this case, and such decree was therefore a final and conclusive adjudication of the rights which might be claimed by any person as legatee or devisee under the will. Code Civ. Proc. § 1666. By distributing to the respondent the sum of $300 without interest the court determined that she was not entitled to interest. This adjudication is not subject to collateral attack. No direct attack is here made and the petitioner is foreclosed.

Whether the legatee would be entitled to interest during the brief period intervening between the making of the decree of distribution and the payment of the principal of the legacy is a question that is not here raised. At any rate she is not entitled to interest for the time elapsing prior to the making of the decree.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

168 Cal. 759

In re WALDEN'S ESTATE. (L. A. 3777.)

(Supreme Court of California. Dec. 11, 1914.)

1. Appearance (§ 20*)—Effect of Voluntary Appearance.

By express provision of Code Civ. Proc. § 416, voluntary appearance of a defendant is equivalent to personal service, as regards acquiring jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 91–102; Dec. Dig. § 20.*]

2. Appearance (§ 8*)—Acts Constituting.

It is a voluntary appearance, giving jurisdiction, where a defendant appears and asks relief which can be granted only on the hypothesis of the court having jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23–41; Dec. Dig. § 8.*]

3. Descent and Distribution (§ 71*)—Determination of Heirship—Parties.

Defendants, in a proceeding to establish heirship, having appeared and presented their claim, are bound by the adjudication adverse to them, irrespective of other possible claimants not having been brought before the court.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. **Appeal and Error (§ 151*)—Party Aggrieved.**

Unattacked findings, in a proceeding to establish heirship, that appellant defendants are not related to decedent, and have no interest in the estate, are a bar to their right to attack findings as to kinship and interest of plaintiff and successful defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Matilda Walden, deceased. From a decree in favor of Martha Munro, in proceedings by her to establish heirship, and from an order denying a new trial, defendants Rachel P. Maher and another appeal. Affirmed.

Leland S. Bowen, of Los Angeles, for appellants. C. M. Stephens, George P. Adams, and Wm. T. Kendrick, all of Los Angeles, Claude R. Ball and James F. Ball, both of Montgomery City, Mo., and Trusten P. Dyer, J. W. Mowell, Elon G. Galusha, Benjamin E. Page, Williams, Goudge & Chandler, F. C. Austin, and C. C. Davis, all of Los Angeles, for respondent.

SLOSS, J. This is an appeal from a decree establishing heirship, entered in a proceeding under section 1664 of the Code of Civil Procedure. The proceeding was instituted by Martha Munro, claiming to be one of the heirs of the decedent. Upon her motion, the court made an order directing service of notice on certain nonresidents by publication, and publication was made. Various persons, including Rachel Maher and Paralie Costa, appeared and filed answers asserting claims as heirs. The default of others was entered, and the matter was heard by the court. The court found that the plaintiff, Martha Munro, and the defendants Wilhelmina Wilson Johnston, Martha Moodie, Sarah Jane Molloy, Robert Ross, and Andrew Ross are the only heirs and next of kin of Matilda Walden, the decedent. It found, further, that neither of the defendants Rachel P. Maher or Paralie Costa was or is in any way related or akin to Matilda Walden, or an heir of said decedent, or entitled to any part of her estate. The particular degree of kinship of the plaintiff and the successful defendants was found, and a decree declaring their rights accordingly was entered. See Estate of Walden, 166 Cal. 446, 137 Pac. 35. From this decree and from an order denying their motion for a new trial the defendants Rachel P. Maher and Paralie Costa appeal. The record on both appeals is embodied in a bill of exceptions.

[1-3] The jurisdiction of the court below is assailed by the appellants, who question the regularity of every step in the proceedings leading up to the publication of notice. But since the appellants themselves appeared in the action, and filed a pleading in which they asked judgment that they were entitled to have the estate distributed to them, they are in no position to make these objections, even if it be assumed that the points urged are meritorious in themselves. Voluntary appearance is equivalent to personal service. Code Civ. Proc., § 416. "Where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process." 2 Enc. Pl. & Pr., 625; Loan, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; Zobel v. Zobel, 151 Cal. 101, 90 Pac. 191. Whether other possible claimants were properly brought before the court is no concern of these appellants. They presented their claim to the court for adjudication as fully as the plaintiff did hers (Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522), and, having invoked the jurisdiction, they are bound by its exercise, whether the result be favorable or adverse.

[4] The appellants also attack the various findings which declare the kinship and heritable rights of the plaintiff and the successful defendants, and assert that the court erred in admitting evidence bearing on these findings. There is, however, no specification of insufficiency of evidence to support the finding that these appellants themselves are not related to the decedent and have no interest in her estate. This finding stands, therefore, as an insuperable bar to their right to question the propriety of the determination that others are entitled. Having no interest themselves, they are not aggrieved by a judgment which will result in the estate being awarded to the respondents. Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Estate of Blythe, 110 Cal. 231, 42 Pac. 643; Williams v. Sav. & L. Soc., 133 Cal. 360, 65 Pac. 822; Estate of Piper, 147 Cal. 607, 82 Pac. 246; Estate of Walker, 148 Cal. 162, 82 Pac. 770; Estate of Fleming, 162 Cal. 524, 123 Pac. 284.

These considerations dispose of every contention of the appellants.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

168 Cal. 727

ELLIOTT v. SUPERIOR COURT OF SAN BERNARDINO COUNTY et al.

(L. A. 3949.)

(Supreme Court of California. Dec. 4, 1914. Supplemental Opinion, Dec. 15, 1914.)

1. **Prohibition (§ 25*)—Petition—Demurrer.**

A demurrer to a petition for writ of prohibition admits that the allegations of the petition are true.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 74; Dec. Dig. § 25.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CORPORATIONS (§ 557*) — RECEIVERS — APPOINTMENT BEFORE DISSOLUTION.

Under Civ. Code, § 305, providing that the corporate powers, business, and property of all corporations formed under the act must be exercised, conducted, and controlled by a board of not less than three directors, courts have no jurisdiction to appoint a receiver of the entire assets of a corporation, in an action for the price of goods sold and delivered.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230–2236; Dec. Dig. § 557.*]

3. CORPORATIONS (§ 557*) — RECEIVERS — APPOINTMENT BEFORE DISSOLUTION—CONSENT.

Consent of the corporation to the appointment of a receiver of the entire assets of the corporation, in a suit for price of goods delivered, void under Civ. Code, § 305, does not validate the appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230–2236; Dec. Dig. § 557.*]

4. COURTS (§ 97*)—STARE DECISIS—FEDERAL AND STATE DECISIONS.

The state Supreme Court is not bound by decisions of the federal Supreme Court, except in cases where the judgment might be reviewed as arising under the Constitution and laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329–333; Dec. Dig. § 97.*]

5. PARTIES (§ 46*) — INTERVENTION — WHAT CONSTITUTES—"INTERVENER."

In an action against a corporation for the price of goods sold, in which a receiver was appointed on behalf of plaintiff and others similarly situated, a petition styled a petition in intervention, asking that a trustee, in a deed of trust on the property of the corporation in favor of petitioner, be allowed to sell the property pursuant to the power therein contained, does not make petitioner an intervener, under Code Civ. Proc. § 387.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 72; Dec. Dig. § 46.*

For other definitions, see Words and Phrases, First and Second Series, Intervener.]

6. PARTIES (§ 40*)—INTERVENTION—"INTEREST."

The "interest" mentioned in Code Civ. Proc. § 387, providing that at any time before trial any person who has an interest in the matter in litigation may intervene, must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 60–63, 65–67; Dec. Dig. § 40.*

For other definitions, see Words and Phrases, First and Second Series, Interest.]

7. PROHIBITION (§ 3*)—ADEQUATE REMEDY AT LAW—RIGHT OF INTERVENER.

A petitioner, for leave to sell under a power in a trust deed in a suit against a corporation for goods sold, in which a receiver was appointed, who is not technically an intervener, and hence has no right to appeal from the order appointing the receiver, has no adequate remedy at law defeating his right to a writ of prohibition to set aside the appointment.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

In Bank. Petition for prohibition by C. Edgar Elliott against the Superior Court of the State of California for the County of San Bernardino and S. F. Kelley. Writ granted on condition that an issue of fact, to be determined later, is found against respondents.

Tyrrell, Abrahams & Brown, of Los Angeles, for petitioner. William B. Ogden, of Los Angeles, for respondents.

SULLIVAN, C. J. The petitioner has applied to this court for a writ of prohibition to arrest proceedings in a certain action pending in the superior court of San Bernardino county, wherein a receiver was appointed. The action, an ordinary one at law, entitled "Brookings Lumber & Timber Co., a Corporation, Plaintiff, v. Gibraltar Investment & Home Building Co., a Corporation, Defendants," was brought to recover $876.56, alleged to be due from the defendant to plaintiff for goods sold and delivered. Hereinafter the plaintiff in the action will be referred to as the Brookings Company and the defendant as the Gibraltar Company.

At the time it filed its complaint the plaintiff moved the court for an order appointing a receiver of the assets of the defendant for the benefit of itself and all other persons similarly situated. The grounds of the motion were "that the plaintiff has no adequate remedy at law, and that the fund out of which the plaintiff and other creditors must look for the payment of their claims is in danger of waste, loss, and destruction." On the same day that the complaint was filed the defendant also applied for the appointment of a receiver. Thereupon the court appointed respondent S. F. Kelley receiver of all of the property, real and personal, belonging to the Gibraltar Company, and directed its officers to deliver to the receiver all of its assets of every kind, including real and personal property, moneys, drafts, bills of exchange, checks, or other evidences of indebtedness, and all books of account, deeds, bonds, mortgages, etc. Pursuant to the order appointing him, the receiver duly qualified and took into his custody all of the assets belonging to the defendant. The Gibraltar Company is a California corporation engaged in the business of buying and selling land, operating nurseries, and propagating and selling nursery stock, plants, and trees. Its business, carried on in several counties in the southern part of the state, is very extensive. Its gross assets exceed in value $1,000,000. It is financially involved, is unable to meet its obligations, secured or unsecured, and is, in fact, insolvent. The petitioner claims to be the owner and holder of two notes of the corporation for the sum of $30,000 each, payable on January 1, 1914, executed in favor of the Midas Fruitland Company, and assigned and indorsed by that company to the petitioner. The petitioner alleges that there is due to him on these notes the sum of $57,956.30 principal and an additional amount in excess of $8,000, representing interest, expenses, and attorneys' fees; that these notes are secured by a deed of trust held by the Citizens' Trust & Savings Bank, covering certain land in San Bernardino county, and including water certificates representing water rights appurtenant to the land. These properties are in the possession of the receiver. It is also alleged in the petition that the Citizens' Trust & Savings Bank, trustee, acting under the advice of its counsel, has refused to sell or offer for sale, under the power of sale contained in the deed of trust, the property held as security, so long as the same remains in the custody and possession of the receiver; "that upon this property are prior and superior mortgage liens held by divers other creditors of the defendant, aggregating $60,000; that the defendant has defaulted in the payment of interest upon the indebtedness secured by these mortgages; and that one of the mortgagees has already commenced foreclosure proceedings. The existence of these prior mortgages and the default of the mortgagor in the payment of interest thereon, it is alleged by the petitioner, has placed his rights and interests in jeopardy. He alleges that he is in danger of losing all of his rights and interest in said property and will be put to great expense unless the property described in the deed of trust is sold under the power of sale contained therein. It is further alleged that the receiver has incurred, and is now incurring, and will continue to incur, great expense in holding, caring for, and maintaining the properties of the Gibraltar Company, and that he is now exercising, and will continue to exercise, control thereof. After the appointment of the receiver, the petitioner herein filed in the superior court of San Bernardino county, in the action brought by the Brookings Company against the Gibraltar Company, an application styled by himself "Petition in Intervention," in which he prayed that the court "grant and give to him and to the Citizens' Trust & Savings Bank, the trustee named in said deed of trust, permission to exercise the power of sale granted in said deed of trust and to satisfy the indebtedness secured thereby," etc. This petition was filed by leave of court and was set for hearing at a later date. What action has been taken by the court on this petition does not appear. To the petition for the writ of prohibition the respondents have filed a demurrer specifying several grounds, all of which may be considered as embraced in the general statement "that the petition does not state facts sufficient to constitute a ground for the issuance of a writ of prohibition." The demurrer must be overruled for the reasons herein stated.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Assuming that the allegations of the petition are true, and for the purposes of the demurrer they must be taken as true, the superior court of San Bernardino county had no jurisdiction to appoint a receiver of the assets of the Gibraltar Company. The order appointing the receiver is void, and all of his acts performed in pursuance of his illegal appointment are necessarily void.

[2] Section 305 of the Civil Code, found in title 1, pt. 4, of that Code, and which title contains provisions applicable to all corporations formed under the laws of this state, provides:

> "The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three directors."

The court, through the appointment of a receiver, exercises the powers, conducts the business, and controls the property of the corporation, which, by virtue of this section, can only be exercised, conducted, and controlled by a board of directors. There is no law of this state, nor can any decision of our Supreme Court be found, which authorizes a court, through a receiver, to take charge of the business and property of a corporation before dissolution, dispose of its assets, and wind up its affairs. On the contrary, this court has repeatedly and consistently held for more than 50 years last past that the courts have no jurisdiction to appoint a receiver of the entire assets of a corporation in a suit prosecuted by a private party. Neall v. Hill, 16 Cal. 151, 76 Am. Dec. 508; French Bank Case, 53 Cal. 495; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; Smith v. Los Angeles & P. R. Co., 4 Cal. Unrep. 237, 34 Pac. 242; Murray v. Superior Court, 129 Cal. 628, 62 Pac. 191; Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561. As stated by this court in the French Bank Case, supra:

> "There is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation, for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management and substitutes its own. * * * There is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management and placing it in the hands of a receiver."

If, as stated in this, a court of equity has no power to appoint a receiver of the assets of a corporation, certainly a court, in a common-law action for goods sold and delivered, has no such power.

[3] The fact that the Gibraltar Company consented to the appointment of a receiver is immaterial. Such consent did not and could not confer jurisdiction upon the court to make the appointment. A corporation cannot in this indirect manner destroy itself. It cannot put beyond its reach the power to do that for which it was created. It is the creature of the law, and its powers must be exercised in the manner prescribed by law and not otherwise. If it wishes to die, it

may do so, but only in the way ordained by law. It must first satisfy and discharge all claims and demands against it. Two-thirds of its members or stockholders must resolve upon dissolution, and the provisions of title 6, pt. 3, of the Code of Civil Procedure, relating to the voluntary dissolution of corporations, must be complied with. If it must be put to death against its will, then the state, and not a private party, must institute proceedings with that object in view. In Smith v. Superior Court, supra, this court was asked to review an order of the superior court of Los Angeles county appointing a receiver in an action brought by the California Bank against the Los Angeles & Pacific Railroad Company to recover judgment upon an unsecured promissory note. As in the case now under consideration, the plaintiff in that case applied for and the defendant consented to the appointment of a receiver, and the court made the appointment. Yet this court held that the order appointing the receiver was void and in excess of the jurisdiction of the superior court. In passing upon the application for a writ of certiorari, referring to the order appointing the receiver, this court (Department 2), speaking through Justice De Haven, said:

> "We are unable to distinguish the action in which the order under review was made from that of the French Bank Case, 53 Cal. 495. It was there held that the appointment of a receiver in such an action was unauthorized and void, and should be annulled on certiorari. The only relief to which the plaintiff in the case of California Bank v. Los Angeles & Pacific Railway Co., was entitled to was a judgment against the defendant railroad company for the amount alleged to be due upon the promissory notes of which the plaintiff therein was alleged to be the owner, and in such an action, upon the facts before it, the court was without power to appoint a receiver. The allegations of the complaint, to the effect that the corporation was insolvent, and that other creditors were threatening to sue the defendant railroad, and that said defendant had no property out of which the plaintiff would be able to satisfy any judgment it might obtain, and that the action was brought in behalf of the plaintiff and all other creditors of the defendant railroad who were willing to come in as plaintiffs, did not change the essential character of the action from one at law to recover upon an unsecured indebtedness to one in which, according to the usages of courts of equity, a receiver may be appointed; nor would the consent of the defendant railroad to the appointment of the receiver at all affect the right of any creditor aggrieved thereby to have the order appointing such receiver annulled in a proceeding of this character."

In Smith v. Los Angeles P. R. Co., supra, referring to the same order appointing a receiver made in California Bank v. Los Angeles & P. R. Co., this court said:

> "The order being void, it may be disregarded. If the order is absolutely void, it is a nullity, and can be attacked in any proceeding. That it is absolutely void was clearly demonstrated when the matter was before the court in department in Smith v. Superior Court, supra."

[4] In support of their contention that the superior court had jurisdiction to appoint the receiver, the respondents cite a number of cases wherein the federal courts have decided that in an ordinary action at law an insolvent corporation may confer jurisdiction upon the court to appoint a receiver by merely consenting to the appointment. These authorities are not binding upon the courts of this state. Our state Supreme Court is not even bound by the decisions of the Supreme Court of the United States, except in cases where the judgment of this court may be reviewed by writ of error to the United States Supreme Court. Such review is permissible only in cases arising under the Constitution and laws of the United States. The case of Brookings Co. v. Gibraltar Co. presents no question which can possibly come within the exception. Under the circumstances, this court is bound to decide according to its own judgment and follow its own decisions, regardless of the decisions of the federal courts.

[5] It is claimed by respondents that inasmuch as the petitioner herein filed a "petition in intervention" in the superior court in the action commenced by the Brookings Company against the Gibraltar Company, wherein he prayed for an order authorizing the sale by the trustee of the property described in the deed of trust given to secure the notes alleged to be held by him, that he thereby became a party to the action, and that his only remedy was by appeal from the order appointing the receiver, and which right he has lost by the lapse of time. There is nothing in this contention. The petitioner here did not intervene in the action in the court below in the sense in which the word "intervention" is used in our Code. His petition, though styled a petition in intervention, is improperly so called. By filing the same he did not become a party to the action. A person may intervene in an action who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both plaintiff and defendant. Section 387, Code Civ. Proc. The petitioner did not have any interest in the matter in litigation, to wit, plaintiff's claim for goods sold, or in the success of either of the parties, or an interest in the matter against both. He did not dispute the plaintiff's claim, which may or may not be due. He did not ask to join with the plaintiff in claiming what the plaintiff sought in his complaint, nor did he ask the right to unite with the defendant in resisting the defendant's claim, nor did he demand anything adversely to both plaintiff and defendant as to the subject of the action. He therefore did not intervene or become a party to the action.

Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101.

[6] The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

[7] As the petitioner did not become a party to the action by intervention or otherwise, he had no right to appeal from the order appointing a receiver. Having no such right, respondents' contention that petitioner's application must be denied because he had a plain, speedy, and adequate remedy in the ordinary course of law by appeal to the Supreme Court is unfounded. Even if the petitioner had by intervention become a party to the proceeding in the superior court, and had a right to appeal from the order appointing the receiver, yet his remedy by appeal would not, under the circumstances of this particular case, have been plain, speedy, and adequate, and a writ of prohibition would lie. Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep 192; White v. Superior Court, 126 Cal. 245, 58 Pac. 450; Glide v. Superior Court, 147 Cal. 21–29, 81 Pac. 225; Dungan v. Superior Court, 149 Cal. 98–103, 84 Pac. 767, 117 Am. St. Rep. 119.

It follows from the foregoing that the demurrer to the petition for a writ of prohibition must be, and the same is, overruled.

This opinion is not to be construed as an authority opposed to the appointment of a receiver of specific property of a corporation, where such appointment would be proper under section 564 of the Code of Civil Procedure in certain actions between private parties. Our views must be taken as applying to an action of the kind now before the court and not as applicable to all kinds of cases against corporations.

At the time the respondents filed their demurrer, they also filed an answer to the petition. The answer fails to state facts sufficient to constitute a defense, except in one particular. The petitioner alleges that he is the owner and holder of two certain promissory notes of the Gibraltar Company for $30,000, payable by the terms thereof to the Midas Fruitland Company, and by the latter indorsed and assigned to the petitioner. The respondents in their answer, for want of information or belief upon the subject, deny this allegation. An issue of fact is thus raised. To determine this issue, the court will take testimony on the 14th instant in San Francisco. If the issue be determined adversely to respondents, then a peremptory writ of prohibition will issue as prayed for. But, if the issue be determined against the petitioner, then his petition will be denied for his failure to show any beneficial interest in the subject-matter of the litigation.

We concur: HENSHAW, J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

Supplemental Opinion.

PER CURIAM. In the above-entitled proceeding the court, in its opinion heretofore filed, overruled respondents' demurrer to the petition herein and decided that the answer of the respondents to said petition, filed with their demurrer, with one exception did not state facts sufficient to constitute a defense. That exception arose out of the allegation, contained in the petition and denied in the answer, that the petitioner was the owner and holder of two certain promissory notes of the Gibraltar Investment & Home Building Company for $30,000 each, described in the petition. The trial of the issue as to the ownership of these notes was set for the 14th inst. Before the day set the petitioner and respondents filed a stipulation effective for the purposes of this proceeding only in which they agreed that the petitioner is the owner and holder of the notes in question.

Now, therefore, in accordance with our opinion heretofore filed herein, it is by the court ordered and adjudged as follows:

1. That the order of the superior court of the county of San Bernardino made in that certain action pending in that court entitled "The Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. The Gibraltar Investment & Home Building Company, a Corporation, Defendant," appointing S. F. Kelley receiver of the assets of said Gibraltar Investment & Home Building Company, is null and void, and was made by said superior court without and in excess of its jurisdiction.

2. That all acts performed by said court or by the judge thereof in relation to said receiver, his appointment or duties, and all acts of said S. F. Kelley performed under or by virtue of said order of appointment as such receiver, are and each of them is void.

3. That a peremptory writ of prohibition issue out of this court, directed to the Superior court of San Bernardino county and the judge thereof and said S. F. Kelley, arresting all proceedings in said action entitled "The Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. The Gibraltar Investment & Home Building Company, a Corporation, Defendant," in so far as they relate to said receiver, his powers and duties, and absolutely restraining said superior court and the judge thereof, and said S. F. Kelley, from doing any act or thing or performing any function whatever by reason or by virtue of or under said order appointing said receiver.

25 Cal. App. 645

PEOPLE v. DRENNAN. (Cr. 265.)

(District Court of Appeal, Third District, California. Oct. 31, 1914.)

1. Rape (§ 52*)—Assault with Intent to Rape—Sufficiency of Evidence.

On a trial for assault with intent to rape a girl eight years old, her testimony that she protested against accused's conduct supported a jury finding that his acts were against her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–74, 76; Dec. Dig. § 52.*]

2. Rape (§ 60*)—Assault with Intent to Rape—Elements.

A conviction for assault with intent to rape was supported by jury findings that accused attempted to have sexual intercourse with a girl eight years old, and that his acts were against her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 101; Dec. Dig. § 60.*]

Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Robert Drennan was convicted of assault with intent to commit rape, and he appeals. Affirmed.

J. M. Inman, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information filed in the superior court of Sacramento county with the crime of rape upon a female under the age of 18 years, and upon a trial for said offense was convicted of the crime of assault with intent to commit rape. He appeals from the judgment and the order denying him a new trial.

The record before us consists entirely of the clerk's transcript, embracing the minutes of the court, the instructions, verdict, etc., and a transcript of the testimony. No briefs on behalf of either the appellant or the respondent have been filed nor was the cause orally argued.

We have, however, taken the pains to examine the testimony, the instructions, and the rulings of the court upon questions involving the admissibility and nonadmissibility of certain testimony, to the allowance of which objections were made and exceptions reserved, and our conclusion is that the defendant was in all respects given a fair and legal trial, and that the verdict appears to be justified.

[1, 2] The record discloses that, although the prosecutrix was but a little over eight years of age, she protested against the conduct of the defendant, which formed the basis of the charge in the information. From this testimony the jury were justified in finding that the defendant's acts were against the consent of the prosecutrix, and such finding, together with the finding that the defendant actually attempted to have sexual intercourse with the child, if, indeed, he did not succeed in doing so, is a sufficient predicate of the conclusion reached by the jury that the crime committed by the accused was that of an assault with intent to commit rape. People v. Akin, 143 Pac. 795.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 638

ADAMS v. GERIG. (Civ. 1255.)

(District Court of Appeal, Third District, California. Oct. 30, 1914.)

1. Account Stated (§ 19*)—Account—Fraud—Findings—Sufficiency of Evidence.

In an action on an account stated, evidence *held* to support a finding that the account was fairly stated, and there was no fraud or false representations by plaintiff.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 91–93; Dec. Dig. § 19.*]

2. Account Stated (§ 11*)—Action—Mistakes—Correction.

In an action upon an account stated, evidence of omissions and errors therein is admissible, and the specific items questioned may be adjusted without reopening the whole account.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 61–72; Dec. Dig. § 11.*]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Elvin Adams against C. Gerig on an account stated. Judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Rankin, of Susanville, for appellant. Pardee & Pardee, of Susanville, for respondent.

BURNETT, J. An examination of the record shows justification for the following statement of facts made by respondent:

"Plaintiff and his wife were hired by the defendant to work upon the latter's farm in Lassen county, the plaintiff to do general farmwork, and his wife to do housework. They commenced work under this employment April 8, 1909, and continued, with some intervals of lost time, until September 21, 1911. The agreed wages for Mrs. Adams were $15 per month, or 50 cents per day, at all times except during haying and harvesting, when she was to have $30 per month, or $1 per day. There is some conflict as to plaintiff's ordinary wages; he says the agreement was $40 per month while defendant asserts the wages were to be $35 per month. But there is no dispute that his pay was to be $2 per day during haying and $2.50 per day during harvest. In October, 1911, after the termination of the employment, the parties attempted to settle at the defendant's farm; but they could not agree as to the state of their accounts, and at the suggestion of the defendant they went, on October 23, 1911, to Bieber's store at McArthur, in Shasta county, to have R. E. Dunlap, the manager of that store, help them to settle. So they submitted their various memoranda to Mr. Dunlap, and he prepared for them a statement of the account, showing a balance due the plaintiff of $1,192.73. Dunlap was entirely disinterested, and did not influence, or attempt to influence, either party. Defendant signed the statement of account, certifying that he owed the plaintiff the balance therein stated, his signature being by mark and witnessed by Dunlap."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

There was a clerical error of $25 in the account, and some items were inadvertently omitted from the settlement. These items are mentioned in the findings and were taken into account in arriving at the amount of judgment given to plaintiff. "After the statement of the account, and before the plaintiff sued, the sum of $426.40 was paid on account by the defendant. The plaintiff commenced his action August 9, 1912, basing it on the account stated."

Defendant by his answer denied that the account was stated, and alleged that plaintiff and Dunlap presented the account to defendant and requested him to sign it and, upon his objection, urged and persuaded him to sign it, and falsely and fraudulently represented to him that it was true and correct. It is further alleged that the account is not correct; "that mistakes were made in the computation of wages of plaintiff and his wife; that it does not contain all the cash or merchandise received by plaintiff from defendant; and that many items of account were omitted therefrom." The cause was tried upon the issues as thus presented, the fullest opportunity being afforded to show the inaccuracy of said account or that fraud or improper influence was practiced, and the court gave judgment to plaintiff for $723.12, and found that "the account was stated as alleged by plaintiff; that it was fairly stated, and no fraud was perpetrated, and no false representations were made by plaintiff or any one acting for him; but that all mistakes were mutual."

[1] The appeal is from the judgment. The finding of the court as to the absence of fraud and the fairness of the transaction culminating in the said statement of account is abundantly supported. Indeed, as claimed by respondent, the testimony of the defendant himself would be sufficient for that purpose, and the account of the settlement and of the surrounding circumstances given by Mr. Dunlap, an entirely disinterested witness, could lead the court to no different conclusion.

[2] The only other question of moment is whether it was proper for the court, upon an action for account stated, to allow evidence of omissions and errors therein and to find in favor of plaintiff in accordance with the developed facts. As to this, under the decisions, there can be no kind of doubt.

The rule is, as stated in Branger v. Chevalier, 9 Cal. 353, as follows:

"Accounts stated may be opened, and the whole account taken de novo, for gross mistake, in some cases. * * * But this can only be done when the gross error affects all the items of the transaction." When "the clear mistake only affects a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. And when the party who seeks to go behind the stated account goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand."

In Carpenter v. Kent, 101 N. Y. 591, 5 N. E. 787, the same question was considered, and the court said:

> "We do not think that the defendants had the right to have the whole account opened, but that they were bound by the account actually settled, unless they could show some mistake or fraud in the settlement. Where an account has thus been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake can be corrected and the rights of the parties readjusted as to such mistake."

It is useless to multiply quotations, but, as sustaining the same doctrine, we may mention the following additional authorities: Tuggle v. Minor, 76 Cal. 100, 18 Pac. 131; Conville v. Shook, 144 N. Y. 688, 39 N. E. 405; Story's Equity (13th Ed.) §§ 523 to 525; 1 R. C. L. p. 220.

Under the issues as made by the complaint and answer, the court very properly allowed, therefore, said account to be surcharged and falsified, and directed judgment in favor of plaintiff for $723.12, instead of $766.40, as claimed.

The findings of fact are supported, they are within the issues, and they in turn support the judgment, and we have discovered no reason for interfering with the conclusion of the lower court.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 641

ASBESTOS MFG. & SUPPLY CO. v. AMERICAN BONDING CO. OF BALTIMORE et al. (Civ. 1317.)

(District Court of Appeal, Third District, California. Oct. 30, 1914.)

STATUTES (§ 267*)—RETROACTIVE OPERATION—CHANGE IN PROCEDURE.

St. 1911, p. 1422, extending the time within which a person claiming under a bond given for the construction of municipal improvements shall file his statement of claim and institute suit thereon, applies in a case where the bond was executed before the amending act was passed, but the work was completed and the claim filed thereafter, since it was a mere change in procedure not affecting the right or the remedy.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350–359; Dec. Dig. § 267.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Asbestos Manufacturing & Supply Company against the American Bonding Company of Baltimore and others. Judgment for plaintiff, and defendant American Bonding Company of Baltimore appeals. Affirmed.

H. A. Van C. Torchiana, of San Francisco, for appellant. Mastick & Partridge, of San Francisco, for respondent.

BURNETT, J. The action is against appellant American Bonding Company of Baltimore as surety upon a bond given by the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Lennig-Rapple Engineering Company for the doing of public work in the city and county of San Francisco. The bond was given pursuant to a statute enacted in 1897 requiring that the person seeking relief under the bond shall file with the board of public works a verified statement of his claim within 30 days from the time such work is completed, and providing, further, that suit may be filed by such claimant within 90 days after the filing of such claim. The work here was completed prior to February 26, 1912, but the claim was not filed until April 12, 1912, and the suit was begun July 18, 1912. But, while the statute in force at the time of the execution of the contract required the filing of the claim and the commencement of the action as stated above, in 1911 (Stats. 1911, p. 1422) the said act was amended and said respective periods were extended, and it is conceded by said appellant "that if the act of 1911 is operative in this case, the claim was properly filed and the suit commenced within proper time." It is insisted, however, that "the amendatory act of 1911 should not be construed as being retroactive and the provisions of the act in force when the bond was executed should be considered the sole criterion."

Respondent, though, calls attention to several decisions directly in point that support the view taken by the trial court. Appellant has not seen fit to notice any of these cases, although it is stated that they were relied upon in the trial court. We content ourselves with specific reference to only three of those cited.

In Bear Lake v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327, the question involved an amendment providing an extension of time for the foreclosure of a mechanic's lien and Mr. Justice Peckham, delivering the opinion of the court, said:

> "The mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or of the remedy, as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute."

It was therefore held that the new act applied to plaintiff's case. In this instance it may likewise be said that the enlargement of the time for filing the claim and beginning the action was made before the time had arrived in which either of said steps could be taken under the old statute, and in principle the two cases are not distinguishable.

A later case is National Surety Co. v. Architectural Decorating Co., 226 U. S. 276, 33 Sup. Ct. 17, 57 L. Ed. 221. Therein the action was brought on a bond, under a Minnesota statute, providing that the parties executing the bond shall be liable, with the condition that the claimant serve notice within 90 days after he finishes his work. After the bond had been executed and delivered, the statute was amended so that time for service of the notice was extended. The claimant served a notice which was late according to the time limit provided in the original statute but was within the time limit as extended by the amendment. The United States Supreme Court held that the extension of time operated merely as a modification of the remedy and did not impair the obligation of the contract, the court saying:

> "The decision must turn, we think, upon the familiar distinction between a law which enlarges, abridges, or modifies the obligation of a contract and a law which merely modifies the remedy, by changing the time or the method in which the remedy shall be pursued, without substantial interference with the obligation of the contract itself. * * * In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent of an action upon the bond affects the remedy and not the substantive agreement of the parties, and although the statute as it stood when the bond was given * * * must * * * be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore the subsequent statute * * * effected merely a change in the remedy, without substantial modification of the obligation of the contract."

The case of Kerckhoff-Cuzner Mill Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648, involved the construction of a statute shortening the time within which a mechanic's lien could be filed. The court said:

> "We do not think that the amendment, when applied to the case in hand, is retroactive in effect. It is true, it *shortened* the time which the respondent would otherwise have had to file its claim and thus seek its remedy. But the authorities are numerous to the effect that a change of remedy, or in the time within which it must be sought, does not impair the obligation of a contract, provided an adequate and available remedy be left."

We think the foregoing cases properly state the rule and are decisive of the controversy here.

There is no more merit in the contention of appellant that the bond does not conform to the requirement of the statute. It seems to follow closely the language of the statute, and specifies that the bond is given as required by an act of the Legislature, entitled "An act to secure the payment of the claims of materialmen, mechanics or laborers employed by contractors upon state, municipal or other public work, approved March 27, 1897." St. 1897, p. 201.

The foregoing are the only points made by appellant and, as they seem untenable, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

25 Cal. App. 647

PEOPLE v. CREITSER. (Cr. 262.)

(District Court of Appeal, Third District, California. Oct. 31, 1914.)

1. Criminal Law (§ 1130*)—Appeal—Briefs.

Under Supreme Court rule 5 (160 Cal. xlvi, 119 Pac. x), declaring that an appeal may be dismissed if the transcript or points and authorities are not filed within time, accused's appeal may be dismissed, where no record of the testimony or briefs were filed when the case was called and there was no appearance on behalf of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. Criminal Law (§ 977*)—Sentence—Waiver of Errors.

Accused pleaded guilty, but was not sentenced within the time prescribed by Pen. Code, § 1191. Thereafter, having withdrawn his plea of guilty and requested that his case be set down for trial, accused again pleaded guilty waiving time for the pronouncement of judgment. *Held*, that he could not assert that the court erred in failing to sentence him on his first plea within the time prescribed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. § 977.*]

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Otto Creitser was convicted of crime, and he appeals. Affirmed.

E. M. Frost, of Eureka, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

HART, J. The defendant pleaded guilty, in the superior court of Del Norte county, to an information charging him with the crime of rape upon a female under the age of consent, May Bartol by name—a name by no means unfamiliar to this court, its possessor having been the victim of similar mistreatment to that charged against the defendant by four other parties, who were convicted of the offense, and who unavailingly appealed their cases to this court. See People v. Bartol, 142 Pac. 510; People v. Hoosier, 142 Pac. 514; People v. Horn, 144 Pac. 641; People v. Taggart, 144 Pac. 1197, the opinion in which was filed in this court on October 27, 1914.

The present appeal is from the judgment and the order denying the defendant a new trial, "and from each and every order of said superior court made after pronouncing judgment in the above-entitled cause."

[1] There has been no record of the testimony filed in this court, nor are there any briefs on file herein. There was no appearance in behalf of the defendant when the cause was regularly called on the calendar at the last regular term of the court, and the Attorney General, therefore, submitted the case on the record, such as it is, now before us. Under these circumstances, we would be justified in ordering the appeals herein dismissed. Rule 5, Supreme Court (160 Cal. xlvi, 119 Pac. x); People v. Perry, 16 Cal. App. 772, 117 Pac. 1036. But the record is brief, and therefore, while not deemed necessary, we have gone to the trouble of examining it carefully, and have discovered nothing therein which would warrant us in sustaining any of the appeals, if, indeed, it may be said that any has been properly taken.

[2] It appears that the defendant's case was called for trial on November 12, 1913, and the same was then proceeded with. Before completing the jury panel the defendant withdrew his plea of not guilty theretofore interposed, and entered a plea of guilty to the charge alleged in the information. The court thereupon fixed Saturday, November 15, 1913, as the time for pronouncing the judgment of sentence. Thereafter the court continued the matter of sentencing the defendant from time to time until the period elapsing between the day upon which he pleaded guilty and the day upon which sentence was finally pronounced comprehended over 100 days.

It appears from the affidavit of counsel for the defendant that, after entering a plea of guilty, and after the several postponements by the court of the time for passing sentence, as above explained, the defendant withdrew his plea of guilty and asked that his case be set down for trial. The matter of fixing a date for the trial of the case was continued until February 24, 1914, at which time the defendant again entered a plea of guilty to the information, and declared to the court that he desired to dispense with any further services of his attorney. The defendant, upon entering his plea of guilty at said time, waived time for the passing of sentence, and the court thereupon and immediately pronounced its judgment.

Thus we have presented all the important facts disclosed by the record of this case as filed in this court.

Although, as stated, no brief was filed or oral argument presented on behalf of the defendant, we may assume that the point upon which the defendant claims the right to a reversal is that (so he might claim), the sentence having been pronounced long after the time within which the law provides that such act shall be performed (section 1191, Pen. Code), the court lost the right or the legal authority to pronounce sentence or judgment at all. That section provides that after a plea or verdict of guilty the court must appoint a time for pronouncing judgment—

"which must not be less than two nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided further, that the court may extend the time not more than twenty days in any case where the question of probation is considered, in accordance with section twelve hundred and three of this Code. If in the opinion of the court there is a reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in chapter six, title ten, part two of this Code."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Referring to said section, the Supreme Court, in Rankin v. Superior Court, 157 Cal. 189, 191, 106 Pac. 718, 719, says:

"The effect of this section is that the court has no authority to fix the time for pronouncing judgment for a day later than 5 days after the verdict; that, if a motion for a new trial or in arrest of judgment is made, the court may, for the purpose of deciding the same, extend the time for 10 days, and that, where the question of probation is considered, the court may, for that purpose, extend the time 20 days. These two provisions for extension of time are not cumulative, and the latest date to which the court is authorized to extend the time for rendering judgment, where present insanity is not involved, is a day not more than 25 days after the date of the return of the verdict." See, also, People v. Flavin, 21 Cal. App. 244, 246, 131 Pac. 321.

But, assuming that there is a legal appeal here, it is readily obvious that, while the court in the first instance exceeded its authority by postponing the matter of passing sentence beyond the time expressly limited by the statute, that point cannot now be urged by the defendant, since it appears, as we have shown, that he withdrew his plea of guilty after the matter of pronouncing judgment had been postponed from one date to another until the statutory period had been passed, and that, after so withdrawing said plea, he again entered a plea of guilty, waived time for the pronouncing of judgment, and the court thereupon and at once pronounced its judgment of sentence. The court, therefore, in passing sentence was obviously within the time limit prescribed by the statute for pronouncing judgment upon what seems to have been at that time the only plea to the information before it.

The judgment and all the orders appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 723

PEOPLE v. SIMONS. (Cr. 538.)

(District Court of Appeal, First District, California. Nov. 10, 1914. Rehearing Denied Dec. 10, 1914; Denied by Supreme Court Jan. 9, 1915.)

1. CRIMINAL LAW (§ 384*)—EVIDENCE—REMOTENESS.
Remoteness may affect the weight of evidence, but it does not ordinarily affect its admissibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.*]

2. CRIMINAL LAW (§ 342*)—EVIDENCE OF MOTIVE ADMISSIBLE TO SHOW IDENTITY.
In a criminal action, motive may be shown when there is any doubt as to the identity of the perpetrator of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 773, 774; Dec. Dig. § 342.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

John C. Simons was convicted of assault with intent to murder, and appeals. Conviction affirmed.

A. L. Frick and Gehring & Wyman, all of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. In this case an appeal is taken from the judgment of conviction and from the order denying defendant's motion for a new trial. The points made in support of the appeal are that certain evidence introduced by the prosecution for the purpose of showing the motive of the defendant for the commission of the crime was too remote; that the district attorney was guilty of misconduct in his argument to the jury; and that too wide a latitude was allowed in the cross-examination of the defendant.

[1] Remoteness may affect the weight of evidence, but it does not ordinarily affect its admissibility.

[2] We are satisfied that the evidence complained of was admissible under the general rule that motive may be shown where there is any doubt about the identity of the perpetrator of the offense; or that motive may be shown generally, although not necessary to be shown in every case. In the present case, if there was a likelihood that the complaining witness was in any way an obstacle to the sexual gratification of the defendant, that might be a motive for assaulting the complaining witness with the intent to murder him. If that be so, the testimony assigned as erroneously admitted was proper for the purpose of showing motive, and also for the purpose of clearing up any doubt there might have been as to the identification of the person guilty of the assault.

We do not think there was any misconduct on the part of the district attorney sufficient to warrant particular mention. As to the cross-examination of the defendant, we are satisfied it was legitimate and within the rule.

The judgment and order appealed from are affirmed.

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25 Cal. App. 675

WADE et al. v. CITY AND COUNTY BANK. (Civ. 1414.)

(District Court of Appeal, First District, California. Nov. 5, 1914. Rehearing Denied Dec. 5, 1914. Denied by Supreme Court Jan. 4, 1915.)

1. TRUSTS (§ 34*)—EXPRESS TRUST—OWNER'S CHECK TO DISCHARGE MECHANICS' LIEN.
Plaintiffs performed labor and furnished material for a building, for which they were not paid. They filed a lien, and served on the owner notices to withhold payments to the building company. Thereafter the owner delivered to defendant bank, where she had a deposit, a check, with direction to pay the building company on its production of satisfactory release of the plaintiff's lien and notices, which was certified by defendant bank and remained in its possession for three years, during which time the building company notified the bank that it had no interest in the check. No demands were made on the bank, which thereafter applied the check upon the drawer's indebtedness. *Held*, that there was no trust as between the plaintiffs and the bank, and the transaction did not constitute a trust in plaintiff's favor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.*]

2. ASSIGNMENTS (§ 49*) — EQUITABLE ASSIGNMENT.
Such transaction did not constitute equitable assignment of the amount due to the plaintiff.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85–98; Dec. Dig. § 49.*]

3. ESTOPPEL (§ 54*)—CONDUCT—KNOWLEDGE.
Such transactions would not be construed as an estoppel in favor of the plaintiffs, where they knew nothing of it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128–135; Dec. Dig. § 54.*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by William Wade and others against the City and County Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Jesse H. Steinhart, of San Francisco, for appellant. F. W. Sawyer and Arthur H. Barendt, both of San Francisco, for respondents.

RICHARDS, J. This action was brought by plaintiffs to obtain judgment against defendant for funds claimed to be held in trust by defendant for the benefit of plaintiffs. Plaintiffs had judgment, from which, and from an order denying a new trial, defendant appeals.

The facts upon which the alleged trust arose are as follows:

[1] In March, 1907, Carolina Taubles entered into a contract for the construction of a building with the Yerba Buena Building Company. At that time she was a depositor with the defendant bank. Plaintiffs each per-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

formed labor upon and furnished material for the construction of the building, for which they were never paid. The plaintiffs filed liens upon the building, and also served on the owner notices to withhold payments to the building company. For the purpose of settling with the contractor, the owner delivered, in March, 1907, to defendant bank a certain check, drawn upon it, with instructions to pay it to the building company on the production of satisfactory releases of the liens and notices to withhold, executed by plaintiffs. The check was subsequently certified by the defendant bank, and remained in its possession for nearly three years, during which time no demand whatsoever was made upon the bank by any one for the funds represented by it. In February, 1910, the construction company served notice upon the defendant bank that it no longer held any interest in the check. In March, 1910, a creditor of the owner, Carolina Taubles, endeavored to levy execution on her account with the defendant bank; and thereupon the bank applied the amount of the money represented by the check upon an indebtedness of said Carolina Taubles to it under its bankers' lien. Subsequently, and on December 8, 1911, plaintiffs herein filed a suit against the bank, claiming that it held the amount of their liens in trust for them. In their argument in support of the judgment, it is claimed by respondents that the transaction between Carolina Taubles and the defendant bank created a trust in their favor. This contention cannot be maintained. There is no evidence to show that the transaction was made for the benefit of plaintiffs. The check was made payable to the Yerba Buena Building Company. Defendant was directed to pay to said company the amount of the deposit upon the production of certain releases of liens and withhold notices. The arrangement in no manner directed the payment to plaintiffs of the amount of their claims, nor was there any duty assumed by the defendant under the arrangement toward plaintiffs or any recognition of their rights. Merely accepting the check under the given directions in itself created no obligation on the part of the bank toward plaintiffs. There was no contractual obligation between them. Whatever rights plaintiffs had were based upon the mechanics' lien law. This right was initiated by plaintiffs by the filing of their liens. For some reason which the record does not disclose, they failed to pursue this right; but nowhere does the evidence show that their action in this respect was due to the fact that the owner had made the arrangement with the defendant bank for the payment of their claims. The money was not received by defendant for the benefit of plaintiffs, but was received, if for the benefit of anybody, for the benefit only of the building company.

The instructions to the bank were to pay the money to the Yerba Buena Building Company only when it produced satisfactory releases mentioned. The building company never presented any releases or demand for the money; but on the contrary, about three years afterward, they disclaimed any interest in the fund.

Upon no theory is there any privity between the plaintiffs and the defendant; and no ground exists upon which plaintiffs can claim any right in the fund involved.

There is no evidence to show that plaintiffs relied in any manner upon the deposit thus made or were in any way prejudiced by it. So far as the evidence shows, they did not rely upon the transaction for the payment of their claims; and in fact there is no testimony indicating in the slightest degree that they ever knew anything about it; nor is there any evidence to show that plaintiffs did a single thing that demanded recognition or that defendant recognized their rights or did anything upon which a liability might be created.

[2, 3] The transaction did not constitute a trust or, as is claimed, an equitable assignment; nor is there anything that could in any manner be construed as creating an estoppel in favor of the plaintiffs, for, so far as the record shows, they knew nothing of it. The entire transaction was simply a means adopted by the owner of the building of setting aside money with which to pay her contractor, in which the plaintiffs were in no manner privies to or in any manner affected by it. Bluthenthal & Bickart v. Silverman, 113 Ga. 102, 38 S. E. 344.

There being no evidence to support the findings that the deposit was made for the benefit of plaintiffs and that they held such fund in trust for them, it follows that the judgment must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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25 Cal. App. 732

HARTFIELD v. ALDERETE. (Civ. 1652.)

(District Court of Appeal, Second District, California. Nov. 11, 1914.)

1. APPEAL AND ERROR (§ 348*)—TIME TO APPEAL—STATUTE.

Under Code Civ. Proc. § 941b, providing that notice of appeal must be filed within 60 days after the notice of entry of judgment, and in any case within 6 months of entry of judgment, an appeal taken within 6 months is taken in time, where no notice of entry of judgment was served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

2. APPEAL AND ERROR (§ 348*)—TIME TO APPEAL—STATUTE—WHAT IS NOTICE.

Where a written notice of entry of judgment is needed to start the running of the time to appeal or to request the transcript of the evidence, the fact that the party has actual notice of the entry of judgment will not suffice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904; Dec. Dig. § 348.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. Appeal and Error (§§ 348, 411*)—Time to Appeal—Written Notice—Statutes.

Under Code Civ. Proc. § 1010, the notice of intent to appeal, which Code Civ. Proc. § 953a, requires shall be served in ten days after notice of entry of judgment, must be in writing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1900–1904, 2100; Dec. Dig. §§ 348, 411.*]

4. Appeal and Error (§ 505*)—Time to Appeal—Waiver of Notice—Record.

Waiver of written notice of entry of judgment must appear from the record, and the mere fact that appellant filed a bond to stay execution, prior to taking an appeal, appearing dehors the record, is not a waiver of the written notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2313; Dec. Dig. § 505.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by A. J. Hartfield against Frank Alderete. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Motion denied.

J. Marion Wright, of Los Angeles, for appellant. Lester E. Hardy, of Los Angeles, for respondent.

SHAW, J. Plaintiff, who is respondent, moves to dismiss the appeal upon the ground that notice thereof and request for a transcript was not filed within 10 days after notice to the defendant of the entry of judgment. The appeal was taken under the alternative method. No notice of the entry of judgment was served upon defendant. After the entry of judgment defendant, as shown by the certificate of the clerk, prior to taking any steps to appeal therefrom, filed a bond the purpose of which was to stay execution of the judgment; and respondent contends that actual notice of the entry of judgment must be deemed implied from the filing of such stay bond.

[1] The judgment was entered on July 2, 1914, and the notice of appeal was filed July 27, 1914. Section 941b, Code of Civil Procedure, provides that such notice of appeal "may be filed at any time after the rendition of the judgment, order or decree, but the same must be filed within sixty days after notice of entry of said judgment, order or decree has been served upon the attorneys of record appearing in said cause or proceeding, provided, however, that if no notice of entry of judgment be given the notice must, nevertheless, be filed, under any circumstances, not later than six months after the entry of the judgment, order or decree." Since no notice of the entry of judgment was served upon the attorneys of record for the defendant, the 60 days within which the appeal must be taken, where such service is had, did not begin to run, and, the appeal having been taken prior to the giving of such notice and within 6 months after the entry of judgment, it follows that the appeal was taken within the time prescribed therefor.

[2] It is the service of the notice which starts the 60 days to running, and not the fact that defendant may have had actual notice of the entry of judgment. In discussing a like question in the case of Title Insurance & Trust Co. v. California Development Co., 143 Pac. 725, it is said:

> "But the 60 days for taking an appeal under section 941b runs from and after 'notice of entry * * * has been served upon the attorneys of record. * * *' This implies, as is intimated in Estate of Keating, 158 Cal. 109 [110 Pac. 109], 'that the notice * * * contemplated is necessarily a notice in writing which may be served in the ordinary manner of serving a writing.' Parol evidence that a party knows a fact, or his written statement from which such knowledge may be inferred, is not equivalent to service upon him of written notice of the fact."

See, also, Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294, and Huntington Park Improvement Co. v. Park Land Co., 165 Cal. 429, 132 Pac. 760.

[3] Section 953a, Code of Civil Procedure, having reference to the preparation of a transcript of the evidence in lieu of a bill of exceptions, provides that the party adopting such method in bringing up the record shall file "with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken * * * be made up and prepared." "Said notice must be filed within ten days after notice of entry of the judgment, order or decree." One of the grounds urged by respondent for dismissal of the appeal is that this notice and request for transcript was not filed within 10 days after notice to defendant of the entry of judgment; and, although the appeal was taken in time, it is insisted that the act of the clerk in preparing the transcript was unauthorized, by reason of the fact that the request therefor was not made within 10 days after defendant had actual notice of such entry. The notice of entry of the judgment contemplated by this section, while not so stated, must nevertheless, under section 1010 of the Code of Civil Procedure, be a written notice. As stated, no written notice of entry of the judgment was at any time served.

[4] While a party entitled to written notice may waive the same, evidence of such waiver must appear from the record. Gardner v. Stare, 135 Cal. 118, 67 Pac. 5; Mallory v. See, 129 Cal. 356, 61 Pac. 1123. There is nothing in either the clerk's or the reporter's transcript disclosing any fact tending to show that appellant had any notice of the entry of judgment. The fact that prior to taking the appeal defendant filed a stay bond is evidenced by matter dehors the record. The bond was a mere loose sheet of paper, performed no function whatever, and hence the

act of filing it was a nullity. It cannot, in our opinion, be considered as evidence of a waiver of the written notice of the entry of judgment to which defendant was entitled.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 666

MONTGOMERY v. DORN et al. (Civ. 1295.)

(District Court of Appeal, Third District, California. Nov. 5, 1914.)

1. TRIAL (§ 396*)—FINDINGS—CONFORMITY TO PLEADING—PRINCIPAL AND AGENT.

In an action on a contract to pay the debt of another, the variance between a finding that R., through his agent, D., entered into the contract and an allegation of the complaint that D. and R. promised to pay the debt was not material; it being sufficient, in an action on a contract executed by an agent, to charge the act as that of the principal, without disclosing the fact of the agency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

2. PRINCIPAL AND AGENT (§§ 145, 146*)—CONTRACT BY AGENT—LIABILITY.

Where a contract is made by an agent within the scope of his employment, ordinarily both the agent and the undisclosed principal, when discovered, are liable, and may be joined as defendants.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 499, 513–520, 521–527; Dec. Dig. §§ 145, 146.*]

3. PRINCIPAL AND AGENT (§ 173*)—CONTRACT BY AGENT—EVIDENCE—RECEPTION OF BENEFITS.

In an action on a contract executed by an agent, binding the principal to pay the debt of another, testimony as to the execution and delivery of the note evidencing the debt and as to the property pledged therefor, and that the consideration for the contract made by the agent was the sale of such property to the principal, was properly admitted.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659–661; Dec. Dig. § 173.*]

4. PRINCIPAL AND AGENT (§ 21*)—EXISTENCE OF AGENCY—TESTIMONY OF AGENT.

In an action on an agent's contract, executed for a valuable consideration, and binding his principal to pay the debt of another, the agent was competent to testify to the fact of his agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

5. PRINCIPAL AND AGENT (§ 23*)—CONTRACT BY AGENT—IDENTITY OF PRINCIPAL—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on an agent's contract binding his principal to pay the debt of another, *held* to show that his principal was a certain individual, and not a company of which such individual was a member.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.*]

6. FRAUDS, STATUTE OF (§ 116*)—AUTHORITY OF AGENT—NECESSITY OF WRITING.

Since the parol promise of a transferee, made in consideration of the executed transfer, to assume an indebtedness of the transferror to a third person is binding, Civ. Code, § 2309, providing that authority to make a contract required to be in writing can only be given by an instrument in writing, does not require that the authority of the transferee's agent to contract for him be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. § 116.*]

7. BILLS AND NOTES (§ 527*)—PROOF OF NONPAYMENT.

The production of a promissory note showing no indorsement of payment was prima facie evidence of nonpayment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847–1855; Dec. Dig. § 527.*]

8. CONTRACTS (§ 187*)—ENFORCEMENT—PARTIES—"EXPRESSLY FOR THE BENEFIT" OF A THIRD PERSON.

An agent's contract, binding his principal, in consideration of property received by the principal, to pay a debt due from the other contracting party to plaintiff, was a contract made "expressly for the benefit" of plaintiff, within Civ. Code, § 1559, providing that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. § 187.*]

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George S. Montgomery against Walter E. Dorn and others. From judgment for plaintiff and denial of new trial, defendant A. J. Rankin appeals. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. R. H. Cross, of San Francisco, A. F. St. Sure, of Alameda, and L. W. Lovey, of San Francisco, for respondent Montgomery.

CHIPMAN, P. J. In plaintiff's amended complaint it is alleged that defendant Fitch executed his promissory note to plaintiff September 26, 1908, for the sum of $1,360, payable 90 days after date, with interest after maturity, secured by certain shares of Home Circle Cash Store & Mail Order House, a corporation; that, after the execution of said promissory note, and prior to the commencement of the action, defendants Dorn and Rankin "expressly and in writing undertook, agreed, and promised the said Chas. A. Fitch, for a good and valuable consideration moving to them, and to each of them, to pay the said promissory note and the whole thereof for the express benefit of plaintiff herein, and said undertaking, agreement, and promise has at no time been rescinded." The prayer is for judgment against defendants for $1,360, with interest at 7 per cent. after December 26, 1908, and that said pledged property be sold and the proceeds applied to the payment of said indebtedness, and for general relief.

Defendant Rankin interposed a general and special demurrer to the amended complaint, which, being overruled, he answered by expressly denying its averments. Defendant Dorn answered, and, on information, denied most of the averments of plaintiff's amended complaint, and, by way of answer thereto, set forth what he alleged to be the facts in the transaction, to wit: That, on or about September 7, 1909, as agent and attorney of Rankin, and not otherwise, he entered into a written agreement (plaintiff's Exhibit 3) to purchase for Rankin from defendant Fitch and one H. McDonald certain shares of said corporation, referred to in plaintiff's complaint, and, in consideration of the transfer of said stock by Fitch and McDonald to Rankin, the said Rankin promised and agreed to pay for said shares certain cash to Fitch, and to liquidate certain designated claims, and among them the said claim of plaintiff; that, in pursuance of said contract, said shares were transferred to Rankin, and Rankin paid to Fitch the amount agreed—to wit, $150—and one other claim, but did not pay certain other claims, nor did he pay the said claim of plaintiff; that he (Dorn) acted solely as agent and attorney of Rankin, and so informed defendant Fitch and said McDonald, and "that said defendant A. J. Rankin was the principal in said contract, and that the defendant, Walter E. Dorn, was but the agent and attorney for said party"; that, in pursuance of said contract, said Rankin became the sole owner of said stock of said corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The court gave judgment for plaintiff against defendants Fitch and Rankin for the sum of $1,360, and interest at 7 per cent. from December 29, 1908, and directed that the said shares be sold and the proceeds applied to the payment of said amount, and that the action be dismissed as to defendant Dorn. Defendant Rankin alone appeals from the judgment and from the order denying his motion for a new trial.

Upon sufficient evidence the court found that the averments of the amended complaint were true, and that the averments of defendant Rankin's answer were not true. Specifically, and on sufficient evidence, it found that Fitch executed the promissory note as alleged, and pledged the said shares as alleged and as testified to by defendant Fitch, and that no part of said promissory note has been paid; that the transaction by which defendant Rankin became liable for the payment of said promissory note was substantially as alleged in defendant Dorn's answer and as testified to by him; that Dorn was acting solely as Rankin's agent and attorney and by his direction and with his knowledge and consent, and that, pursuant to said written agreement entered into by Dorn, Rankin paid certain of the claims therein agreed by him to be paid, but that he did not pay plaintiff's said claim; that Dorn received no profits or benefits from said transaction, and that "defendant A. J. Rankin received all the benefits and profits accruing from said contract, and was and is the principal thereunder; that defendant A. J. Rankin received valuable and sufficient considerations for the execution of said contract of October 7, 1909, as hereinafter set forth." Finding numbered 7 is as follows:

> "That defendant A. J. Rankin, after the said execution and delivery of said promissory note, * * * to wit, on or about October 7, 1909, expressly and in writing undertook, agreed, and promised the said Charles A. Fitch, for a good and valuable consideration moving to him, to pay the said promissory note owing from said C. A. Fitch to plaintiff and the whole thereof for the express benefit of plaintiff herein, and said undertaking, agreement, and promise has at no time been rescinded."

[1] 1. Appellant's first proposition is that there is a fatal variance between paragraph 4 of the complaint and the findings thereon; namely, finding 7, supra. This paragraph stated that Walter E. Dorn and A. J. Rankin "expressly and in writing undertook, agreed and promised the said Charles A. Fitch, for a good and valuable consideration moving to them, and to each of them, to pay said promissory note and the whole thereof, for the express benefit of the plaintiff." The claim is that "both Dorn and Rankin undertook in writing to pay said promissory note and that both received consideration therefor, while the findings, based upon the evidence as it was viewed by the court, are that A. J. Rankin alone 'expressly and in writing undertook, agreed, and promised' to pay said promissory note"—citing People v. Cummings, 117 Cal. 497, 49 Pac. 576. In that case the indictment charged that the note was obtained by false pretenses, describing the notes as having been executed by one person as maker, but the proofs showed that the note was executed by two persons as joint makers, and the variance was held material. No such case appears here. It was not alleged that Dorn and Rankin jointly executed the agreement and it was not found that Rankin "alone" entered into the agreement, but rather that he, through his agent, Dorn, entered into it.

[2] Dorn was, on the face of the agreement, a principal, while, in fact, he was the agent of the undisclosed principal. "The general rule is that, where the contract is made by an agent within the scope of his employment, both the agent and the undisclosed principal, when discovered, are liable on the contract, and may be joined as defendants thereon." 31 Cyc. p. 1624. It was not necessary to aver the fact of agency, "it being sufficient to charge the act as that of the principal, without disclosing the fact of the agency" (Id. p. 1626); and where "the proof is that such acts were done or knowledge obtained by his authorized agent, there is no variance" (Id. p. 1638). Rankin was shown by the evidence to have been the undisclosed principal, and was properly joined with Dorn as party defendant, and as to Rankin a good cause of action was stated. Rankin was therefore not prejudiced, whether or not a judgment went against Dorn. Allen v. Globe Grain & Milling Co. et al., 156 Cal. 286, 291, 104 Pac. 305.

[3, 4] 2. In making his proofs plaintiff introduced testimony as to the execution and delivery of the note; also as to the pledging of the shares of the corporation; also as to the contract for the sale of certain of these shares—to all of which defendant Rankin objected, on the ground that his name did not appear on the note or in the contract, and that each transaction was res inter alios acta. The testimony was relevant when offered as to the other defendants, and the testimony later along in the trial fully connected Rankin with the transactions. We discover no error in admitting this or any of the evidence offered. It was competent to show who received the benefits of the transaction, and it was competent to show by Dorn for whom he was acting. "While the statements or admissions of one not as a witness that in a certain transaction he acted as agent for another are not competent to prove the fact of agency, yet, if he is called as a witness, his testimony, not only that he acted as the agent of the party, but as to the fact of agency, * * * where it rests in parol, is as competent as that of any other witness." McRae v. Argonaut Land & Development Co., 6 Cal. Unrep. Cas. 145, 54 Pac. 743; Mechem on Agency, § 101.

[5] 3. Some further points are presented on motion for nonsuit which will be briefly noticed. It is claimed that the evidence showed that the contract was the obligation of A. J. Rankin & Co., and not that of Rankin. Dorn testified that, to the best of his knowledge, Rankin was a member of the said company, and that he represented the company in the negotiations. The evidence was that Rankin was the only person disclosed as principal. Dorn testified that Rankin received the benefits and profits of the contract, and that he was acting for Rankin throughout the transaction, and that Rankin became the owner of the stock "in pursuance of the contract." Rankin was a witness in his own behalf. Neither in his answer nor in his testimony did he claim that his firm was a party to the transaction. The testimony of defendant Fitch, as well as that of Dorn, shows that the transaction was for Rankin's individual benefit.

[6] Appellant further contends that the contract was invalid, because it was an agreement to pay the debt of another, and was not signed by Rankin, and that Dorn had no authority in writing to act for Rankin, citing sections 1624 and 2309, Civ. Code. "The promise of a transferee of property, made in consideration of the transfer, to assume and discharge an indebtedness of the transferror to a third person, is obligatory on him although resting in parol." 20 Cyc. 174; Sacramento Lumber Co. v. Wagner, 67 Cal. 293, 7 Pac. 705; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611; Doe v. Allen, 1 Cal. App. 560, 82 Pac. 568. Inasmuch as the agreement was one not required to be in writing, it was not essential that Dorn's authority to act for Rankin should be in writing, and section 2309 of the Civil Code has no application.

It is also claimed that Dorn's authority was "expressed in general terms" and hence he had no authority "to act in his own name," citing section 2322 of the Civil Code. Dorn was asked by appellant's attorney to state why he had not presented the contract to Rankin to be signed. He answered:

> "For the reason that Mr. Rankin did not want to buy the stock in his own name, as he said to me, and he said he didn't want to buy it in his own name for the reason that, he being in the grocery business, the creditors of the Home Circle Cash Store were so numerous, and it was Mr. Rankin's opinion if they knew he was the purchaser they would insist on being paid in full, and it was his idea that, by purchasing it in my name, I would be able to make a settlement with the creditors for a less amount than 100 per cent. on the dollar."

He testified directly that Rankin requested him (Dorn) to execute the contract in his own name.

[7] 4. The production of the promissory note showing no indorsement of payment was prima facie evidence of nonpayment. Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Hurley v. Ryan, 137 Cal. 461, 70 Pac. 292; Stuart v. Lord, 138 Cal. 672, 72 Pac. 142.

[8] 5. Finally, it is contended that the contract, plaintiff's Exhibit 3, is not the contract contemplated by section 1559 of the Civil Code, which provides as follows:

> "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

Dorn was the party of the second part in the contract and by its terms it was agreed:

> "That the party of the second part shall assume and pay or liquidate the following claims against the parties of the first part (C. A. Fitch and A. H. McDonald) or either of them, to wit: The claim of A. J. Rankin Company, and his assignee, F. B. O'Reilley, for the sum of $2,600.00 or thereabouts. The claim of Morris Bros. Company for the sum of $350.00 or thereabouts. The claim of George S. Montgomery, for the sum of $1,360.00, or thereabouts, together with interest. Pay to C. A. Fitch between $100.00 and $150.00 immediately upon a transfer of all of the stock."

There was evidence, and the court found, that Rankin, in accordance with said contract, paid Fitch the sum of $150, and Morris Bros. Company $350, but did not pay plaintiff as by said contract he agreed to do. The contention of appellant is that plaintiff, Montgomery, was to receive under this contract "nothing more than a mere incidental benefit" and that, applying the recognized definition of the word "expressly," the conclusion "is inescapable that the same [the contract] was never intended for the 'express benefit' of plaintiff, Montgomery, in this action, and is therefore not within the provisions of section 1559 of the Civil Code." Cases are cited, of which Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100, is an example, where the court said:

"The general rule applicable to cases of this kind is 'that, when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other."

Is this such a case? In our opinion, the contract cannot be so construed. The contract reads:

"That the parties of the first part [Fitch and McDonald] sell, and the party of second part [Dorn] buys [describing the shares of stock] upon the following terms and conditions, to wit: That the party of the second part shall assume and pay," etc., as quoted above.

In addition to the promise to pay the claims mentioned, Dorn (Rankin) was to give Fitch a position in case Dorn (Rankin) succeeded in reorganizing the corporation whose stock he was buying, and Fitch was to receive some of the shares of this new corporation if organized. There is nothing in the contract, however, that gives the slightest ground for the contention that plaintiff's interest in it was merely incidental. The payment of the claims mentioned was the chief consideration for the transfer of the stock, and when we substitute Rankin for Dorn, as the evidence fully warrants our doing, it seems to us very clear that the contract was made "expressly for the benefit" of plaintiff. Dorn testified that in making the sale of the stock Fitch insisted that certain claims against him should be paid, among them the claim of Montgomery evidenced by the note in suit. Hence the provision in the contract for the payment of this claim. Dorn delivered the contract to Rankin, who must be presumed to have known what his obligations were under it. He discharged part of them pursuant to the contract, and we can see no reason for holding that he should not discharge the one here involved. Many cases might be cited to show that section 1559 is not confined in its application to the case of a sole or primary beneficiary. Washer v. Independent Mining Dev. Co., 142 Cal. 702, 76 Pac. 654, Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71, and Goff v. Ladd, 161 Cal. 257, 118 Pac. 792, are among such cases. The principle here involved is further illustrated in cases such as Malone v. Crescent City M. & T. Co., 77 Cal. 38, 18 Pac. 858. There defendant agreed to pay a certain amount to a creditor of one Murray, who was engaged in running logs for defendant. It was held that an original indebtedness was thus created in favor of the creditor of Murray, and that, if a contract be for the benefit of a third person, even though he be not cognizant of it when made, the promise, if adopted by him, is deemed to have been made to him, and he may sue thereon, though the whole consideration moved to the promisor from the original promisee; and it is no objection to such action that the original promisee might also sue upon the promise. This principle was applied where the grantee of a mortgagor assumed the payment of the mortgage debt. Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27. See, also, Meyer v. Parsons, 129 Cal. 653, 62 Pac. 216; Tevis v. Savage, 130 Cal. 411, 62 Pac. 611.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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25 Cal. App. 729

PEOPLE v. AMADIO. (Cr. 540.)

(District Court of Appeal, First District, California. Nov. 11, 1914.)

1. Criminal Law (§ 553*)—Evidence — Sufficiency.

Contradictions and inconsistencies in the testimony of prosecutrix do not make her testimony inherently improbable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.*]

2. Criminal Law (§ 1159*)—Evidence—Sufficiency.

That conflict appears in the testimony of the prosecution or on the whole case is not ground for a reversal of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

3. Witnesses (§ 380*) — Impeachment — Inconsistent Statements.

The district attorney may, in attempting to impeach accused as a witness, call his attention to his testimony on a prior trial, though what was said and done by the district attorney on the former trial was to trap accused into an inadvertent answer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210–1219; Dec. Dig. § 380.*]

4. Criminal Law (§ 1171*)—Trial—Misconduct of District Attorney.

Personal references by the district attorney to counsel for accused made in the heat of trial are not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

5. Criminal Law (§ 1137*)—Election of Offense—Effect.

Where the district attorney, at the suggestion of counsel for accused, elected to rest his case on a particular transaction, and accused, through his counsel, acquiesced in the election, accused could not complain because the district attorney selected a date different from that alleged in the information.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

6. Criminal Law (§ 1032*)—Election of Offense—Effect.

Where the criminal act is shown to have been committed prior to the filing of the information and within the period of limitations, complaint cannot be made on appeal on the ground of variance between the date alleged in the information and the date proved, and accused, complaining of a variance, must show that he suffered thereby or was taken by surprise, and that injury resulted to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. § 1032.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Superior Court, Alameda County; L. S. Church, Judge.

Antonio Amadio was convicted of crime, and he appeals. Affirmed.

Eric G. Scudder, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. We are satisfied that none of the points made in support of the appeal is sufficient to warrant a reversal.

[1] The contention that the testimony is inherently improbable is based entirely upon claimed contradictions and inconsistencies in the testimony of the prosecutrix. Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability.

[2] The best that can be said in favor of the argument in support of the appeal is that there is a pronounced conflict in the testimony offered upon behalf of the prosecution, but it is only a conflict; and, whether it appear in the evidence offered on behalf of the people or in the evidence adduced upon the whole case, it will not constitute a ground in this court for a reversal of the judgment.

[3] We see no prejudice to the defendant in the conduct of the district attorney that will justify this court in reversing the judgment. Whatever was said and done by the district attorney in the first trial of the case may or may not have been by way of trapping the defendant into an inadvertent answer; but, however that may be, the district attorney was within his rights when, in an attempt at impeachment, he called the attention of the defendant upon the second trial of the case to his testimony given upon the prior trial.

[4] The district attorney's references to counsel were purely personal, and evidently made in the heat of battle, and we fail to see how they operated to prejudice the defendant.

[5] With reference to the contention that the proof adduced at the trial is at variance with the allegations of the information with respect to the date of the commission of the alleged offense, we are satisfied that the district attorney had the right to elect, and did elect, upon the suggestion of the counsel for the defendant, to rest upon a particular transaction as the foundation of his case, and that the defendant, through his counsel, acquiesced in that election. No particular harm, therefore, came to the defendant by reason of selecting a date different from that alleged in the information.

[6] Moreover, we believe it to be the general rule that, if the act is shown to have been committed prior to the filing of the information and within the period of the statute of limitations, no complaint can be made here upon the ground of a variance. Even if a variance had occurred, it was incumbent upon the defendant, in view of the election made, to show that he had suffered by that variance or was taken by surprise, and that injury to him resulted therefrom.

We are satisfied from a review of the evidence, direct and circumstantial, that it is sufficient to warrant the verdict of the jury.

The judgment and order appealed from are affirmed.

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25 Cal. App. 727

PEOPLE v. McALPINE. (Cr. 515.)

(District Court of Appeal, First District, California. Nov. 10, 1914.)

1. CRIMINAL LAW (§ 1137*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY—INVITED MISCONDUCT.

The misconduct if any of the district attorney in asking questions of a witness invited by prior questions asked by accused's counsel cannot be complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

2. CRIMINAL LAW (§ 1171*)—APPEAL—MISCONDUCT OF DISTRICT ATTORNEY — CURING BY CONDUCT OF COUNSEL FOR ACCUSED.

The misconduct of the district attorney in asking a witness questions is cured by subsequent questions of counsel for accused, put to him when a witness in his own behalf, and bringing out the identical matter embraced in the questions complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 3126, 3127; Dec.Dig. § 1171.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

C. W. McAlpine was convicted of crime, and he appeals. Affirmed.

Geo. J. McDonough, of Oakland, and Henry B. Lister, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and John J. Barrett, of San Francisco, for the People.

PER CURIAM. The defendant in this case was charged with the crime defined by section 593 of the Penal Code. He was convicted, and has appealed from the judgment and the order denying his motion for a new trial.

The points made in support of the appeal are the misconduct of the district attorney in asking certain questions, and that the evidence is insufficient to support the verdict and judgment.

[1, 2] There is no merit in the claim that the district attorney was guilty of misconduct. Perhaps he should not have asked the questions complained of, but the record shows fairly enough that the questions complained of were invited by previous questions of counsel of the defendant. Moreover, whatever harm resulted from the asking of those questions was cured and condoned by the subsequent question of counsel for the defendant, put to the defendant when a witness in his own behalf, which brought out very emphatically and distinctly the identi-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cal matter embraced in the questions complained of. It is the settled rule that error, if any, of the kind complained of is cured by the bringing out of the same subject-matter by defendant's counsel.

As to the next contention, the court entertains no doubt that the proof on the part of the prosecution in the trial court abundantly establishes the fact that the complaining corporation was authorized to do business at its location at the time of the commission of the offense, and that it was so doing business under proper legal authority. It is contended that the evidence is further insufficient to establish the fact that the defendant was the perpetrator of the offense; but we are satisfied that the evidence upon the whole case, direct and circumstantial, amply supports the verdict and judgment in this respect.

For the reasons stated, the judgment and order appealed from are affirmed.

25 Cal. App. 726

PEOPLE v. LUX. (Cr. 531.)

(District Court of Appeal, First District, California. Nov. 10, 1914.)

Witnesses (§ 268*)—Cross-Examination of Accused—Scope of Direct Examination.

Where accused testified on her direct examination relative to her possession of the pistol with which the homicide was committed, it was proper to permit her to be cross-examined as to what she did with the pistol prior to the shooting and where she carried it on her person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Hazel Lux was prosecuted for murder, and appeals from a judgment of conviction. Affirmed.

Gehring & Wyman, of Oakland (A. L. Frick, of Oakland, of counsel), for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. It is conceded that the evidence upon the whole case is sufficient to support the verdict; and the only point made is the alleged error in the cross-examination of the defendant. The direct examination of the defendant upon one particular point related to her possession, prior to her going to a moving picture show, of a pistol—the pistol with which it was alleged she committed the crime of murder charged against her. The direct examination unequivocally referred to this pistol and the defendant's possession of it. The court is satisfied that the cross-examination on that point was germane to the direct examination. The people were entitled to know what she did with the pistol prior to the shooting and where she carried it on her person. There is no doubt at all in our minds but that the cross-examination on that subject was legitimate and proper and without any prejudice to the defendant; and, that being the only point in the case, the judgment and order appealed from are affirmed.

PEOPLE v. AH FONG. (Cr. 525.)

(District Court of Appeal, First District, California. Nov. 10, 1914.)

Statutes (§ 114*)—Title and Subject—Practice of Medicine.

The title of St. 1913, p. 722, regulating the practice of medicine and surgery, *held* sufficient to indicate the entire subject-matter of the act within the requirements of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145, 147–149; Dec. Dig. § 114.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Ah Fong was convicted of violating the act for the regulation of the practice of medicine and surgery, and he appeals. Affirmed.

William H. Schooler, of Chico, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen. (Louis H. Ward, of San Francisco, of counsel), for the People.

PER CURIAM. The record shows that this is an appeal from a judgment of conviction and from an order denying the motion of the defendant for a new trial, in a case wherein the defendant was charged with violating an act for the regulation of the practice of medicine and surgery, etc., approved June 2, 1913. Stats. 1913, p. 722.

There is no merit in the contention that the statute under which the defendant was prosecuted and convicted is unconstitutional. In our judgment, the title of the act indicate with sufficient detail the entire subject-matter of the act; and we are satisfied that there is not in the body of the statute in question anything which is in conflict with it title or not included within the scope thereof.

We are also satisfied, from a reading of the entire evidence in the case, that it is sufficient to sustain the verdict and the judgment.

For these reasons, the judgment and order appealed from are affirmed.

25 Cal. App. 724

TYSON et al. v. REINECKE. (Civ. 1387.)

(District Court of Appeal, First District, California. Nov. 7, 1914. Rehearing Denied by Supreme Court Jan. 5, 1915.)

1. Guaranty (§ 56*)—Discharge of Guarantor—Change in Obligation—"Due Date."

One interested in a corporation receiving material executed an instrument whereby he guaranteed the payment at "due date" of all accounts for goods already delivered and to be delivered to the corporation by the seller. At the time of the execution of the instrument, the seller extended to the corporation 60 days' credit. Subsequently the period of credit was changed to 30 days, with the option to the corporation at the expiration of that time to give notes for 30 or 60 days. Notes for 30 or 60 days were given. *Held*, that since, by the terms of the guaranty, credit was not restricted as to time, any reasonable change as to the length of credit did not relieve the guarantor from liability, unless materially changing the contract of guaranty, and the adoption of the new period of credit and execution of notes did not release the liability of the guarantor; the words "due date" meaning, in commercial transactions, that an account will be paid at the time fixed for its payment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 67; Dec. Dig. § 56.*]

2. SALES (§ 191*)—PAYMENT — NOTES — EVIDENCE.

Mere receipts for notes given by a buyer to the seller and entries in the books of account of the seller referring to them as received in payment do not make the notes absolute payment when it was not the intention of the parties that the notes should be accepted in satisfaction of the accounts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 505; Dec. Dig. § 191.*]

3. ATTACHMENT (§ 154*)—WRIT OF ATTACHMENT—AFFIDAVIT—AMENDMENTS.

A motion to dismiss a writ of attachment on the ground that the writ was issued for a greater amount than that stated in the affidavit may be denied, and the court may, as authorized by Code Civ. Proc. § 558, permit an amendment of the writ to conform to the affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 432-443; Dec. Dig. § 154.*]

4. GUARANTY (§ 1*)—COLLATERAL CONTRACT —"CONTRACT OF GUARANTY."

A contract of guaranty is a collateral contract for the direct payment of money, and it is immaterial whether the obligation is principal or collateral.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by James Tyson and others, as trustees, against S. W. Reinecke. From a judgment for plaintiffs, and from orders denying a new trial and refusing to discharge an attachment, defendant appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant. Denson, Cooley & Denson, of San Francisco, for respondents.

RICHARDS, J. This is an action on a guaranty. The appeal is by defendant from a judgment and from an order denying him a new trial. Defendant also appeals from an order refusing to dissolve an attachment.

Plaintiffs are assignees of Gage, Mills & Co., a partnership, and the action is brought for the reasonable value and the alleged contract price of lumber alleged to have been sold and delivered by said partnership to the Metropolis Construction Company, a corporation, and is founded upon a written instrument of guaranty signed by defendant in the words and figures as follows:

"San Francisco, Cal., Dec. 21, 1909.

"Mss. Gage Mills & Co., No. 2005 Market St., City—Gentlemen: In consideration of having delivered lumber & other materials & that you will continue to deliver same to the Metropolis Construction Co. of No. 24 Cal. St.—I hereby guarantee the payment—at due date—of all the accounts for goods already delivered & to be delivered to the above Construction Co. in the future. Yours truly, A. W. Reinecke.

"Witness: Louis P. Schwerdt."

The answer admits the execution by the defendant of the said instrument of guaranty, but denies all the other material allegations of the complaint, and pleads exoneration of the guaranty under section 2819 of the Civil Code.

After trial, the court found in favor of the plaintiffs on all the issues, and judgment was accordingly entered against the defendant for the sum of $6,319.91, being the amount of plaintiffs' demand and interest from the time of commencing suit to the rendition of judgment. The defendant owned one share of stock in the Metropolis Construction Company. He was also, as he termed it, "accommodation treasurer" of the corporation, but performed none of the duties of that office. The partnership had been selling lumber to the corporation for several weeks, when W. L. B. Mills, a member of the partnership, prepared the instrument of guaranty here declared on, and sent it by Louis P. Schwerdt, a salesman of the partnership, to the defendant, with the request that the defendant should sign the same, which the defendant did. Originally, and for several months after the guaranty was made, the partnership was selling to the corporation "cash on 60 days." Subsequently, the corporation being slow in its payments, the partnership refused to give the corporation 60 days' time to pay its bills; and it was accordingly arranged between them that 30 days' time should be given the corporation when, if it could not pay, notes at between 30 days and 60 days would be accepted. Under this arrangement, the partnership accepted a series of notes from the corporation, commencing in May, 1910, and ending in November, 1910, which notes were payable in 30, 35, 45, and 60 days after date. The notes given by the corporation to the partnership to and including September, 1910, were all paid by the corporation at maturity. A note given October 31, 1910, payable in 30 days, was also paid at maturity. The corporation, however, gave, and the partnership accepted, two notes which are unpaid for goods sold in September, 1910, also two notes for goods sold in October, 1910, which are not paid. These notes were given and accepted by the partnership in each instance 30 days after the sale and for a sufficient number of days to make the day of payment in each instance more than 60 days after the sale.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It is the contention of the defendant that these four notes, aggregating $5,100, extended the time of payment of the amount, and that the acceptance of such notes by the partnership, under the terms of section 2819 of the Civil Code, exonerated the defendant pro tanto from the guaranty.

There can be no doubt that, if what was done in this case as to each of the notes would amount to an extension of the time of payment thereof beyond what was understood by the parties to be meant by the term "due date," the defendant was exonerated, and plaintiff cannot recover. Daneri v. Gazzola, 139 Cal. 418, 73 Pac. 179; 20 Cyc. 1443. The question then to be decided calls for a construction of the term "due date." There seems to be no judicial interpretation of the meaning of the term; but it is clear that in commercial transactions, generally speaking, it means that an account will be paid at the time fixed or agreed upon for its payment. In this case, at the time the guaranty was executed, the copartnership was selling to the corporation goods upon a credit of 60 days; but there is no circumstance in the case that would warrant the conclusion that there was a usage of trade or a contract between the parties, under which the corporation was entitled to a credit upon all sales at 60 days. Schwerdt, the salesman for the partnership, who took the guaranty to the defendant to be signed, had no authority to bind the partnership to give the corporation 60 days' credit; nor did anything he said on that occasion have that effect. What he said there amounted to no more than a statement that at that time the partnership was giving the corporation 60 days' credit on all sales. Mills, who acted exclusively for the partnership concerning these matters, testified that the conversation between Schwerdt and the defendant as to the 60 days' credit was not reported back to him. If this was true, there is nothing in the record to show that the partnership knew that defendant was aware of the length of credit that was being extended to the Metropolis Construction Company; so, from the facts in the case, we hold that, even if the defendant had knowledge that the corporation was receiving 60 days' credit on all deliveries at and before the execution of the guaranty, there being no usage or understanding to the contrary, the partnership was authorized to extend the corporation credit for any reasonable length of time, and that some length of credit was contemplated by all the parties concerned.

But, as by the terms of the guaranty the credit was not limited or restricted in any respect as to time, we think that any reasonable change as to the length of the credit would not relieve the guarantor from his liability thereunder, unless such term of credit materially changed the contract of guaranty. It is not claimed that the terms, as changed, were unreasonable.

When the guaranty was executed, the period of credit was 60 days. Subsequently, in order that the corporation and the partnership might continue business relations, that period of credit was changed and a new date of payment was agreed on, namely, that 30 days' credit should be given, at the expiration of which the account was to be paid or at the option of the corporation it was to give its note for some period of time, varying according to circumstances from 30 to 60 days. Under these facts, it is apparent that the giving of the notes was a part of the new arrangement which did not, in any material respect, change the contract of guaranty, and they marked the period of credit within which the payments were to be made. This brings the guarantor within the terms of his guaranty, namely, that the accounts would be paid at "due date," and his liability follows.

[2] Coming now to the proposition of whether or not the notes may be regarded as having been given and accepted as absolute payment, little need be said. Receipts for the notes and entries in the books of account kept by the partnership refer to the notes as having been received in payment. This, with other evidence in the record, would be sufficient, no doubt, to support a finding that the notes were accepted by the partnership as payment (Jenne v. Burger, 120 Cal. 444, 52 Pac. 706), but Mr. Mills, who, as before stated, acted throughout these transactions for the partnership, denied that the notes were so accepted, and it is also in evidence that, in looking over the books of account of the concern and observing that the notes were entered therein as payment, Mills told the concern's bookkeeper that those entries were incorrect, and in the future to enter them as notes. In brief, it appears quite clear from a reading of the whole record that it was not the intention of the parties that the notes should be accepted in satisfaction of the accounts. In any event, it is certain there is a conflict in the evidence on this branch of the case, and for this reason we cannot, even if we were so inclined, disturb the finding of the court, which was against the defendant.

[3] As to the appeal from the order denying a motion to dissolve the writ of attachment issued in the above-entitled action, it appears that the ground of the motion was that the writ of attachment issued for a greater amount than that stated in the affidavit. Assuming that this was true, in which event the motion would be well founded (Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019; O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465), still, as the court, under the terms of section 558 of the Code of Civil Procedure, as amended in 1909, permitted an amendment of the writ which made it and the affidavit

therefor agree in amount, and as we think in so doing the court acted within the authority vested in it by that section, it follows that its order cannot be disturbed.

[4] Taking up the last point made by defendant, we think it equally clear that a contract of guaranty is a contract "for the direct payment of money." It is a collateral contract for a "direct payment of money." If the payment is "direct," it is immaterial whether the obligation is principal or collateral. Hathaway v. Davis, 33 Cal. 161, 167; San Francisco v. Brader, 50 Cal. 506; County of Monterey v. McKee, 51 Cal. 255; McKee v. Monterey County, 51 Cal. 275.

It follows from what has been said that the appeal from the judgment and from the order refusing a new trial, as well as the appeal from the order refusing to dissolve the attachment, should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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25 Cal. App. 651

In re KELLY et al. (Civ. 1279.)

(District Court of Appeal, Third District, California. Nov. 4, 1914.)

1. ADOPTION (§ 3*)—ABANDONED CHILDREN—STATUTES—CONSTRUCTION.

Civ. Code, § 224, defining an abandoned child, which may, without the parent's consent, be adopted, whereby the natural relation between parent and child is destroyed, is to be strictly construed.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.*]

2. ADOPTION (§ 7*)—"ABANDONED CHILD"—ABANDONMENT.

Within Civ. Code, § 224, defining as an "abandoned child," which may be adopted without consent of the parents, a child deserted by both parents or left in the care and custody of another by its parents, without agreement or provision for its support, for the period of one year, mere failure of parents of a child, in the care and under the custody of another, to contribute, while it is in such custody and care, to its support and maintenance for a year, does not constitute abandonment.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, First and Second Series, Abandon.]

3. ADOPTION (§ 7*)—ABANDONED CHILDREN—"ABANDONMENT."

To constitute an abandonment within Civ. Code, § 224, as to adoption of abandoned children, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor; that is an absolute relinquishment by the parents of custody, and control of it; and thus the laying aside by them of all care for it must be shown.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, First and Second Series, Abandon.]

4. ADOPTION (§ 7*)—ABANDONED CHILDREN—ABANDONMENT—INTENTION.

Abandonment, within Civ. Code, § 224, as to adoption of abandoned children, is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the parent, showing a determination not to have the benefit of the right to which he is entitled.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*]

5. ADOPTION (§ 13*)—ABANDONED CHILDREN—ABANDONMENT—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show abandonment, within Civ. Code, § 224, as to adoption of a child abandoned by its parents.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 23; Dec. Dig. § 13.*]

6. ADOPTION (§ 7*)—ABANDONED CHILDREN—"AGREEMENT FOR SUPPORT."

Though not kept, a promise by the father to compensate, when able to do, persons for taking care of and supporting his child, constitutes the "agreement or provision for its support," absence of which Civ. Code, § 224, makes essential to a child being abandoned, as regards right to adopt it.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

In the matter of the petition of William P. Kelly and another to have Mary Louise Donahoo, a minor child, declared an abandoned child. From a judgment for petitioners, the parents of the child appeal. Reversed.

Rowan Hardin, of Sonora, for appellants. Crittenden Hampton, of Sonora, for respondents.

HART, J. This proceeding, as its title readily indicates, was instituted by the above-named petitioners, in the superior court of Tuolumne county, for the purpose of securing the judgment of said court that one Mary Louise Donahoo, a minor, is an abandoned child within the purview of section 224 of the Civil Code; the ultimate object of the judicial declaration so sought herein being to enable said petitioners to adopt said minor. The petition alleges facts sufficient to state a case of abandonment under the section of the Civil Code above mentioned, and the same was answered and contested by the parents of the minor. At the hearing of the proceeding, evidence for and against the claims of the petition was taken, the court found that said child had been abandoned by its parents within the contemplation of said section 224 of the Civil Code, and rendered and caused to be entered judgment in accord with said finding. This appeal is prosecuted by the parents of said minor from said judgment.

The single question submitted on this appeal is whether the said minor is an abandoned child within the meaning and intent of the Code section above referred to.

Among other provisions, said section contains the following:

"Any child deserted by both parents or left in the care and custody of another by its parent or parents, without any agreement or provision for its support, for the period of one year, is deemed to be an abandoned child within the meaning of this section. * * *"

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is claimed and the petition avers that the parents of the minor concerned here left said minor in the care and custody of the petitioners, without having made any agreement or provision for its support, for a period of more than one year.

The salient facts upon which this controversy is to be determined are practically undisputed, and may be briefly stated as follows:

The minor involved in this controversy is one of twins—a boy and a girl—born to the contestants, Mr. and Mrs. M. J. Donahoo, on the 22d day of January, 1909. The mother of the twins was, after the birth thereof, left in such delicate health that she became apprehensive that she could not properly take care of and maintain both the infants, and the parents therefore came to the conclusion that the infants would fare the better by placing one in the custody and under the control of a sister of the father of the children, a Mrs. Emma Swanson, then residing in the city of Sonora. To this end, and some three weeks after the birth of the infants, the father and mother completed arrangements whereby Mrs. Swanson took the custody and assumed the responsibility of caring for and maintaining the girl baby. Shortly after the infant was given into the custody of Mrs. Swanson, and, while yet in such custody, the Donahoos departed for Los Angeles, where they took up their residence. The infant remained with Mrs. Swanson until the month of June, 1912—a period of over three years—when the latter was taken so seriously ill as to have suffered mental derangement to a degree which required her removal to and, for a brief period, incarceration in the state hospital for the insane at Stockton.

The petitioners were near neighbors of Mrs. Swanson, and so became aware of her illness immediately upon the happening thereof. They gave her much attention and did all that lay within their power to make her as comfortable as she could be made under the circumstances. They took charge of and ministered to the wants and necessities of the baby girl during Mrs. Swanson's illness and prior to her removal to the asylum. They communicated the fact of Mrs. Swanson's illness to the Donahoos, and informed them that she was greatly embarrassed financially. Upon receiving that information, the father of the child forwarded to the petitioners, for the use and benefit of Mrs. Swanson, the sum of $30. After Mrs. Swanson had been committed and taken to the asylum, the petitioner, William P. Kelly, addressed a letter to the parents of the child in which he declared that he and his wife had become greatly attached to the baby, that they had no children of their own, and that they desired to adopt the infant. To that proposition no response was made by the Donahoos, so far as the record discloses. The petitioners retained custody of the child after Mrs. Swanson was sent to the asylum and for over a year cared for and supported her. During that period a number of letters was written by the Donahoos to the petitioners concerning Mrs. Swanson and the child. In one of said letters the father of the baby explained that he had just suffered the loss of several hundred dollars through the failure of a concern for which he had been working, but that he was then working for another company, and that, "as soon as I get a pay day, I will send you more money, and as often as I do get one." He further stated in said letter that "if anything should happen to sister (referring to Mrs. Swanson) we will arrange about Louise," referring to the baby. The other letters above referred to as having been written to the Kellys by the Donahoos disclose a commendable degree of parental solicitude for the child, and, while they contained no direct statements indicative of an intention on the part of the Donahoos to compensate the petitioners for caring for and supporting the baby, the general tenor of their language does not support the conclusion that the parents intended to abandon or relinquish their right to its custody.

It appears that, a few months after being committed to the asylum, Mrs. Swanson sufficiently recovered her physical and mental health to justify her discharge from that institution, and so, in the month of December, 1912, she left the asylum and went to Fresno, where she remained until July, 1913, when, at the request of the Donahoos, she went to Sonora for the purpose of regaining possession of the child. Mrs. Swanson testified in part as follows:

> "As soon as I regained my health (after she was released from the asylum), I was in communication with Mrs. Kelly all the time relative to the welfare of the little girl. In June, 1913, arrangements were made with Mr. Donahoo to send me to Sonora to get the child, as shown by the letter from Mr. and Mrs. Donahoo to me, dated the 16th day of June and the 23d day of June, 1913. I came to Sonora about the 10th day of July for the purpose of getting the little girl, acting in behalf of Mr. and Mrs. Donahoo. I did not know that any proceedings had been commenced at that time to have the child declared an abandoned child. I was informed of such proceedings by Mr. Kelly after I reached Sonora. From my knowledge of the conditions surrounding Mr. and Mrs. Donahoo in this matter I know neither of the parents had any intention at any time of abandoning the little girl. At one time I tried to get the consent of the father and mother to adopt the little girl, but they refused to consider the matter at all. When I came to Sonora in July, 1913, Mr. Kelly told me that Mr. Donahoo had promised to pay for the care of the child, but that he had failed to keep his promise. I have recollections during lucid moments of my sickness in July, 1912, of Mrs. Kelly telling me that she and her husband would care for the child and that Mr. Donahoo had promised to pay for the care of the child. At the time I was taken sick, Mr. Donahoo was living in Los Angeles. After I

regained my health, I knew Mr. Donahoo's financial condition during the latter part of the year 1912 and the early part of the year 1913, and knew that he was out of work a portion of the time and that he had sickness in the family and was unable to pay his bills. The sum of money I had in my possession at the time I was taken sick was money sent me by Mr. Donahoo. * * * Mr. Donahoo sent me money for the support of the child, and whenever I requested it he sent me money for my support."

M. J. Donahoo testified that, during the time the child was with his sister, Mrs. Swanson, he paid for its support and maintenance and at times paid for the support of Mrs. Swanson. He said that, prior to the receipt from William P. Kelly of a telegram on June 3, 1912, telling him of the illness of Mrs. Swanson, he was unaware of the latter's physical and mental condition. At that time his wife was ill in Los Angeles and he was unable to collect money which was due him, and for these reasons he did not go to Sonora to take possession of his child and to render succor to his sister.

"I knew," he continued, "the child was in good hands with Mr. and Mrs. Kelly and was satisfied that I could make settlement with them afterwards for the trouble in caring for the child, when I had means to do so. Prior to the writing of the letter of July 7th, the petitioners' Exhibit A, I wrote to Mr. Kelly asking him to contribute for the child and that I would contribute to him for it as soon as I was able. The money which I mentioned being sent in the letter marked petitioners' Exhibit B was intended to apply toward the support of the child, and in compliance with my promise to reimburse Mr. Kelly for his trouble and expense in caring for the child. At no time did I have any intention of abandoning said child, and it was my intention to come and get the child and reimburse Mr. Kelly as soon as my finances would permit. * * * I am in a position now to pay Mr. Kelly a reasonable sum per month to reimburse him for his trouble in caring and providing for said child, and I am desirous of obtaining the child and caring and providing for her. As soon as these proceedings were commenced, I tendered money to Mr. Kelly, being the sum of $10, as testified to by Mr. Kelly herein."

Both Mr. and Mrs. Kelly testified that when Mrs. Swanson was taken ill, as above explained, they found that the child had been very much neglected; that she was weak and emaciated for want of sufficient food; that she was without proper raiment and unclean of body. They declared that they had never been remunerated by her parents for the care and support they had given the child for a period of over one year, and that no provision had been at any time made by the parents for the child's care and maintenance.

The foregoing constitutes a statement in substance of all the facts and some of the testimony upon which the judgment appealed from was founded. As stated, and as must readily be observed from an examination of the above statement, there is in reality no dispute as to the facts, and the sole question is: Was the court legally justified in declaring and adjudging upon said facts that the minor involved here was an abandoned child within the meaning of section 224 of the Civil Code, supra?

We cannot persuade ourselves that the conclusion of the learned trial judge is sustainable.

[1] In the first place, it is to be remarked that a statute which authorizes, upon a showing of the existence of certain designated facts or conditions, a court to make a decree or an order whereby the natural relation between parent and child is destroyed, must be strictly construed, and is therefore to be applied in those cases only in which the precise facts or conditions prescribed by such statute are shown to exist. As is said in the case of Matter of Cozza, 163 Cal. 514, 522, 126 Pac. 161, 164 (Ann. Cas. 1914A, 214):

> "The adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their children was against its policy and repugnant to its principles. It had its origin in the civil law and exists in this state only by virtue of the statute which, as above stated, expressly prescribes the conditions under which adoption may be legally effected. Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is expressly dispensed with, the court has no jurisdiction in the matter."

While the effect of an adjudication that a minor is an abandoned child under the terms of section 224 of the Civil Code is not to directly sever the relation of parent and child, still, since the result of such adjudication under said section is to enable a third party to adopt such child without first procuring the consent of its parents, thus practically depriving the parents of any voice in the matter of an adoption, in case a proceeding for that purpose be inaugurated, that section is also to be subjected to a strict construction when its application is invoked.

[2] In the second place, we are persuaded to say that the mere failure of the parents of a minor child, in the custody and under the care of a third party, to contribute, while it is in such custody and care, to the support and maintenance of such child for a period of one year, does not itself constitute an abandonment of the minor within the purview of said section of the Code. If the rule were otherwise—that is, if an adjudication of abandonment could legally be predicated on the mere failure by the parents to support their minor children—the result, in innumerable instances, would be to work a manifest wrong upon parents. It is not difficult to conceive of circumstances wholly beyond the control of parents having the deepest affection for their children which would render it impossible for them to support their children or care for them in a proper way. It would, indeed, be a harsh rule which would, under such circumstances, au-

thorize a judicial determination by which the natural right of the parents to the custody and control of their children would be forever severed.

[3, 4] To constitute an abandonment under said section of the Code, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor. In other words, there must be shown an absolute relinquishment of the custody and control of the minor, and thus the laying aside by the parents all care for it. Crabb on Synonyms; Pidge v. Pidge, 44 Mass. (3 Metc.) 257, 265; Sikes v. State (Tex.) 28 S. W. 688, 689; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17; Dikes v. Miller, 24 Tex. 417, 424; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054, 1058. And abandonment is a question of intention, which must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled. Breedlove v. Stump, 11 Tenn. (3 Yerg.) 257, 276.

[5] We have been unable to perceive in the evidence adduced at the hearing of this proceeding a single fact which may fairly be said to indicate an intention in the parents of the child concerned here to desert said minor or relinquish their natural right to her custody, care, and control. To the contrary, according to our interpretation of the proofs, the parents not only manifested a desire to perpetuate all the consequences of the natural relation subsisting between them and the infant, but displayed commendable anxiety for its welfare.

The evidence, without dispute, shows that, fearful lest the delicate physical condition of the mother was such that she could not properly nourish the two infants born at the same time to her, the parents arranged with the sister of the father to take custody and care of the infant girl; that the father, during the period that the child was with his sister and until the latter became ill and unable to bestow proper care upon the baby, paid the custodian of said child for the service of caring for it; that, after Mrs. Swanson became ill, the father sent to the petitioners the sum of $30 which, while intended to be used for the benefit of the sick woman, was doubtless in part or perhaps in full payment of her services in caring for the infant; that the general tenor of the language of the letters from both the father and mother of the child to the petitioners, after the latter had voluntarily taken the custody of the infant, clearly indicated an intention on the part of the parents to reimburse the petitioners for their services in looking after and attending to the welfare of the child; that, as a matter of fact, the father agreed to compensate the petitioners for their services to the child whenever he found himself financially able to do so.

Under the facts as thus recapitulated, and which, as stated, stand uncontradicted, it is difficult to conceive how an adjudication that the minor in controversy is an abandoned child, or was abandoned by its parents, within the meaning of the language of section 224 of the Civil Code, can be upheld.

[6] The promise by the father of the child that he would compensate, when able to do so, the petitioners for taking care of and supporting it, constituted the "agreement or provision for its support" contemplated by said section, and the fact that the father failed to keep said promise can prove nothing but a violation of the agreement.

It may be true that the child, now approaching her sixth year, and having been with the Kellys for over a year, has formed a strong attachment for the petitioners, as they no doubt have for the child. It may also be true that the Kellys are better circumstanced than are her parents for bestowing upon her proper care. But, while these considerations might, perhaps, be of more or less importance in disposing of a guardianship proceeding, they cannot, obviously, enter into the determination of the question of adoption against the consent of the parents or of a proceeding, like the present, which, if sustained, would render it legally unnecessary to consult the desires or wishes of the parents in a proceeding looking to the adoption of their minor children by another.

We conclude that the learned trial judge erred in the conclusion crystallized in the judgment from which this appeal is prosecuted, and said judgment is therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 678

KLAMATH LUMBER CO. v. CO-OPERATIVE LAND & TRUST CO. (Civ. 1261.)

(District Court of Appeal, Third District, California. Nov. 5, 1914.)

1. Frauds, Statute of (§ 26*)—Original or Collateral Promise—Credit to Promisor.

Where the agent of a land company, accompanied by a purchaser of land from such company, in negotiating for the purchase of potato crates for the use of such purchaser, asked for credit, whereupon the seller said that, if the land company would pay him, he would do it, and the land company's agent said that that was all right, and they would do that, and the seller understood that he was selling to the land company and looked entirely to it for payment, the land company was not merely the principal debtor, but the only debtor, and there was no question of a guaranty under the statute of frauds (Civ. Code, § 1624, subd. 2).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 35–42½; Dec. Dig. § 26.*]

2. Corporations (§ 425*) — Authority of Agents—Estoppel.

Where a seller of chattels, for which the agent of a corporation agreed that the corporation would pay, though they were to be used by a third party, was told by the person having control of the corporation's business that the agent was handling the matter, and that the seller should take the matter up with him, and whatever he did would be all right, and in reliance thereon the chattels were sold, the corporation was precluded from denying the agent's authority to bind it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

3. Sales (§ 52*) — Actions for Purchase Price—Evidence.

In an action for the purchase price of chattels, in which defendant claimed that the sale was made to a third party, evidence that such third party was in Oregon in explanation of plaintiff's failure to call him as a witness was properly admitted, especially where the facts sufficiently appeared without objection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118–144, 1045; Dec. Dig. § 52.*]

4. Appeal and Error (§ 1051*)—Harmless Error—Admission of Evidence.

In an action for the purchase price of goods, in which defendant claimed the sale was made to a third party, the admission of a question asked the seller's president as to whether he had any agreement with defendant, though technically objectionable, was without prejudice, where, from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with defendant and the testimony made it obvious that such was the opinion of the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

5. Trial (§ 203*)—Instructions—Issues.

An instruction that plaintiff brought the action to obtain a judgment against defendant for $600 alleged to be due plaintiff from defendant for the sale of potato crates, for which plaintiff alleged defendant promised to pay at the rate of 15 cents per crate, no part of which sum plaintiff alleged had ever been paid, was not improper, though it was probable that the jury had already been advised of the claim of each party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. § 203.*]

6. Sales (§ 364*)—Actions for Price—Instructions.

Such instruction was not objectionable because of the failure to refer to a delivery as well as a sale, as any one would understand that "sale" implied a delivery, especially where there was no question as to the delivery of the crates; the only question being as to the party to whom they were sold.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065–1076; Dec. Dig. § 364.*]

7. Sales (§ 364*)—Actions for Price—Instructions.

In an action for the purchase price of goods, in which defendant claimed that the same was made to a third party, where there was evidence supporting plaintiff's theory of the transaction, an instruction defining an original obligation and a principal debtor and embodying plaintiff's theory was properly given, as either party has a right to an instruction based upon his theory of the case, if there is any evidence to support it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065–1076; Dec. Dig. § 364.*]

8. Sales (§ 364*)—Actions for Price—Instructions.

In an action for the purchase price of goods which defendant claimed was sold to a third party, an instruction that if the jury were satisfied from all the evidence that defendant's promise, if any was made, was an original promise to pay for the goods, and not a conditional one, it was their duty to find that fact in favor of plaintiff could not have been understood as meaning otherwise than that they should find that the promise was an original promise, if they were satisfied from the evidence that an original promise was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065–1076; Dec. Dig. § 364.*]

9. Appeal and Error (§ 1064*)—Harmless Error—Instructions.

Though the instruction embodied a truism and was unnecessary, it could have done no harm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

10. Appeal and Error (§ 1064*)—Harmless Error—Instructions.

In an action for the purchase price of goods which defendant claimed were sold to a third person, where it was admitted that they were "furnished" to the third person in the sense that they were shipped to him for use on land purchased by him from defendant, and it was defendant's contention that they were not only furnished to him, but that he alone was liable, an instruction that the fact that the goods were furnished to a third person by plaintiff was not of itself absolutely sufficient to show conclusively that the promise of defendant to pay, if any was made, was a conditional one was not prejudicial because of the reference to the furnishing of the goods to the third person as a fact, especially as such reference was favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

11. Sales (§ 53*)—Parties—Questions for Jury.

That potato crates sold for use by a purchaser of land from defendant as the result of negotiations between plaintiff, such purchaser, and defendant's agent were shipped to such purchaser was not conclusive that defendant's promise to pay was not an original promise, but only a conditional promise to pay, if the purchaser did not, but was merely a circumstance for the jury, and an instruction that it was not conclusive, though somewhat argumentative, was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145–151; Dec. Dig. § 53.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Klamath Lumber Company against the Co-operative Land & Trust Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

F. G. Ostrander, of Merced, for appellant.
F. W. Henderson, of Merced, for respondent.

BURNETT, J. The action was to recover the sum of $600 for certain sweet potato crates alleged to have been sold and delivered to defendant. The main controversy is as to whether the crates were sold to defendant or to a certain Mr. Gutman, the evidence being sharply conflicting on this point. Closely related to the foregoing is another contention by appellant that if it ever made any promise to pay plaintiff for the crates it was a conditional one—that is, it would pay if Gutman did not—and, the proviso not being in writing, it was void by reason of subdivision 2 of section 1624 of the Civil Code.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Preliminarily we may mention certain facts that are undisputed. Plaintiff was engaged in the business of retailing lumber and box materials, and the defendant principally in colonizing land, although organized for the purpose also of buying and selling personal property. One of the latter's customers was George Gutman, to whom it had sold a tract of land; the payment therefor to be made out of the crops raised. Said crops were to be marketed in the name of the corporation and the proceeds divided, one-half to be Gutman's and the other to be applied, first, on the interest, and the balance on the purchase price. Among defendant's employés was a salesman by the name of V. H. Gerard, who testified that during the time in controversy one Mr. Cone had control of defendant's business at Merced, where the crates were sold. As to the sale itself, we must, of course, accept the account that favors respondent's contention. Therefore we refer specifically to the testimony of J. H. Routt, the president and manager of plaintiff:

"About September the 5th to the 10th, in 1909, Mr. Gerard came to my office with a stranger that he introduced as Mr. Gutman, and said, 'We want to get your price on sweet potato crates,' and said that the Co-operative Land & Trust Company had sold Mr. Gutman a piece of land. * * * He spoke of Mr. Gutman as being a model farmer; the amount of crop was then growing; and I then gave him prices on sweet potato crates, car load lots to be delivered at Atwater or Livingston. The price named was 15 cents per crate. Mr. Gerard then said to me, 'There will be no money available to pay for those crates until they have made a shipment and we have received the returns, and we would like 30 days' time.' I told Mr. Gutman the prices quoted were very low and were cash prices; but I says, 'If you people [referring to the Co-operative Land & Trust Company] will pay me, I will give you the time;' and Mr. Gerard said, 'That is all right; we will do that;' and stated something of the conditions of the contract, it being a crop contract, and the money would come through their hands. Mr. Gutman had very little to say. Mr. Gerard said, 'We are not ready to close the deal with you to-day or at this time, as we want to get prices from the Merced Lumber Company, and wherever we can buy them the cheapest we will have to place the order.' They left my office, and in the afternoon I was anxious about the sale, and I went to the Co-operative Land & Trust Company's office and inquired for Mr. Gerard, but did not see him, and Mr. Cone told me that Mr. Gerard was out just then, but would possibly be in soon. I stated to Mr. Cone what I would like to see Mr. Gerard for, and I told him my conversation with Mr. Gerard at my office, and what he had said to me about Mr. Gutman farming the land and crops, and so forth, and Mr. Cone also praised Mr. Gutman very highly and seemed to think he was one of the best customers they had sold land to; * * * but Mr. Cone said: 'Mr. Gerard is handling this matter. You take the matter up with him, and whatever he does will be all right.' * * * Later I telephoned from the Klamath Lumber Company's office to Mr. Gerard. He was in the Co-operative Land Company's office and asked him about the order. He says: 'Mr. Gutman has gone home, and we have not decided just what we will do. We have quotations from the Merced Lumber Company just the same as yours, 15 cents per crate, but I will try to favor you with the business. I will turn it your way if I can. I am going out to see Mr. Gutman to-morrow morning, and I will let you know after I return.' In the afternoon of the following day Mr. Gerard called me up on the telephone and says, 'Mr. Routt, you can ship a car load of sweet potato crates to Mr. Gutman at Livingston. I asked him how many I should ship, and told him that '3,000 would make a minimum car, but we usually ship 3,500 to 4,000 crates to a car;' and he said, 'Ship 4,000;' that he would probably want more than that. * * * I ordered the crates by telephone from Sonora, and they were shipped, and when the 30 days had expired, possibly a few more, I went to Gerard and told him that the time was up, and that I would like to have our money. 'Well,' he says, 'I will see Mr. Gutman in a day or two; I don't think he has any returns or there has been any returns on the shipment of sweet potatoes.' I said, 'All right;' and in a few days after that I saw him again, and he made the same excuse; and I said: 'Mr. Gerard, I need my money and have to pay for those crates. You pay me, and then you can get your money from Mr. Gutman. I understand you get a portion of the crop anyway, and you can secure yourself. He is a stranger to me, and I am looking to you for my money, and not to Mr. Gutman.' 'All right,' he said, 'we will soon get that adjusted.' * * * I never presented any bill to Mr. Gutman in the matter; never went to see him. I make out all the bills in the office. I never wrote to him. I made no attempt to collect from Mr. Gutman, because I had an agreement with the Co-operative Company people, with Mr. Gerard, and I did not look to Mr. Gutman at all. The reason I entered up the bill in my book against Gutman is that Mr. Gerard told me to ship the shucks to Gutman. * * * I thought they were all in a sense parties to the deal, because Mr. Gerard had explained to me that the money —they had the handling of the money from the crops to some extent at least—and I expected that if there was anything due from Mr. Gutman they would collect it, and of course they, being obligated to me for the payment, would pay me. It was not my idea that I was selling to both of them. I understood that I was selling to the Co-operative Land Company for Mr. Gutman."

It would be difficult to select more apt language than the foregoing to express an agreement of sale to the defendant. The contract was made entirely with Mr. Gerard, who assumed to represent appellant. Mr. Routt declared that, "If you people (referring to defendant) will pay me, we will give you the time;" and Gerard thereupon said, "That is all right; we will do that." Furthermore it appears that Routt understood that he was selling to the Co-operative Land & Trust Company, and that he looked entirely to it for payment. It thus appears that the creditor parted with value and entered into the obligation in terms and under circumstances such as to render defendant not simply the principal debtor but the only debtor in the case.

It is equally plain that, according full credit to the testimony of Mr. Routt, no question of guaranty would arise.

[2] The only other consideration remaining as to the obligation of defendant to pay the purchase price of the crates involves the authority of Gerard to make the contract for defendant. There is no doubt, however, that Cone had full power in the premises, and his statement to Routt would bind the company and preclude any denial of Gerard's authority after plaintiff, in reliance upon it, had sold the crates.

In view of the foregoing, we do not see how it can be seriously argued that the evidence is insufficient to support the conclusion that the crates were sold to defendant; that it promised to pay for them; and that upon such promise, plaintiff relied in delivering said property.

[3] The alleged errors in the admission and rejection of testimony are hardly of sufficient gravity to merit specific notice. It was proper for plaintiff to show that Gutman was in Oregon in explanation of the circumstance that he was not called as a witness. Besides, the fact sufficiently appeared without objection.

[4] The following question was asked of Mr. Routt:

"And as president of the corporation, as the manager of the plaintiff in this action, Mr. Routt, did you have any agreement with the defendant in this action in the year 1909?"

Technically speaking, the question probably was objectionable, but the answer was entirely without prejudice, as, from the facts testified to by the witness, the conclusion necessarily followed that the agreement was with defendant, and said testimony made it obvious that such was the opinion of the witness.

[5, 6] We can see no valid objection to this instruction, given by the court on request of plaintiff:

"Plaintiff brings this action to obtain a judgment against defendant for the sum of $600, alleged to be due plaintiff from defendant for the sale of 4,000 sweet potato crates, for which plaintiff alleges defendant promised to pay; that defendant promised to pay it at the rate of 15 cents per crate, no part of which sum plaintiff alleges has ever been paid."

It was proper for the court thus to state the nature of the action although it is quite probable that the jury had already been fully advised of the claim of each party. There could be no reasonable apprehension that any sensible man would fail to understand that the term "sale" implied a "delivery" of the property. Besides, there was no controversy as to the delivery of the crates; the only question being as to whom they were sold.

[7] The instruction as to an original obligation and the principal debtor is substantially in the language of section 2794 of the Civil Code and, as a principle of law, is unobjectionable. That it embodied the theory of plaintiff as to the character of the transaction in question cannot be doubted, and that there was evidence to support that theory has already appeared. It is well settled, of course, that either party has the right to have an instruction given to the jury, based upon his theory of the case, if there is any evidence to support it. Buckley v. Silverberg, 113 Cal. 673, 45 Pac. 804.

[8, 9] We think it is plain enough to what fact the court referred in this instruction:

"If you are satisfied from all of the evidence adduced in this case that the promise of defendant, if any was made, was an original promise to pay for the crates and not a conditional one, I charge you it is your duty to find that fact in favor of plaintiff in this action."

It could hardly be understood as meaning otherwise than an instruction to find that the promise of defendant was "an original promise to pay for the crates," if the jury were satisfied from the evidence that an original promise was made by defendant. This was the important issue in the case, and while the instruction, embodying, as it does, such a truism, was not necessary, it could have done no harm. It may be said in this connection that the distinction between a guaranty and an original promise was fully set forth in instructions given by request of defendant, and nothing was left uncertain as to the meaning of those terms.

[10, 11] As we view it, the only ground for plausible criticism as to the instructions is afforded by this direction:

"The fact that the crates in question were furnished to Gutman by the plaintiff is not of itself absolutely sufficient to show conclusively that the promise of defendant, if any were made, was a conditional one."

As to the statement of fact in the first part of the instruction, it may be said that there was no dispute that the crates were "furnished" to Gutman. They were shipped to him for use on the land that he had purchased from appellant. In fact, it was the contention of defendant throughout the trial, not only that the crates were furnished to Gutman, but that he alone was liable for the purchase price. The reference to said circumstance as a fact could not therefore be prejudicial, independent of the consideration that said fact was favorable to appellant. It is true also, as a matter of law, that said fact was "not of itself absolutely sufficient to show conclusively that the promise of defendant, if any, was a conditional one." If "absolutely conclusive," all the foregoing discussion would be idle, as no other alternative would have been left the lower court but to direct a verdict for defendant. The truth is, of course, that said fact was a circumstance to be considered by the jury in determining whether defendant was primarily liable for the purchase price of the crates, but it is not at all conclusive of the question.

There is more reason for contending that the instruction is somewhat argumentative, and for that reason should have been omitted, but it is entirely apparent from the whole charge, full, fair, and complete as it was in its entirety, that the jury were not misled by the court in any respect.

We feel satisfied that there is no substantial merit in any of the points made by appellant, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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25 Cal. App. 714

ARENS v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 1379.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

1. APPEAL AND ERROR (§ 1002*)—VERDICT ON CONFLICTING EVIDENCE—JURY.

Where, in an action for injuries to a traveler in a collision of a street car, the traveler and his companion testified that the car gave no signal before it was about 40 feet away, rapidly approaching, and the car men testified that the usual signals were given, there was a conflict in the evidence on the issue of signals, so that the finding of the trial court would not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. COURTS (§ 91*)—CONTROLLING DECISIONS—DECISIONS OF SUPREME COURT.

A decision of the Supreme Court on the law of the road and last clear chance by street car men to avoid collisions with travelers is conclusive on a District Court of Appeal, where the facts in the two cases are almost exactly identical.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Albert J. Arens against the United Railroads of San Francisco. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley W. Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

RICHARDS, J. This is an action brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between his wagon, upon which at the time the plaintiff was riding, and a street car of the defendant being operated by its employés on Twenty-Fourth street, in the city of San Francisco.

The evidence showed that on the 11th day of October, 1906, about 2:30 o'clock in the afternoon, the plaintiff was driving his one-horse wagon on Douglass street, in that city, and turned into, and proceeded easterly along and down, Twenty-Fourth street, which at that point has a considerable downward grade. The latter street was at that time in the course of improvement, and its sides were so torn up in preparation for bituminizing as to leave the only available place for driving the space occupied by the tracks of the defendant. When the plaintiff turned into Twenty-Fourth street he looked up the street and saw the car of the defendant which traverses that street standing at the top of the grade, which is also the terminus of the car line. According to the plaintiff's testimony his attention was next directed to the car by his companion, and he then observed it within about 40 feet of his wagon, coming rapidly down the hill. There is a conflict in the evidence as to whether any bell was rung or other signal given before the plaintiff thus observed the car; both the plaintiff and his companion asserting that they heard no such signal, while the employés in charge of the car asseverate that the usual signal was rung all the way down the hill. The plaintiff, upon discovering the approaching car, undertook to turn out sufficiently to permit it to pass, but failed or was unable to do so in time, and, his wagon being struck by the car, he was thrown out and injured.

Upon the trial of the case before the court without a jury the court found that the defendant was guilty of negligence in the respects averred in the complaint, and that the plaintiff was not guilty of contributory negligence, and it thereupon rendered judgment in favor of the plaintiff for the sum of $2,000, from which judgment, and from the order of the court denying a new trial, the defendant appeals.

[1] The first proposition insisted upon by the appellant is that the finding of the court that the defendant was guilty of negligence in approaching the plaintiff at too high a rate of speed is not sustained by the evidence in the case. Counsel for the appellant argues at some length and with much force that the evidence upon the point is not sufficiently in conflict for the application of the familiar rule. We think, however, that a careful reading of the record shows that counsel's zeal has led him into error in this respect, and that the proofs of the plaintiff show sufficiently that the car was proceeding at a more rapid rate down the hill toward the plaintiff in plain view, and with only a limited area in which to turn aside and avoid the collision, than its operator should have gone, and hence that the finding of the court in this respect is justified by the proofs in the case.

We think also that the same is true with respect to the finding as to the warning signals given or neglected to be given. There is a sufficient conflict in this respect to require the application of the rule that the finding of the trial court will not be disturbed.

[2] The court also found in favor of the plaintiff upon the issue of contributory negligence; and upon this branch of the case counsel for both parties have presented elaborate arguments, citing many authorities dealing with the law of the road and the "last clear chance" of avoiding the collision. We

are of the opinion, however, that the Supreme Court of this state has relieved this court of the necessity of an exhaustive review of the cases cited by respective counsel herein by its recent decision in the case of O'Connor v. United Railroads of San Francisco, 141 Pac. 809. This was a case almost exactly identical with the case at bar, and in which counsel for the respective parties were the same, and in which also practically the same line of authorities was cited and relied upon on each side. The law laid down by the Supreme Court as controlling that case must be regarded by this court as controlling this one in every essential particular relied upon by the appellant herein.

It follows that the judgment and order denying a new trial must be, and they are hereby, affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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25 Cal. App. 711

HATFIELD v. PEOPLE'S WATER CO.

(Civ. 1377.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

1. WATERS AND WATER COURSES (§ 201*) — PUBLIC SERVICE CORPORATIONS—RATES FOR WATER.

A public service corporation supplying water to the inhabitants of a city must furnish water on the payment or tender of the established legal rates.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

2. WATERS AND WATER COURSES (§ 203*) — PUBLIC SERVICE CORPORATIONS — RATES — ACTIONS—PLEADINGS.

A complaint, in an action against a water company for charging excessive water rates, which alleges that the city council fixed water rates for a year, commencing July 1st, that during the following six months plaintiff was furnished water by the predecessor in interest of the company and charged an excessive rate, that subsequent to the charging and collecting of the excessive rate, the company, as successor in interest, continuously attempted to collect rates in excess of the rate fixed by the council each year thereafter and during the present year, and threatens to and will, unless restrained, refuse to supply water to plaintiff until the rate demanded is paid, states no cause of action as against a demurrer, for failing to allege the establishment by the city of legal rates for the time specified.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290–299; Dec. Dig. § 203.*]

3. WATERS AND WATER COURSES (§ 188*) — PUBLIC SERVICE CORPORATION — EXACTING EXCESSIVE WATER CHARGES—EFFECT.

A violation by a public service corporation supplying water of Const. art. 14, §§ 1, 2, prohibiting the collection by public service corporations of a rate for water in excess of that fixed by a city council, does not, ipso facto, work a forfeiture of the works and franchises of the corporation, and it may thereafter collect some charges for supplying water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by William M. Hatfield against the People's Water Company. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 144 Pac. 300.

R. M. F. Soto, of San Francisco, H. A. Luttrell and Milton Shepardson, both of Oakland, for appellant. McKee & Tasheira, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a judgment entered in favor of the defendant after the refusal of the plaintiff to amend his complaint in compliance with an order of the court below sustaining the defendant's demurrer. Plaintiff's cause of action is based upon an alleged violation by the defendant of those constitutional provisions (Const. art. 14, §§ 1, 2), which prohibit the collection by a public service corporation of a rate for water in excess of that fixed by a city council. The action is for damages, and the prayer of the complaint is for an injunction restraining the defendant from shutting off the plaintiff's water supply and prohibiting the collection of any rate whatsoever from the plaintiff.

[1, 2] The demurrer was properly sustained. The complaint in part and in substance alleges that the plaintiff is the owner of certain premises in the city of Oakland; that the city council passed a resolution fixing water rates for the year commencing July 1, 1906; that during the six months' period from July 1, 1906, to January 2, 1907, he was furnished water by the Contra Costa Water Company, the predecessor in interest of the defendant, and charged at the rate of $2.30 per month; that by the resolution of the city council fixing water rates only $1.69¾ per month could be lawfully charged and collected, and that therefore the plaintiff had paid for water served to him during the six months mentioned an excess rate aggregating the sum of $3.62; that subsequent to the charging and collecting of such excess rate the defendant, as the successor in interest of the Contra Costa Water Company, has been continuously attempting to collect "rates of compensation in excess of the rate fixed by said council each year thereafter and during the present year," and that said defendant "during the present year" threatens to and will, unless restrained, refuse to supply the plaintiff with water until he pays the rate demanded. Undoubtedly it was the duty of the defendant to furnish the plaintiff with water upon the payment or tender of the established legal rates, and clearly, therefore, the fact of the establishment of those rates was an indispensable element of the plaintiff's cause of action. It will be noted that the plaintiff's complaint does not allege that the city council, subsequent to the year in which the alleged excess was charged and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

collected ever passed a resolution announcing the rates for the succeeding years, and furthermore it is impossible to ascertain from the allegations of the complaint what, if any, were the fixed legal rates for those years. The general allegation of the complaint that "during the last three years and more" the defendant has been attempting to collect rates in excess of the rates fixed each year, without specifying what such fixed rates were, is a mere conclusion of the pleader, which cannot be availed of to initiate and invite an issue of fact.

[3] The complaint does not state a cause of action sufficient to support a judgment enjoining the defendant from making and collecting any water rate at all for water served to the plaintiff subsequent to the alleged collection of the excess rate from the plaintiff. On this phase of the case it is the plaintiff's contention that the mere charging and collecting as alleged of a rate for water in excess of the rate permitted by the Constitution ipso facto operated as a forfeiture of the works and franchises of the defendant, and that, therefore, the right thereafter to collect any rate at all should be denied the defendant. The contention was by this court in effect decided adversely to the plaintiff in the case of Hatfield v. People's Water Co., 144 Pac. 300, where it was held that the identical conduct complained of in the present case did not ipso facto operate to produce a forfeiture of the works and franchises of the defendant. If we were correct in the conclusion reached in the case cited, it follows that the complaint in the present case does not state a cause of action sufficient to support an injunction prohibiting the defendant from charging and collecting any water rate whatsoever upon the theory that its right to do so expired with the forfeiture of its franchises and works.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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25 Cal. App. 706

PARRY v. AMERICAN MOTORS CALIFORNIA CO. (Civ. 1366.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

1. PRINCIPAL AND AGENT (§ 87*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION—SALES AFTER TERMINATION OF AGENCY.

Under an exclusive agency contract entitling the agent to a commission on all automobiles sold within a certain territory, the agent was not entitled, in the absence of bad faith, to a commission on a sale made after termination of the contract, though the agent, during the life of the contract, had made an unsuccessful attempt to sell a car to the same purchaser.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 204; Dec. Dig. § 87.*]

2. PRINCIPAL AND AGENT (§ 87*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION.

That such agent, by selling a car during the life of the contract, had caused the purchaser to become acquainted with the principal did not entitle the agent to commission on cars sold by the principal's successor, after termination of the agency, to such purchaser's father.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 204; Dec. Dig. § 87.*]

3. PRINCIPAL AND AGENT (§ 81*)—EXCLUSIVE AGENCY CONTRACT—COMMISSION.

Where a manufacturer of automobiles gave an agent the exclusive sale of its cars within a given county, this did not, in the absence of any trade usage to the contrary, entitle the agent to a commission on a sale made by the manufacturer wholly outside of such county to a resident thereof.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194–214, 219, 223; Dec. Dig. § 81.*]

Appeal from Superior Court, Alameda County; Wm. M. Finch, Judge.

Action by W. J. Parry against the American Motors California Company, a corporation. From judgment for defendant and denial of new trial, plaintiff appeals. Affirmed.

Langan & Mendenhall, of Hayward, for appellant. Street & Street, of Oakland, for respondent.

RICHARDS, J. This is an action to recover $2,400, and interest thereon, for commissions alleged to be due the plaintiff upon sales of automobiles.

On May 26, 1911, the San Francisco branch of the American Motors Company, by agreement in writing, appointed the plaintiff and one F. E. Romie its exclusive representatives for Alameda county for the sale of the "American" automobile, under the terms of which appointment it is claimed that the San Francisco branch of the American Motors Company and the defendant became indebted to said Romie and plaintiff in the sum of $2,400. Subsequently, and prior to the commencement of this action, defendant took over the business of the San Francisco branch of the American Motors Company and assumed all its liabilities. Prior to the commencement of this suit F. E. Romie assigned to plaintiff his interest in the alleged demands of Parry and himself against the San Francisco branch of the American Motors Company and defendant. The findings of the trial court were against the plaintiff, and judgment accordingly went in favor of the defendant. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The contract upon which the action is based, and which was entered into by the assignor of the defendant as party of the first part and the plaintiff and his assignor as parties of the second part, provides, among other things, as follows:

"First. We hereby appoint second parties as our exclusive selling representative for Alameda county, state of California, for the purposes of handling American cars therein, and we agree:

"Second. To allow said second parties a discount of 15% from the regular current catalogue list price for the various models of cars manufactured by the American Motors Company at Indianapolis, Indiana, said price to be f. o. b. the factory. * * *

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Fourth. In view of the fact that the above territory lies so close to San Francisco, it might be deemed expedient at times for some of the selling force of the first party to enter into said territory and make a sale therein, in which case second parties are to receive 7½% commission on said sale, provided same is made at regular retail price established by the factory. In case a sale is made at a less price the commission payable to second parties shall be agreed upon specially each time in advance of any such sale. * * *

"Seventh. To allow said second parties the privileges of selling in open territory whenever possible."

The regular retail price of the three types of cars involved here was agreed at the trial to be as follows: The 50 H. P. car, $4,250; the 1912 model, 30 H. P. car, $2,400, and the 1913 model, 30 H. P. car, $2,475. It is also admitted that the defendant and his predecessor sold to residents of Alameda county during the term of plaintiff's contract, as follows: To Herman Hess, a 50 H. P. car, for $3,583.95, the retail price being $4,250; to W. S. Heywood, a 50 H. P. car, for $2,785.32, the retail price being $4,250; to Stanley Gaune, a 50 H. P. car, for $3,048.13, the retail price being $4,250; to E. L. Brock, a 30 H. P. car, for $2,166.60, the retail price being $2,400.

[1] The plaintiff and his assignor also claimed to have sold Mrs. C. E. Gilman a 30 H. P. car, of the model 1913, for the regular retail price. Concerning this transaction, it seems that during the absence of Mr. Gilman from home the plaintiff called on Mrs. Gilman and had her sign a contract for the purchase of a car. When Mr. Gilman returned and learned what had occurred he told the defendant company that the contract had been entered into without his consent, that therefore he would have absolutely nothing to do with it, and that he would not take an American car under any conditions. No car was sold to Mrs. Gilman. About three months after the termination of the plaintiff's contract, however, the defendant persuaded Mr. C. E. Gilman to buy a car. There is no intimation in the record that the contract of purchase was entered into after the expiration of the agency with the view of affecting the question of commissions.

[2] Two cars were sold by the defendant's predecessor to Herbert Von Loan, one for $2,016.45 and the other for $2,036.55 the retail price of each being $2,400. The plaintiff and his assignor had sold E. Von Loan a car prior to this sale, and it was through that transaction that he became acquainted with the San Francisco concern. Thereafter, desiring to help his son, Herbert Von Loan, to establish himself in business, Von Loan and his son called at the San Francisco establishment, with the view of purchasing two cars and of getting the agency of the American car for Modoc county, where they lived. After some negotiations the cars were sold to Herbert Von Loan under his regular agency contract and paid for by his father. In any event, the Von Loans were not residents of Alameda county, and the evidence does not show that the sales were effected through the efforts of the plaintiff and his assignor.

It was stipulated at the trial of the case by counsel for the plaintiff that no agreement was made between the parties here concerned as to the commission which plaintiff and Romie should receive on account of sales of cars sold in San Francisco by defendant and his predecessor to residents of Alameda county at a price less than the regular retail price established by the factory.

Plaintiff claims that the evidence does not support the findings, and the main points argued in the briefs are: (1) Are sales made to residents of Alameda county, but negotiated outside of the county, within the terms of the agency? and (2) if they are, does the contract of agency fix a commission therefor?

As to the Gilman transaction, it does not appear from the record where the sale was made, but even if it were made in Alameda county, we do not conceive how it can be held that plaintiff is entitled to recover commissions for this sale, since it clearly appears that the transaction did not occur during the life of the agency.

As to the cars sold to Von Loan, from the testimony already alluded to, it must be held that there is ample evidence to sustain the view that the agents were not the moving cause of the sale.

[3] As to the remainder of the sales, it appears that they were made by the defendant or its predecessor at San Francisco to residents of Alameda county and for less than the regular retail price. As to these plaintiff claims that under the terms of the contract he is entitled to 7½ per cent. commission.

The contract between the parties reserved the right to the company to enter Alameda county for the purpose of selling its cars therein, and provided that whenever its selling force should enter that territory and make sales of cars therein at the regular retail price as established by the factory, the agents should be entitled to a commission of 7½ per cent. The contract, however, further provides that in case a sale is made at a figure less than the regular retail price the commission payable shall be agreed upon in advance of any such sale.

The evidence as to the sale of these cars, however, shows that, although sold to residents of Alameda county, the sales were made in San Francisco. It is not shown by the plaintiff that in order to effect these sales the defendant's representatives or employés entered the territory of the plaintiff. We think, therefore, that such sales do not come within the terms of the contract, so as to entitle the plaintiff to a commission or discount thereon. This was the rule followed by the Supreme Court in Haynes Automobile Co. v. Woodill Automobile Co., 163 Cal. 102, 124 Pac. 717, 4 L. R. A. (N. S.) 971, where it is said:

> "In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory is not entitled to commission on a sale made by the manufacturer outside of such territory, to a resident thereof."

Similarly, in the case at bar, there is no evidence of a trade usage, or that a person who has appointed an exclusive agent for a given territory is thereby prevented from dealing outside of the limits of that territory with a resident thereof.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

25 Cal. App. 685

STERN, School Director, v. COUNCIL OF CITY OF BERKELEY et al.

(Civ. 1364.)

(District Court of Appeal, First District, California. Nov. 7, 1914.)

1. Municipal Corporations (§ 58*)—Charter—Effect as State Law.

A charter framed and adopted pursuant to Const. art. 11, is not a law passed by a municipality, but is a law of the state, having the same force and effect as a law directly enacted by the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145–147; Dec. Dig. § 58.*]

2. Statutes (§ 4*)—Constitution as Limitation on Power.

The state Constitution is not a grant of power, but rather a limitation on powers of the Legislature, and it is competent for the Legislature to exercise all powers not forbidden by the state and federal Constitutions or delegated to the general government.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 3; Dec. Dig. § 4.*]

3. Municipal Corporations (§ 57*)—Charter—Conflict with General Laws.

A municipal charter framed under Const. art. 11, may, unless prohibited by some provision of the Constitution expressed or necessarily implied therefrom, contain any provision not in conflict with, or covered by, general laws of the state; hence a charter provision providing for compensation of school directors in furtherance of the general law relating to schools, and not forbidden by the Constitution, is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*]

4. Municipal Corporations (§ 57*) — Charters—Compensation of School Directors —"Municipal Officer."

A provision of a charter framed under Const. art. 11, providing for compensation to city school directors, is not invalid on the theory that such provision should be covered by general laws because the school system is necessarily a state affair, since a school director is purely a "municipal officer," and his compensation is exclusively controlled by charter provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. § 57.*

For other definitions, see Words and Phrases, First and Second Series, Municipal Officer.]

5. Statutes (§ 90*)—Special Laws—Municipal Charters—Compensation of Officer.

Where a municipal charter, as a whole, is germane to the purpose of its creation, and its various sections are subordinate to, and in harmony with, the fundamental and statutory law, and affect all persons and things alike in the particulars provided for, the objection that such charter or any provision thereof such as fixing compensation of school directors is special legislation under Const. art. 4, § 25, subd. 28, is not tenable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 98–100; Dec. Dig. § 90.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Mandamus proceedings by Herman I. Stern against the Council of the City of Berkeley and J. Stitt Wilson and others, as members of the Council. From a judgment sustaining a demurrer to an alternative writ, petitioner appeals. Reversed, with instructions to overrule the demurrer and require respondents to answer.

Vincent Surr and William H. Bryan, both of San Francisco, for appellant. Redmond C. Staats, of Berkeley, for respondents.

LENNON, P. J. The appellant in this proceeding is a school director of the city of Berkeley. He sought by a petition for writ of mandate presented to the superior court of Alameda county to compel the respondents, as members of the city council, to issue to him a warrant upon the city treasury for his salary as school director. An alternative writ was issued, a demurrer to which was sustained without leave to amend; and this appeal is from the judgment thereupon entered.

Petitioner's claim to the salary in controversy is based on section 19 of article 5 of the charter of the city of Berkeley, which provides that:

> "Each school director shall receive five dollars for each regular meeting of the board of education which he shall attend, provided that he shall not receive more than fifteen dollars in any month."

The question here involved is the validity of this provision, considered in conjunction with the Constitution of the state, as such Constitution existed prior to the amendment in October, 1911, of subdivision 2 of section 8½ of article 11, which amendment reads as follows:

> (1) "It shall be competent in all charters framed under authority given by section 8 of article 11 of this Constitution, to provide, in addition to those provisions allowable by this Constitution and by the laws of this state, as follows: * * * (2) For the manner in which, the times at which, and the terms for which the members of boards of education shall be elected or appointed, * * * and for the number which shall constitute any one of such boards."

This subdivision, as amended in October, 1911 (Stats. 1911, p. 2166), expressly declares that it shall be competent in all charters framed under authority of section 8 of article 11 of the Constitution to provide for the qualifications, compensation, and removal of members of boards of education. It thus appears that prior to the amendment in question the power of city charters to fix the compensation of members of boards of education was not in express terms given by the Constitution. It is not contended, however, upon behalf of the respondents that the amendment referred to is retroactive, or that it in any wise affects the constitutionality of the charter provisions in controversy here. It is the contention of respondents that, before the amendment to the Constitution in the particulars stated, a municipal corporation was not authorized to provide for the payment of salaries to school directors; and therefore it is argued that the charter provision in question had no basis for its enactment and is therefore void. The charter provision in question must be upheld, unless it is clearly shown to have been at the time of its enactment repugnant to, and inconsistent with, the then existing fundamental law.

[1] A charter framed and adopted pursuant to the constitutional provisions is not a law passed by a municipality. It is a law of the state, having the same force and effect as a law directly enacted by the Legislature. As was said in Ex parte Sparks, 120 Cal. 395, 399, 52 Pac. 715, 716, 717:

> "It is clear that it is made a law by the Legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state, and is not made a law by the people of the municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the Legislature or rejected, as it shall see fit."

See, also, Sheehan v. Scott, 145 Cal. 684, 685, 79 Pac. 350; Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923; Frick v. Los Angeles, 115 Cal. 512, 47 Pac. 250.

[2, 3] Our Constitution is not a grant of power, but, rather a limitation upon the powers of the Legislature; and it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the state or delegated to the general government or prohibited by the Constitution of the United States. Accordingly it has been held that, unless prohibited by some provision of the Constitution expressed or necessarily implied from its terms, a municipal charter adopted as provided in article 11 of the Constitution may contain any provision not in conflict with, or covered by, general laws of the state. Los Angeles v. Longden, 148 Cal. 380, 83 Pac. 246. It is true that the Legislature, in keeping with the general provisions of the Constitution, has provided a general system of laws concerning the creation and conduct of the common schools of the state. These laws are controlling and conclusive over conflicting charter provisions; but the charter of a city or of a city and county may provide for matters not enumerated in the general laws and not in conflict therewith. McKenzie v. Board of Education, 1 Cal. App. 407, 82 Pac. 392; Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. The power of charters to so provide extends to all cases where the purpose of the provision is in furtherance of the purpose of the general laws of the state. Los Angeles School District v. Longden, supra. In the present case the charter provision in question is obviously in furtherance of the school system adopted by the state, and does not conflict with the general laws relating to and regulating the same. There is no general law with respect to the compensation to be paid to school directors or trustees. The general laws relating to and regulating the state school system nowhere limit or deny the right of a municipality or of the legislative power acting through a freeholder's charter to make provision for the payment of salaries to school trustees or directors.

[4] It is further contended upon behalf of the respondents that, inasmuch as the public school system of the state has been made, by the Constitution and general laws, a matter of general concern, the regulation of that system is a state affair, as distinguished from a municipal affair, and therefore can be rightfully covered and controlled only by general state laws. Generally speaking, this may be so; but, in our opinion, appellant, as a school director of the city of Berkeley, is a municipal officer, irrespective of whether or not the duties of the office are exacted by the charter or imposed by the general law of the state, and therefore the compensation to be paid him by the city out of the city treasury for services rendered the city in maintaining its school system as an integral part of the state school system is purely a municipal affair, which is exclusively controlled by charter provisions. Trefts v. McDougald, 15 Cal. App. 584, 115 Pac. 655.

[5] The further contention that the charter provision in question is a special law, and is therefore unconstitutional under subdivision 28 of section 25 of article 4 of the Constitution, is untenable. Necessarily the charters of the various cities throughout the state must differ in many minor details in order to conform to the varying needs of different localities. Such differences, however, will not operate to bring each of the many existing city charters within the category of special legislation. Where a municipal charter, as a whole, is germane to the purpose of its creation, and its various sections are subordinate to, and in harmony with, the fundamental and statutory law of the state, and affect all persons and things alike in the particulars provided for, the objection that such charter or any provision thereof is special legislation cannot be successfully maintained. Potwin v. Johnson, 108 Ill. 70; People ex rel. v. Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800.

Respondents' contention that the petition does not show that the city of Berkeley has any funds from which his claim could be paid is answered by the petition itself, which alleges that there are moneys in the general fund for this purpose.

What we have thus far said, in effect, covers and disposes of the remaining points made upon behalf of the respondents. In conclusion, it may be said that we have been cited by opposing counsel to all of the decisions of our appellate courts relating to powers conferred under various charter provisions. It would be a matter of supererogation to reassert the doctrines laid down in those cases. We are satisfied that nothing contained in the legislative enactments or in any of the expressions of opinion of the courts of last resort upon the subject in hand conflicts with the conclusions we have reached here.

For the reasons stated, it is ordered that the judgment appealed from be reversed, with instructions to the lower court to overrule the demurrer and require the respondents to answer.

We concur: RICHARDS, J.; KERRIGAN, J.

25 Cal. App. 717

WALTZ v. SILVEIRA et al. (Civ. 1382.)

(District Court of Appeal, First District, California. Nov. 9, 1914.)

1. SALES (§ 477*) — CONDITIONAL SALE — BREACH OF CONTRACT—REMEDIES OF SELLER —ELECTION.

Where the seller sued for the price of a safe sold with a condition that title should remain in the seller until payment, he thereby waived his right to a return of the safe in good condition on default by the buyer in making payments.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411–1417; Dec. Dig. § 477.*]

2. SALES (§ 347*)—PURCHASE-MONEY NOTE—CONSIDERATION—DESTROYED.

Where a safe in consideration of which a note was given was so damaged by fire as to render it useless for the purpose for which it was intended and used, the consideration for the note was destroyed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962–972; Dec. Dig. § 347.*]

3. TRIAL (§ 165*) — MOTION FOR NONSUIT — PROBATIVE EFFECT OF EVIDENCE—CROSS-EXAMINATION.

That the evidence of the destruction of the consideration for the note sued on was developed on cross-examination of plaintiff's witnesses did not lessen its probative effect or preclude the court from considering it in passing on a motion for nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

4. SALES (§ 439*) — IMPLIED WARRANTY — BREACH—BURDEN OF PROOF.

Where, in an action on a note for the price of a safe, defendant cross-complained, alleging that the safe was bought to protect jewelry, and that, through defects of construction unknown to defendant, jewelry stored in the safe was damaged by fire, for which damage judgment was prayed, the burden was on defendant to establish the implied warranty given to a purchaser of personal property by Civ. Code, §§ 1767, 1769, by proof that plaintiff knew of such defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1258–1260; Dec. Dig. § 439.*]

5. APPEAL AND ERROR (§ 977*)—ORDER GRANTING NEW TRIAL—PRESUMPTION.

Where an order granting a new trial on a motion based in part on insufficiency of the evidence is general in its terms, it must be assumed on appeal that the new trial was granted for insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

6. APPEAL AND ERROR (§ 933*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

A general order granting a new trial will not be disturbed on appeal, in the absence of a showing of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3426, 3772–3776; Dec. Dig. § 933.*]

7. SALES (§ 441*)—WARRANTY—BREACH—EVIDENCE—CONCLUSIVENESS.

In an action on a note for the price of a jeweler's safe, wherein defendant counterclaimed for damages to jewelry stored in the safe, relying on breach of the warranty of reasonable fitness given by Civ. Code, § 1770, evidence that the safe was destroyed and its contents damaged by fire was not conclusive as to whether the safe was reasonably fit for its purpose, where there was evidence that no so-called fireproof safe could go through a fire such as that in question without serious damage to the safe and its contents.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277–1283; Dec. Dig. § 441.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Charles Waltz against Anna L. Silveira and another. From a judgment of nonsuit and the denial of a new trial, plaintiff appeals, and from the granting of a new trial after judgment for defendants on cross-complaint, defendants appeal. Affirmed.

F. M. Parcells, of San Francisco, and B. F. Griffins, of Richmond, for plaintiff. Mastick & Partridge, of San Francisco, C. C. Hamilton, of Oakland, F. I. Lemos, of Hayward, and H. F. Chadbourne, of San Francisco, for defendants.

LENNON, P. J. The plaintiff in this action sought to recover from the defendants the sum of $315, alleged to be the balance due and unpaid of the purchase price of a fireproof safe which had been sold and delivered to the defendants pursuant to the terms of a contract of conditional sale. The plaintiff was nonsuited, and this appeal in part is from the judgment thereupon entered that the plaintiff take nothing by his action, and from an order denying a new trial.

The material averments of the plaintiff's complaint were admitted by the answer of the defendants; but, as a special defense to the action, they pleaded the destruction of the safe by fire without fault on their part. By the terms of the contract the defendants, as part of the purchase price, gave in exchange an old safe valued at $375, and paid the sum of $105 in cash. Thereupon the defendants, as required by the contract, executed to the plaintiff 12 promissory notes, each for the sum of $35, payable monthly, with interest at the rate of 8 per cent. per annum until paid. Only three of the notes were due and had been paid at the time of the fire. After the fire the defendants refused to pay the remaining 9 notes, aggregating the sum of $315, upon the theory that, the safe having been destroyed through no fault of theirs, the consideration for the notes had failed. By the terms of the contract title to the safe was to remain in the plaintiff until the last of the promissory notes had been paid.

[1] It is conceded to be the law that, in the absence of an agreement to the contrary, the risk accompanies the title to property, and that, "where there is a mere agreement to sell, and title therefore has not passed, the loss falls upon the vendor." Potts, etc., Co. v. Benedict, 156 Cal. 322, 324, 104 Pac. 432, 25 L. R. A. (N. S.) 609. But it is contended that the evidence adduced in support of the plaintiff's case did not show that the safe sold to the defendants had been actually destroyed, and that, even if it had been destroyed, the nonsuit should not have been granted because of a covenant in the contract in controversy to return the safe to the plaintiff in good order "in any event."

Upon the failure or refusal of the defendants to meet the payment of the notes provided for in the contract, the plaintiff had one of two remedies: he might recover the possession of the safe; or, waiving the conditions of the contract, consider the sale as absolute, and sue for the balance of the purchase price as evidenced by the notes. The plaintiff could not have both remedies. Parke, etc., Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435; Muncy v. Brain, 158 Cal. 300, 110 Pac. 945; Elsom v. Moore, 11 Cal. App. 377, 105 Pac. 271. Having elected to proceed against the defendants for the purchase price of the safe plaintiff thereby exercised his option to treat the transaction as an absolute and completed sale. Consequently he must be held to a waiver of the alternative condition of the contract, to the effect that the defendants would upon default of the payments provided for or "in any event" return the safe in good condition.

[2] During the presentation of the plaintiff's case the fact was developed without conflict that the building in which the safe had been placed by the defendants was, without fault on their part, destroyed by fire, and that, as a result of the fire, the safe, without fault on the part of the defendants, was damaged to such an extent as to render it useless for the purpose for which it was intended, purchased, and used. This being so, the safe was destroyed within the meaning of the law. Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 South. 759; Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; London, etc., Ins. Co. v. Heckman, 64 Kan. 388, 67 Pac. 879; Palatine Ins. Co. v. Weiss, 109 Ky. 464, 59 S. W. 509; O'Keefe v. London, etc., Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Thuringia v. Malott, 111 Ky. 917, 64 S. W. 991, 55 L. R. A. 277.

[3] The destruction of the safe was a fact developed in evidence upon the cross-examination of the plaintiff's witnesses; but this did not lessen its value as evidence, nor preclude the trial court from considering it when passing upon the motion for nonsuit. The motion for nonsuit was rightfully granted.

[4] The defendant Anna L. Silveira cross-complained against the plaintiff, and for a cause of action alleged substantially that the safe described in the contract referred to in the plaintiff's complaint was intended and purchased for the express purpose of protecting a stock of watches and jewelry against damage by fire; that the safe was not fireproof, and was not reasonably fit for the purpose for which it was sold and purchased, because of certain defects existing in the material and construction of the safe which were unknown to the defendant and cross-complainant; that, owing to the unfitness of the safe for the purpose for which it was agreed to be sold and was sold, a stock of jewelry stored therein was damaged by the fire referred to in the sum of $3,000. This phase of the case was tried with a jury under a stipulation of the parties that any evidence offered and received upon the whole case should apply to every phase of the case. A verdict for $1,500 was rendered in favor of the defendant and cross-complainant, Anna L. Silveira. Thereafter the plaintiff and cross-defendant moved for and was granted a new trial upon this phase of the case. The defendant and cross-complainant has appealed.

[5, 6] The motion for a new trial of the issues involved in the cross-complaint was grounded in part upon the insufficiency of the evidence to justify the verdict. The order granting a new trial was general in its terms, and therefore we must assume that the alleged insufficiency of the evidence to support the verdict in favor of the defendant and cross-complainant appealed to and prompted the court below to grant a new trial. A general order granting a new trial will not be disturbed, in the absence of a showing of an abuse of discretion. It would serve no useful purpose to detail the evidence upon which the defendant and cross-complainant relies to support the verdict. It was the defendant and cross-complainant's contention in the court below, and it is her con-

tention here, that the safe in controversy at the time of its purchase and sale contained undisclosed latent defects in its materials and construction, and, as a consequence, was not reasonably fit for the purpose for which it was sold. In this behalf it will suffice to say that it was not disputed at the trial that the safe in controversy was bought and sold as a fireproof safe for the express purpose of safeguarding a stock of jewelry; and it must be conceded that the evidence adduced in support of the allegations to the cross-complaint shows without conflict that the safe was destroyed and its contents damaged by fire. The fact that the safe was destroyed by fire, in the sense that it was no longer fit for the use for which it was intended and purchased, may have been some evidence of the existence of a latent defect; but the record is barren of any evidence showing, or tending to show, that the plaintiff and cross-defendant had any knowledge of the existence of a latent defect in the material and construction of the safe. The burden of proving that fact was at all times on the defendant and cross-complainant; and, in the absence of such proof, it cannot be held that the verdict of the jury was justified upon the theory that it was rightfully based upon proof of the breach of the implied warranty given to a purchaser of personal property by the provisions of sections 1767 and 1769 of the Civil Code.

[7] The case of the defendant and cross-complainant, in so far as it concerned the alleged breach of the statutory warranty, given by section 1770 of the Civil Code, that the safe was reasonably fit for the purpose for which it was sold, was rested upon proof of the fact that the safe was destroyed and its contents damaged by fire. This undoubtedly was evidence that the safe was not absolutely fireproof; but such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold. Upon this phase of the case expert witnesses for the plaintiff and cross-defendant testified, in effect, that the safe in controversy was reasonably fireproof, and that neither it nor any other so-called fireproof safe could go through the fierce flames of an extraordinary fire such as occurred in the present case without serious damage to the safe and its contents. In brief, the best that can be said for the defendant and cross-complainant is that the evidence upon the issue under discussion was in substantial conflict; and, in the absence of an apparent abuse of discretion, it is the rule that an order granting a new trial grounded upon the insufficiency of the evidence is, in the presence of a substantial conflict in the evidence, conclusive upon this court. Domico v. Casassa, 101 Cal. 412, 35 Pac. 1024; Von Schroeder v. Spreckels, 147 Cal. 186, 81 Pac. 515; Estate of Everts, 163 Cal. 449, 125 Pac. 1058.

The judgment and orders appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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25 Cal. App. 691

STATE SAVINGS & COMMERCIAL BANK v. WINCHESTER et al. (Civ. 1385.)

(District Court of Appeal, First District, California. Nov. 7, 1914.)

1. Corporations (§ 429*) — Officers — Authority.

A corporation can act only through its board of directors, and the public generally act at their peril with one purporting to represent such corporation without evidence of his being authorized by the governing board of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720–1723, 1725; Dec. Dig. § 429.*]

2. Banks and Banking (§ 116*)—Officers—Unauthorized Loan—Estoppel of Bank—Notice to Agent.

Where the secretary of a bank combined with the president and general manager of a corporation to get control of the bank, and for that purpose the president, to procure funds with which to buy stock, applied to the bank for a loan on behalf of the corporation with the secretary's knowledge, the bank is estopped to claim that the loan was made in the regular course of business so as to charge the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282–287; Dec. Dig. § 116.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the State Savings & Commercial Bank, a corporation, against Elisabeth F. Winchester and Frank Winchester. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

F. A. Cutler and F. R. Sweasey, both of San Francisco, for appellant. E. A. Bridgford, of San Francisco, for respondents.

LENNON, P. J. This is an appeal from a judgment and from an order denying a new trial. The action was one to foreclose a mortgage executed by defendant and respondent, Elisabeth F. Winchester, as security for the payment of a promissory note in the sum of $11,500, made by the Main-Winchester-Stone Company, as maker, and the respondent as indorser and guarantor. The execution of both the note and mortgage was an admitted fact in the case; but as a defense to the foreclosure proceedings, it was alleged that the note and mortgage were executed without consideration to either the respondent Elisabeth F. Winchester or to the Main-Winchester-Stone Company, and that the same were both obtained by false and fraudulent representations.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The facts leading up to the transaction in suit, and out of which the claim of fraud arises, are, in substance as follows: On December 13, 1906, A. G. Stoll, the then president and general manager of the Main-Winchester-Stone Company, made application to the appellant bank upon behalf of said company for a credit loan of $15,000. The application for the loan was approved; and a credit was thereupon given to the Main-Winchester-Stone Company upon the books of the bank in the sum mentioned, for which three notes were executed in different sums to the bank by Stoll in the name of the company. Thereafter, these notes were taken up with a renewal note of said company for $15,000, which renewal note was indorsed by A. G. Stoll, R. P. Grubb, a Mr. Richardson, and Frank Winchester, all directors of the Main-Winchester-Stone Company. After the sum of $3,500 had been paid and indorsed thereon, Richardson, having sold his stock in the Main-Winchester-Stone Company, desired to be released as an indorser of said renewal note. The bank thereafter released him, in consideration of the giving by respondent Elisabeth F. Winchester of the mortgage in question, as security for the payment of the indebtedness due upon the renewal note. A second renewal note was thereupon executed in the sum of $11,500, upon which the name of Elisabeth F. Winchester replaced that of Richardson as indorser, and at the same time and as a part of the same transaction, the mortgage in question was executed as security therefor. The indorsement of the second renewal note and the execution of the mortgage by respondent were in lieu of the prior indorsement of Richardson. The trial court found that Stoll as the president and general manager of the Main-Winchester-Stone Company was without authority to execute the first renewal note in controversy, that said company never received any benefit from the money obtained upon the note, and that the same was procured to be signed by fraud and through false and fraudulent representations. In support of and as a basis for this finding, the trial court also found that prior to the execution of the original notes involved in the transaction, A. G. Stoll, C. P. Hagg, who was the then secretary of the appellant bank, and other persons, had entered into an agreement to secure control of the appellant bank by purchasing a certain amount of its capital stock; that the loan procured by Stoll, to and in the name of the Main-Winchester-Stone Company, from the appellant bank, was procured and used by him for the purpose of purchasing a controlling interest in the appellant bank, and not for the use and benefit of said company; that, in order to conceal and cover up this phase of the transaction, Stoll, on January 15, 1907, represented to the Main-Winchester-Stone Company that it was necessary to borrow $15,000 from the appellant bank, to be used in the business of the company; that he could secure such a loan from the appellant bank if a resolution were passed authorizing the same; that such resolution was duly passed authorizing a loan from the appellant bank not to exceed $15,000; and that such resolution made no reference to past loans made by appellant bank to the Main-Winchester-Stone Company. It was further found that all subsequent notes made by said Main-Winchester-Stone Company to appellant bank, including the note and mortgage in suit and the indorsements and guaranties thereon, were made without any knowledge on the part of the makers thereof, of the transaction of December, 1906, but that such notes, indorsements, guaranties, and mortgage were made in the belief that the money borrowed, guaranteed, and secured had been procured by Stoll under the resolution of January 15, 1907, that, in fact, no loans were made by appellant bank under said resolution, and that the only money appellant bank parted with was the sum advanced in December, 1906. Upon these facts judgment went for defendants.

[1] It is conceded by appellant that a corporation can act only through its board of directors, and that the public generally act at their peril with one purporting to represent such corporation without evidence of his being authorized by the governing board of such corporation. It is insisted, however, that the evidence shows that the Main-Winchester-Stone Company so conducted itself as to be estopped from denying that Stoll had authority to make the loan for want of the proper resolution. On the other hand, it is the contention of the defense that the money obtained from the appellant bank by Stoll and claimed to have been wrongfully diverted from the use of the Main-Winchester-Stone Company was advanced by the bank for the individual use of one of the directors of the company with the knowledge of the bank.

[2] The trial court adopted the view that, inasmuch as Hagg was secretary of the appellant bank, any knowledge gained by him in the transaction with Stoll was imputable to the bank. In this behalf, as previously stated in substance, the trial court found that arrangements were made between Hagg, the secretary of the appellant bank, and Stoll and others prior to the loan of December, 1906, to get control of the bank; but Stoll was without the necessary funds to pay for his proportion of the stock; that in the making of the application and obtaining of the loan, he dealt only with Hagg and never saw or dealt with any other officer of the bank, in connection with the transaction; that shortly after the loan was made, a majority of the stock of appellant bank was transferred to Stoll, Hagg, and others; and

that they were immediately installed as directors of the bank.

There is evidence, in our opinion, to support this finding, and this finding in turn supports the conclusion and judgment of the trial court to the effect that the appellant bank was estopped from claiming that the loan in controversy was made in the regular course of business. 5 Cyc. p. 460.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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25 Cal. App. 660

PEOPLE v. EDDARDS. (Cr. 526.)

(District Court of Appeal, First District, California. Nov. 4, 1914.)

1. False Pretenses (§ 26*)—Information.

An information for obtaining money under false pretenses *held* sufficient, both in following the language of the statute and in setting forth with particularity the details and successive steps of the fraud.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 31; Dec. Dig. § 26.*]

2. Indictment and Information (§ 133*)—Insufficient Amplification—Demurrer.

Objection that the information for obtaining money by false pretenses makes no reference to the means by which the fraud was consummated, aimed at its mere uncertainty because of insufficient amplification to set forth the entire transaction, being in the nature of special demurrer, is waived by failure to demur in limine.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454–468; Dec. Dig. § 133.*]

3. False Pretenses (§ 29*)—Information—Sufficiency.

That one of the representations by which defendant is charged to have obtained money, if standing alone, might not be sufficiently tangible to base a prosecution on does not require a reversal.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 34–36; Dec. Dig. § 29.*]

4. Criminal Law (§ 829*)—Trial—Instructions.

It is enough that a refused requested instruction was covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. Criminal Law (§ 406*)—Evidence—Conversations With Third Person.

Conversations between defendant and another regarding dealings between them, constituting part and proof of the dealings charged between defendant and the complaining witness, are admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894–917, 920–927; Dec. Dig. § 406.*]

6. Criminal Law (§ 371*)—Evidence—Similar Transaction—Motive.

Evidence of a similar transaction of defendant with another is admissible to shed light on his motive in making the representations to complaining witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

7. Criminal Law (§ 1169*)—Appeal—Harmless Error—Immaterial Evidence.

Admission of evidence of an entirely immaterial matter is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

8. Criminal Law (§ 1159*) — Appeal — Review—Conflicting Evidence.

There being a substantial conflict in the evidence, the verdict cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

E. J. Eddards was convicted, denied a new trial, and appeals. Affirmed.

Miss Marguerite Ogden, of San Francisco, and Holcomb & Kempley, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a verdict and judgment of conviction, whereby the defendant was found guilty of the crime of obtaining money under false pretenses, and from an order denying the defendant's motion for a new trial.

[1, 2] The first alleged error of the trial court consists in the denial of the motion of the defendant in arrest of judgment, and for a dismissal of the action upon the ground that the facts stated in the information did not constitute a public offense.

The information charges that the defendant, together with one George Gilbert—

"devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into their custody and possession the personal property of Frank M. Ferguson, with intent to cheat and defraud said Frank M. Ferguson of the same, did then and there willfully, unlawfully, knowingly, and designedly, falsely, fraudulently, and feloniously pretend and represent to the said Frank M. Ferguson that they, the said E. J. Eddards and George Gilbert, had sold to the Standard Oil Company, a corporation, a mica mine for a large sum of money, and that said large sum of money was then and there in the hands of and in the possession of one Asa V. Mendenhall, and that a portion of said large sum of money, to wit, the sum of $15,000, in lawful money of the United States, in the hands and in the possession of said Asa V. Mendenhall, was to be paid by said Asa V. Mendenhall to one J. S. Lord; that said $15,000 in lawful money of the United States was the share and interest of said J. S. Lord received from the sale of said mica mine to the Standard Oil Company, a corporation; that adjoining said mica mine there were other lands containing mica, and that they, the said E. J. Eddards and George Gilbert, had then and there a contract with said Asa V. Mendenhall whereby the said Asa V. Mendenhall would, for a consideration of 10 per cent. of the sale price, induce the Standard Oil Company, a corporation, to purchase from them, the said E. J. Eddards and Geo. Gilbert, 10 mica claims for the sum of $550,000 in lawful money of the United States when they, the said E. J. Eddards and Geo. Gilbert, would locate and properly stake off said ten mica claims and obtain deeds on said mica claims."

It is then set forth specifically that each and all of the foregoing representations were utterly false and fraudulent, and were known so to be by the said E. J. Eddards and Geo. Gilbert, and each of them, and were made by them and each of them for the purpose of inducing said Frank M. Ferguson to pay over and deliver to them the sum of $200; and that the said Frank M. Ferguson, believing each and all of said false and fraudulent representations and pretenses to be true, and being deceived thereby, did deliver and pay over to said defendants the sum of $200, which said sum was received and obtained by them and each of them with the intent then and there to cheat and defraud the said Frank M. Ferguson out of the same, and that they and each of them did thereby then and there willfully, unlawfully, fraudulently, designedly, and feloniously cheat and defraud said Frank M. Ferguson out of said money.

We think this information sufficient both in the respect that it follows the language of the statute, and also in that it sets forth with particularity the details and successive steps of the fraud. It is contended by the defendant that there is no reference in the information as to the means by which the alleged fraud was consummated. This objection, however, is one which is aimed at the mere uncertainty of the information by reason of its insufficient amplification so as to set forth the entire transaction between the defendants and the defrauded person, and is in the nature of a special demurrer. This being so, it should have been made in the form of a demurrer to the information in limine, but the record shows that no such pleading was presented. We think, therefore, that this objection, if otherwise tenable, was waived by the failure of the defendants to demur to the information.

[3] The next contention of the appellant is that one of the several representations made by the defendants to the defrauded person was inadequate to form the basis of a criminal pretense sufficient to satisfy the statute. But this was only one of the representations averred to have been made by the defendant; and, while standing alone, it might not be regarded as sufficiently tangible to base a prosecution upon, still we think that, read with the others, especially when viewed in the light of the entire testimony, the insufficiency of this single item of the charge would not be adequate to work a reversal of the case.

[4] The appellant's next contention is that the court erred in its refusal to give to the jury the fifth instruction asked by his counsel. We think that this instruction, however correct in point of law, was sufficiently covered by the other instructions given by the court.

[5-7] As to the alleged errors of law arising out of the rulings of the court during the trial, we do not find that any of these are of sufficient importance to warrant discussion in detail. The principal one of these has reference to the action of the court in permitting the witness Mendenhall to testify in respect to conversations between himself and the appellant regarding dealings between them closely allied to the transaction with the complaining witness. These conversations were admitted for two reasons: First, as part and proof of the very dealings between the appellant and Ferguson set forth in the information; and, second, as evidence of a similar transaction with Mendenhall tending to shed light upon the motive of the appellant in the making of his representations to Ferguson. Both of these were sufficient reasons for the admission of this testimony. There is also a ruling of the court admitting in evidence a certain telegram for money sent by George Gilbert, the codefendant, with appellant, to the wife of one J. O. Brown, who was one of the associates of appellant in the mica enterprise. The purpose of producing this telegram and its admission does not seem very clear; but it is too immaterial an episode in the progress of the case to justify a reversal, even if it were conceded to be an error.

[8] The main argument of counsel for the appellant upon the hearing of this appeal and in her briefs was devoted to the plea that the evidence in the cause did not sufficiently show the defendant to be guilty of the offense charged in the information. This branch of the case was very clearly, logically, and plausibly presented; and were this the trial court, or were we sitting in the attitude of jurors, we may not say how far it would have availed to set this defendant free; but since the evidence in the cause was conflicting upon practically every important issue of fact involved in the trial, we may not, under the well-established rule of this court, give ear to an argument predicated upon such substantial conflict in the testimony as the record discloses here.

We find no sufficient error of law in the record to justify a reversal of the case. The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(169 Cal. 26)

In re MATHEWS. (S. F. 6824.)

(Supreme Court of California. Dec. 16, 1914.
Rehearing Denied Jan. 14, 1915.)

1. Guardian and Ward (§ 10*)—Right of Parent to Guardianship—Statute.

Under Code Civ. Proc. § 1751, the father or mother of a child under 14 is entitled to be guardian unless the parent is incompetent, even though the child's health and welfare may be promoted by giving it to another.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

2. Guardian and Ward (§ 13*)—Competency of Mother—Evidence.

On an appeal by the mother of a child under 14 from an order appointing a stranger his guardian, evidence *held* not to sustain a finding that the mother was unfit to act as guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

Department 1. Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Application for the appointment of a guardian of Gerald Mathews, a minor. From an order appointing Warren A. Rouse guardian, the mother of the minor appeals. Order reversed.

J. L. Nagle and Louis H. Ward, both of San Francisco, for appellant. E. E. Parlin, of San Francisco, for respondent.

ANGELLOTTI, J. This is an appeal by the mother of Gerald Mathews, a minor, from an order appointing one Warren A. Rouse guardian of his person and estate. The minor was born January 28, 1906, and has been in the family of Warren A. Rouse and his wife, Carrie E. Rouse, for over seven years. It is not questioned that the Rouses are in all respects competent to properly care for him, or that he is being given a comfortable home with them and being raised as one of their own children. The application of Rouse for appointment alleged that the father of said minor is either dead or has abandoned the child, and that the mother is an unfit and improper person to have his custody. The trial court found that the father of the minor is dead, and that the mother "is an unfit, incompetent, and improper person to have the care, custody, or control of the said Gerald Mathews," and "that the interest, welfare, and safety and happiness of said minor * * * will be promoted by" the appointment of Rouse.

[1] It is well settled that, under the provisions of section 1751 of the Code of Civil Procedure, the father or mother of a minor child under the age of 14 years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed guardian in preference to any other person, and that the court must appoint a parent seeking to be appointed, unless it finds such parent incompetent, notwithstanding the judge is of the opinion that the child's health and welfare may be promoted by giving it to another. In re Forrester, 162 Cal. 493, 123 Pac. 283; In re Salter, 142 Cal. 412, 415, 76 Pac. 51. Here, as we have seen, there is such a finding, and the only question is whether such finding has sufficient legal support in the evidence.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] We have given the evidence in this case very careful consideration and are unable to find therein sufficient support for this finding. Apparently the mother has always discharged her full duty to her child, in so far as she was able to do so. When he was but a few months old, immediately after the earthquake and fire of 1906, she advertised for a home for him, and in response to an answer to her advertisement she placed the infant in the care of the Rouses, as she says, upon an agreement that she was to pay for its maintenance $25 per month. Her testimony as to an agreement to pay them is opposed to the testimony of Mrs. Rouse, but it is not denied that she constantly, up to a short time ago when she sought the return of the child, contributed substantially to its support, giving the money therefor to Mrs. Rouse. She visited the child at frequent intervals, and so far as we can see failed in no respect in the discharge of any of her obligations as a mother, in so far as she was able to discharge those obligations. She had no property and no home, and worked for a living as a domestic servant, and therefore was obliged to temporarily, at least, place the child somewhere else. It may be that she will still be unable to keep the child with her, but no sufficient reason appears in the evidence why she should be deprived of the legal custody of the child and the right to determine where he shall be kept. She testified that she wishes to place him with her brothers and sisters in their home in San Francisco, and that they have indicated their willingness to receive him. It does not appear that this would be in any way an improper place for the child, or that the child would not be properly cared for in such place. The evidence relied on as warranting a finding of incompetency is pitifully weak, and entirely insufficient in our judgment to warrant a conclusion that the mother is incompetent to act as guardian and should be deprived of the custody of her child.

The order appealed from is reversed.

We concur: SLOSS, J.; SHAW, J.

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168 Cal. 771

In re WARNER'S ESTATE.

WARNER v. WARNER. (Sac. 2142.)

(Supreme Court of California. Dec. 12, 1914. Rehearing Denied Jan. 11, 1915.)

1. Husband and Wife (§ 33*)—Antenuptial Contract — Breach — Rescission — Estoppel.

An antenuptial contract, by which, in consideration of an annual payment of $100 and the support of her minor daughter, the wife released all her interest in his property except the sum of $1,000, which she was to receive at his death. The marriage took place May 2, 1889, and the wife's daughter became of age July, 1895, about which time she married and left home. The wife continued to accept payments under the contract until the parties became estranged some seven years thereafter, when there was litigation between them concerning her right to file a homestead claim on certain of his land. *Held*, that the husband's breach of the antenuptial contract by failing to support and care for the wife's daughter became complete in 1895, when the daughter became of age, and, the wife not having elected to rescind the antenuptial contract for that reason during the remainder of her husband's life, she was estopped after his death to repudiate the same in order to claim a widow's share of her husband's estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 196–202, 204, 885; Dec. Dig. § 33.*]

2. Contracts (§ 270*)—Rescission—Right to Rescind—Time.

Rescission of a contract, when not effected by consent, can be accomplished only by reasonable diligence to rescind promptly on discovery of the facts giving the right so to do if the party entitled is free from undue influence and aware of his right, and if under such circumstances he does not elect to rescind within a reasonable time, but continues with knowledge of the facts to accept payments due under the contract, the right is barred.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

3. Trial (§ 397*)—General Finding—Evidence—Failure to Make Special Finding.

Where, on an issue of estoppel against a widow to claim breach of an antenuptial contract by her husband since deceased, the court made a general finding that she was estopped, which was sustained by the evidence, omission to specifically find that her failure to exercise her right to rescind during the husband's lifetime was not caused by his undue influence was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

4. Husband and Wife (§ 34*)—Antenuptial Contract—Breach by Husband—Estoppel of Wife—Findings—Evidence.

On an issue as to a widow's right to administer her deceased husband's estate, evidence *held* to warrant a finding that her failure to exercise her right to rescind an antenuptial contract between them during her husband's life was not caused by his undue influence, and that she was therefore estopped to deny that she was bound thereby because of his alleged breach of the contract which was complete 11 years prior to his death.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 204, 205; Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, Sacramento County; G. W. Nicol, Judge.

In the matter of the estate of Adam Warner, deceased. Applications by Katie Warner and by Adam J. Warner for letters of administration. From an order directing the issuance of letters to Adam J. Warner and denying the motion of Katie Warner for a new trial, she appeals. Affirmed.

See, also, 158 Cal. 441, 111 Pac. 352.

A. A. De Ligne and R. Platnauer, both of Sacramento, for appellant. A. L. Shinn and W. F. Renfro, both of Sacramento, for respondent.

PER CURIAM. A rehearing in bank was ordered in this cause after a decision in department 1 of this court. Upon further consideration of the case we are satisfied with the reasoning and conclusions reached in the opinion in department, adopt that opinion as the opinion of the court in bank, and affirm the orders appealed from.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The opinion in department, written by Justice SHAW and concurred in by his associates in department, Justices ANGELLOTTI and SLOSS, is as follows:

"In this matter, the appellant, Katie Warner, the widow of deceased, applied for letters of administration of his estate. The respondent, Adam J. Warner, a son of the deceased, filed a counter petition asking that letters be issued to himself. He also filed a written opposition to the widow's petition. The widow, in turn, contested his petition. After a trial of the issues thus presented, the court found in favor of the son and made an order directing that letters of administration issue to him. From this order and from a subsequent order denying her motion for a new trial, the widow appeals.

"There have been two previous appeals in the case. The son, in his written opposition, set up as a bar to the widow's right to letters an antenuptial agreement between her and the deceased, whereby she relinquished all right, claim, and interest in his estate, as heir or otherwise. In her answer thereto she alleged: (1) That the agreement was obtained by fraud; (2) that it was the result of a mutual mistake; (3) that it was without adequate consideration; (4) that Adam Warner in his lifetime waived the agreement; (5) that he had in his lifetime failed to perform it. A general demurrer to this answer was sustained, and letters were awarded to the son. She appealed, and the order was thereupon reversed by the District Court of Appeal, to which the appeal had been duly transferred. That court held that the agreement, on its face, barred her right to letters of administration, that the answer thereto was sufficient upon a general demurrer, and that the court, in that proceeding, had jurisdiction to inquire into the facts upon which she sought to impeach the agreement. See 6 Cal. App. 361. Upon the second hearing in the superior court, findings were made against her upon all the issues and letters were again awarded to the son. Again the widow appealed to the Supreme Court, and again the order was reversed. This reversal was placed on the ground that there was no evidence to support the finding that Adam Warner had performed the conditions of the contract on his part. In his petition and in his written opposition, the son had alleged such performance. Upon the first appeal this allegation was held to present a material issue. Upon the second appeal this statement upon the first appeal was held to have become the law of the case. 158 Cal. 441, 111 Pac. 352. It was further decided that the finding upon the issue as to performance was not sustained by evidence tending to show that the widow had waived performance by consenting to the nonperformance at or before the time of its occurrence. There was no finding that there had been such waiver.

"The antenuptial agreement provided that Adam Warner should take care of, keep, maintain, support, and educate the minor child of the widow, a daughter named Mary, then about 12 years old. It is claimed that Adam Warner failed to perform this covenant, in so far as it bound him to maintain and educate Mary during her minority. The son, after the last appeal, amended his pleadings by alleging a waiver of performance in this respect, and further by alleging that the widow was estopped to claim such failure of performance as a ground for the impeachment of the contract.

"In addition to the covenant to support her and to support and educate the child, the agreement provided that the said Adam Warner should pay the said Katie Warner 'the sum of one hundred dollars per annum out of his own property' and that at his death she should receive $1,000 from his estate. It was held upon the first appeal that this right to receive $1,000 was a mere claim and did not give her an interest in the estate sufficient to entitle her to administration as widow or heir. The antenuptial agreement was executed on May 17, 1889. The marriage took place on the same day. Mary Winkelman, the daughter, became of age on July 9, 1895, and about that time she was married to L. H. Slater.

"The court below found that the widow did not refuse to allow Adam Warner to perform the covenant for the minor child's support and education or prevent such performance by sending her away from home and that she did not by reason thereof prevent or waive such performance. It based its decision giving letters to the son solely upon the ground that the widow was estopped to take advantage of the nonperformance to defeat the agreement. Upon this point the finding is as follows:

" 'That said Katie Warner is estopped to claim that the said agreement was not in full force and effect at the time of the death of said Adam Warner, and is estopped from claiming that the covenants relating to the care, maintenance, support, and education of said minor child were not fully performed by said Adam Warner. That said estoppel arises out of the following facts: That said Adam Warner failed to perform said covenant relative to the care, maintenance, support, and education of said minor child immediately after the marriage of said Adam Warner and Katie Warner, and at all times subsequent; that said minor child became of lawful age and was married more than ten years before the death of said Adam Warner and, at all times after the marriage of said Adam Warner and said Katie Warner, and up to the time of the death of said Adam Warner, said Katie Warner, with full knowledge of the default of said Adam Warner in the performance of said covenants, continued to receive and accept from said Adam Warner the annual payment of $100 therein provided, and, at all times, the said Katie Warner and the said Adam Warner treated the said agreement as being in full force and effect, and each performed all of the covenants of said agreement, except that the said Adam Warner failed to perform the covenants relative to the care, maintenance, support and education of said minor child.'

[1, 2] "It is not claimed that the specific facts set forth in this finding are contrary to the evidence. The appellant insists that they are insufficient, if true, to create an estoppel. This claim we think is wholly untenable. Adam Warner died on January 22, 1906. His breach of the contract became complete in July, 1895, at which time Mary, the minor child, became of age and was married. The right which the widow now claims, as against the validity of the agreement, is the right to repudiate or rescind it because of this breach and thus to avoid its results upon her. This right to rescind accrued to her, if at all, immediately upon the breach becoming complete in 1895. If she then desired to avail herself of it by repudiating the contract and to claim immunity from its effect to deprive her of any share of the decedent's estate as heir or otherwise, it was incumbent upon her to act promptly in the matter and to refuse further recognition of the contract. Rescission, when not effected by consent, can be accomplished only by the use of reasonable diligence to rescind promptly upon discovery of the facts which entitle the party to rescind, if such party is free from undue influence, and is aware of the right to rescind. Code Civ. Proc. § 1691. Where one has a right to rescind a contract because of a breach by the other party, and, with knowledge of such right, continues thereafter to accept from the other party payments due there-

under, the right of such person to rescind the contract for that breach is thereby barred. Delano v. Jacoby, 96 Cal. 280, 31 Pac. 290, 31 Am. St. Rep. 201; Oppenheimer v. Clunie, 142 Cal. 320, 75 Pac. 899; 2 Pom. Eq. Jur. §§ 817, 897, 917. The effect of such conduct is sometimes called a waiver of the right to rescind, and sometimes it is said that it creates an estoppel against that right. The mere name given to the effect of the conduct is immaterial. Upon the breach of the covenant she had her option either to treat the contract as subsisting and to rely upon her right to recover damages for that breach, or to rescind it altogether and thereafter to refuse to recognize it or act under it and thenceforth to claim a restoration to her prospective rights in his estate at his death as his widow. Her conduct in subsequently receiving and accepting these payments up to the time of his death clearly evinces an intention not to rescind the contract but to insist upon its validity. After having so acted for the ten years succeeding the breach and having thereby induced him to continue making the payments of $100 each year as the contract provided, she cannot now assert her former right to rescind.

[3, 4] "It is suggested that the court does not expressly find that her failure to exercise her right to rescind was not caused by the undue influence of her husband, and hence that the presumption that she was under such influence must prevail, and that this excuses her failure to exercise her right. We are of the opinion that this point is covered by the general finding that she is estopped to claim that the agreement is now not fully performed by reason of the specific facts stated. If she had been prevented from earlier rescission by his undue influence, then she would not have been estopped. The finding therefore implies that she was not so prevented. Thus construing the finding, it is fully sustained on this point by the evidence. The parties were estranged during the last seven years of his life, and in the year 1900 there was sharp litigation between them concerning the effect of this agreement upon her right to file a declaration of homestead upon his land. He brought an action to cancel the homestead declaration on the ground that it was filed without his consent and that the antenuptial agreement prevented her from claiming a homestead interest in his property. In that litigation she had the advice of her own attorney in regard to the agreement and its legal effect. This occurred several years after the complete breach of the covenant and six years before his death, during all of which time she continued to receive the payments.

"There is no merit in the claim that this question of estoppel was decided against the son by this court on the last appeal and has now become the law of the case. The court there, in reversing the order on the ground that there was no evidence to sustain the finding on the material issue of nonperformance, said that this omission was not cured by the fact that evidence had been introduced tending to show that the widow had waived the nonperformance by consenting thereto at or before the time of the breach. On the issue of waiver there was no finding. No other reference was made to the subject of waiver or estoppel. The fact that she accepted annual payments after the breach occurred is not even mentioned, nor is anything said about the effect of such acceptance. No rule of law was announced in that opinion which could become the law of the case on the facts presented upon the present appeal on the subject of estoppel or waiver.

"These comprise all the questions presented in support of the appeal. We find no ground upon which the order complained of can be deemed erroneous."

The orders appealed from are affirmed.

We dissent: ANGELLOTTI, J.; MELVIN, J.

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ALBERT PICK & CO. v. JORDAN, Secretary of State. (S. F. 6392.)

(Supreme Court of California. Dec. 15, 1914. Rehearing Denied Jan. 14, 1915.)

1. Courts (§ 97*)—Federal Courts—Controlling Decisions.

A state court in deciding a federal question must conform to the latest decision of the federal Supreme Court thereon, though it necessitates the reversal of its own prior decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329–333; Dec. Dig. § 97.*]

2. Taxation (§ 53*)—"Excise Tax"—Nature.

An "excise tax" is an inland impost levied on articles of manufacture or sale and also on licenses to pursue trades or dealing in commodities, and is frequently denominated a privilege or occupation tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 127; Dec. Dig. § 53.*

For other definitions, see Words and Phrases, First and Second Series, Excise.]

3. Commerce (§ 69*)—Corporations—Privileges—Excise Taxes.

The taxes imposed by Pol. Code, § 409, requiring the Secretary of State to charge and collect fees for filing articles of incorporation, graduated on the amount of the capital stock, and by St. 1905, p. 493, imposing an annual license tax on foreign corporations doing business in the state, are excise taxes, demanded as a privilege for the right to do a domestic business, and not taxes based on the capital stock but merely measured thereby, and the imposition of the taxes on a foreign corporation selling its merchandise in the state, though manufactured elsewhere, is not an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113–119; Dec. Dig. § 69.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition for mandate by Albert Pick & Co. against Frank C. Jordan, as Secretary of State, to direct the filing of a certified copy of articles of incorporation, without payment of fees. From a judgment awarding the mandate prayed for, Frank C. Jordan, appeals. Reversed with directions.

U. S. Webb, Atty. Gen., Raymond Benjamin, Chief Deputy Atty. Gen., John H. Riordan, Asst. Atty. Gen., for appellant. McClellan & McClellan, J. C. Campbell, and David L. Levy, all of San Francisco, for respondent. Campbell, Weaver, Sheldon & Levy, of San Francisco, amici curiæ.

HENSHAW, J. Petitioner is a corporation, organized under the laws of the state of Illinois, for the purpose of manufacturing and selling and generally dealing in china, glassware, pottery, restaurant supplies, and other merchandise. It manufactures none of the enumerated articles in the state of California. However, as it avers in its petition, it has for a long time been engaged in interstate commerce in these goods and wares between the state of Illinois, the state of California, and other states of the United States.

It maintains a branch office and place of business in the city and county of San Francisco, and sells its goods, wares, and merchandise in the city and county of San Francisco and in other states of the United States, and ships its goods, wares, and merchandise from the state of Illinois into the state of California and into other states, and from the state of California into other states. It has tendered to the secretary of state for filing a certified copy of its articles of incorporation with other appropriate papers required by the laws of the state, and the secretary of state has refused to file the same excepting upon prepayment of the fee fixed by section 416 of the Political Code (now 409, Pol. Code), and the fee prescribed by section 2 of the act relating to revenue and taxation providing for a license tax on corporations. Stats. 1905, p. 493. Petitioner, refusing to pay the fees, made application to the superior court of the city and county of San Francisco for mandate against the secretary of state directing him to file these papers without payment of the fee exacted by the terms of subdivision 4 of section 409 above cited and the corporation license tax of 1905.

The secretary of state answered, setting forth that the petitioner, besides the conduct of interstate commerce in which it is admittedly engaged, transacts—

> "a large volume of intrastate business within the state of California; that said intrastate business forms no part of and is neither inextricably nor necessarily connected with the interstate business of said company; and respondent further alleges that its said interstate business is nowise dependent upon the aforesaid intrastate business of said company; that the authorized capital stock of said company amounts to one million dollars."

A general demurrer to this answer was interposed and sustained, and the trial court filed its findings of fact and conclusions of law, wherein it declared in accordance with the allegations of the petition and awarded the mandate prayed for. The secretary of state has appealed from this judgment.

[1] Upon this appeal we are asked to distinguish this case from that of Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236, where this court, in the matter of the exaction of taxes or fees upon corporations engaged in interstate commerce, sought (though perhaps in vain) to determine the underlying principles and to follow the rulings of the Supreme Court of the United States enunciated in that series of cases beginning with Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. We are asked to do this because of the new light which it is said has been shed upon the legal questions involved by the cases of Baltic Mining Co. and S. S. White Dental Manufacturing Co. v. Commonwealth of Massachusetts, decided by the Supreme Court of the United States, and reported in 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127.

In Mulford Co. v. Curry this court expressed the reluctance it felt over the necessity of applying the principles of the Western Union Telegraph Co. v. Kansas, and the other like cases to the fiscal and revenue laws of the state. It did so under the compulsion of its oath to uphold the Constitution and laws of the United States as expounded by its highest tribunal. If we were in error in our understanding of the law, if the Supreme Court of the United States has latterly thrown additional light upon its own exposition of the law, or if it has receded from any of the views which it has expressed in the earlier cases, it is for this court to remodel its own decisions in swift conformity therewith.

It becomes necessary, therefore, even at the peril of prolixity, to set forth the understanding which this court had, and which in Mulford Co. v. Curry it expressed, of the legal principles enunciated and the legal controversies decided in that series of cases beginning with the Western Union Telegraph Co. v. Kansas.

By the law of Kansas every foreign corporation "seeking to do business in this state" was required to file a copy of its charter or of its articles of incorporation with the secretary of state, and, when so filing, to "pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first $100,000 of its capital stock or any part thereof, and upon the next $400,000 or any part thereof of one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of $500,000, $200." The Western Union Telegraph Company, a New York corporation, was conducting business in the state of Kansas. That business was both interstate, involving the reception within the state of messages from points outside of the state, and, conversely, the sending of messages from points within the state to points outside the state, and intrastate or domestic, consisting of the sending and reception of messages between different points wholly within the state. It refused to make the filing and pay the fee prescribed by the Kansas statute, and the state brought its action in one of its own courts against the company, seeking to oust and restrain it from doing any *domestic* business within the state, such being one of the penalties by the laws of Kansas prescribed. The state court rendered its decree of ouster and restraint as prayed for. The cause was transferred under writ of error to the Supreme Court of the United States, and there decided by a sharply divided court upon an elaborate opinion handed down by Mr Justice Harlan. The Western Union Telegraph Company was capitalized for $100,000,000. The "charter fee" (such is the description of the fee used by the state of Kansas) in the case of the Western Union Telegraph Company amounted to $20,100.

Amongst the contentions of the state of Kansas in support of the validity of the judgment of its court were that it had the absolute right to impose the terms and conditions upon which a foreign corporation might do a domestic business within its territorial limits; that the fiscal law under review imposed as such condition the payment of a charter fee based on or admeasured by the par value of the capital stock of corporations; that this was not a tax upon the property of the corporation either within or without the state, but was "a local police regulation on local business only"; that the fact that the statute might cause inconvenience to interstate business did not render it unconstitutional; that the failure to comply with the law did not prevent the foreign corporation from continuing to the fullest extent in engaging in interstate commerce. The contentions of plaintiff in error are set forth by the Supreme Court in the opening paragraph of the opinion which it rendered in that case. They are as follows:

> "The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the state, *a given per cent. of its authorized capital*, wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and therefore is illegal under the commerce clause of the Constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the state, a thing which could not be done consistently with the due process of law enjoined by the fourteenth amendment."

And here, at the outset, it may be well to state that each and every one of these contentions is to the fullest extent sustained by the decision. It is to be remembered that the Supreme Court itself declares that these contentions are the ones to which particular attention will be directed. What the Supreme Court decides is that without regard to the name by which the license, or fee, or excise, or impost, or occupation or privilege tax, may be called, when it takes the *form* that it took in Kansas, of an exacted payment of a given per cent. of the authorized capital stock, this exaction accomplishes two distinct illegal and unconstitutional results. First, it is in legal effect a tax upon all of the property represented by the capital stock of the corporation, therefore a tax upon such parts of the property as were engaged in interstate commerce, and therefore an invalid tax under the commerce clause of the Constitution of the United States; and, second, it is an attempt by the state to tax property beyond its territorial jurisdiction, and is therefore confiscatory in nature and violative of the fourteenth amendment of the Constitution. That there can be no possibility of misunderstanding the meaning of the Supreme Court in this particular, we shall employ a few quotations from its decisions. But before doing so we will quote one sentence from the dissenting opinion of Mr. Justice Holmes in this particular case. Bearing in mind that the majority of the Supreme Court declared that the Kansas law imposed a tax, we note Justice Holmes in dissenting saying:

> "I assume that a state cannot tax a corporation on commerce carried on by it with another state, or on property outside the jurisdiction of the taxing state; and I assume, further, that for that reason a tax on or *measured by* the value of the total stock of a corporation like the Western Union Telegraph Company is void."

Mr. Justice Holmes' argument proceeds upon the view that Kansas had not imposed a tax at all.

> "She simply has said to the company that if it wants to do local business it must pay a certain sum of money. * * * The whole matter is left in the Western Union's hands."

The prevailing opinion declared that there was no decision—

> "holding that a state may, by any device, or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another state. * * * If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through the forms to the substance of things."

Then says the court:

> "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent. *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted and its property wherever located, and, in terms, makes it a *condition* of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent. of its whole authorized capital, representing all of its property and all its business and interests everywhere. * * * So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the telegraph company shall pay *a given per cent. of*

its authorized capital stock, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for the statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the telegraph company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported."

In the course of its argument and in demonstration that its reasoning was not meant to apply exclusively to that class of corporations known as common carriers, it uses this illustration:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a state, should, in addition, solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a *condition* of the right to engage in local business within its limits that the corporation pay a given per cent. of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution no court could, by any form of decree, recognize or give effect to or enforce such a condition."

And in announcing the familiar doctrine that Kansas might exact a license tax of the corporation "strictly on account of local business done by it in that state," it couples this statement with the declaration:

"But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall *first* pay to the state a given per cent. of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the state."

And the opinion concludes as follows:

"The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution."

The next case of Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, arose under the same Kansas statute, Mr. Justice Harlan again delivering the opinion. It reiterates and reaffirms the opinion and decision of the Western Union Case, and defines that decision in terms, and in the following language:

"The Charter Board, we have seen, gave it permission to engage in intrastate business in Kansas on *condition* that it should pay to the State Treasurer *for the benefit of the permanent school fund of the state*, as a charter fee, the sum of $14,800, which is the prescribed statutory per cent. of the company's authorized capital, representing *all* of its property and interests everywhere, in and out of the state, and *all* its business, both interstate and intrastate. It does not appear how much of the single 'fee' demanded by the state is to be referred to the interstate business of the company nor how much to its property outside of the state, nor what part has reference to its intrastate business or to its property within the state. * * * We hold: * * * (2) That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property, interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state and contribute from its capital to the support of the public schools of Kansas."

Mr. Justice White filed a concurring opinion in that case, in which, while assenting to the views of his associates, he carried the doctrine further than they, declaring, with unimpeachable logic:

"It is not by me doubted that as a practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business."

Epigrammatically, he presents the controversy in the following sentences:

"The only right here challenged is the authority of a state to impose an unconstitutional tax and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business. And this upon the false assumption that absolute power to exclude exists; that is, to impose an unlawful tax and sustain it by another unlawful assumption of power, a process of reasoning which, to my mind, must rest on the proposition that in deciding questions of constitutional power it is to be held that two wrongs make a right."

Mr. Justice Holmes again dissented, reiterating in amplified form the views expressed in his earlier dissent, and concluding:

"I think that the tax in question, *for I am perfectly willing to call it a tax*, was lawful under all the decisions of this court until last week." (The italics are ours.)

The next case was Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423. This case had to do with an Arkansas law, which required all foreign corporations to file copies of their charters or articles of incorporation with the secretary of state, under heavy penalties for failure so to do, and required them also to pay into the treasury of the state, "for the filing of said articles, a fee of $25 where the capital stock is $50,000 or under; $75 where the capital stock is over $50,000 and not more than $100,000; and $25 additional for each $100,000 of capital stock." The Supreme Court of the United States declared that the case could not "be distinguished in principle from Western Union v. Kansas and Pullman Co. v. Kansas," and that the difference in the wording of the Kansas and Arkansas statutes—the former being in the nature of a percentage tax, the latter naming fixed sums of money based upon capitalization—did not differentiate the cases so as to take the Arkansas statute out of the ruling of the former cases. These cases were followed by Atchison, etc., Railway Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050. The statute of Colorado exacted a "fee" of a foreign corporation of two cents upon each $1,000 of its capital stock, which fee it was declared was for the right to do a local business within the state. The action was brought to recover the tax paid under protest. Mr. Justice Holmes, who dissented in the earlier cases, delivering the opinion of the court, declared:

> "Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to do business wholly within the state."

Again the question arose in International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103. The International Text-Book Company was a Pennsylvania corporation organized for purposes of profit and with a capital stock. It combined the publication of text-books and courses of instruction in various arts and sciences with an educational school conducted by correspondence, to the students of which it transmitted for a consideration these text-books and educational courses. It employed salaried agents within specified territories to secure pupils or students. It did so in Kansas. It failed or refused to comply with certain provisions of the Kansas statute, one the provision for the charter fee considered in Western Union Telegraph Co. v. Kansas, supra, and another the provision requiring it to file with the secretary of state a detailed statement showing the authorized capital, the paid-up capital stock, the amount of assets and liabilities, etc. Among the penalties prescribed for a failure so to do was the denial of the right to the defaulting corporation to maintain an action in any of the courts of the state. The International Text-Book Company sued Pigg as a debtor under one of its contracts of instruction. The Supreme Court of the United States reaffirmed the invalidity of the Kansas charter fee statute, and further declared:

> "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state confessedly could not control by legislation. It results that the provision as to the statement mentioned in section 1283 [Gen. St. 1901] must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the secretary of state that such statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

And, finally, was decided in Bucks Stove & Range Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189, where this purely manufacturing and mercantile corporation offended against the same Kansas law and was held by the Supreme Court to be immune from punishment therefor, under authority of the Pigg Case, supra.

We have now considered all of the decisions of the Supreme Court of the United States (saving the Massachusetts case hereinafter to be reviewed) which can have any bearing upon the questions before us. It becomes pertinent here to take up for brief analysis the case of Mulford Co. v. Curry, supra, wherein in this state the foregoing decisions of the Supreme Court first came under review. The more pertinent does it become to do this since the statutes in the present case under review are in all substantial particulars identically the same as they were when Mulford Co. v. Curry was decided. A reference to Mulford Co. v. Curry will save a repetition of the language of those statutes. Additionally it should be added that section 410 of our Civil Code declares that every foreign corporation which shall neglect or fail to comply with the conditions of sections 408 and 409 of the Code shall be subject to a fine of not less than $500, to be paid into the state treasury to the credit of the general fund, and every such corporation so failing is denied the right "to maintain any suit or action in any of the courts of this state, or acquire or convey any legal title to any real property within the state until it has complied with said section." This language is as general as language can be made. It is declared applicable to "*every* corporation organized under the laws of another state, territory, or of a foreign country." Section 408 requires "*every* corporation organized under the laws of another state, territory, or of a foreign country" to "file in the office of the secretary of state of the state of California a certified copy of its articles of incorporation," etc. The language of section 416 of the Political Code quoted in Mulford Co. v. Curry has become by amendment the language of the present section 409 of the same Code.

The Mulford Company, like the petitioner in the case at bar, was a commercial corporation organized to do, and doing, an interstate business and an intrastate business within the state of California. Like the present petitioner, it objected to the enforcement of the fees exacted by our laws, and, after tendering certain nominal filing fees, sought mandate against the secretary of state to compel him to receive and file certain documents, the filing of which was called for by our laws. That part of our laws to which the Mulford Company in especial objected was section 416 of the Political Code (now 409). This law, it will be noted (as did the Kansas statute), imposes a single fee upon corporations which it is made mandatory upon the Secretary of State to collect for filing their articles of incorporation, the other sections referred to requiring that such articles be filed. In addition to this law, requiring foreign corporations to pay this fee before they can engage in business in the state of California at all, we have upon our books another law designated in its title as "A license tax upon corporations," requiring them to pay an annual license tax for the right to continue in business. Stats. 1905, p. 493. It was the first license law which this court had under especial consideration in the case of Mulford Co. v. Curry. This may be noted from the declaration in the case where the annual license fee law is set out, that it is set out as "having further relation to the matter." It was not important to the decision in the Mulford Company Case to elaborate our views upon these acts separately. The latter one was referred to, first, because it formed a part of the same fiscal system; second, because it, too, based its license fee charges upon the authorized capital stock of corporations; and, third, because the practical effect in the case of every foreign corporation seeking to engage in business in the state of California was to require it to pay two fees. To illustrate, if the Western Union Telegraph Company had undertaken to engage in business in California, an analysis and competition will show that it would have been required to pay a fee of $10,000 under sections 409 of the Civil Code and 416 of the Political Code, and a fee of $250 under the corporation license tax act, or a total of $10,250 in California, as compared with $20,100 in Kansas.

Turning to the judgment in Mulford Co. v. Curry, it will be found that the only judgment rendered is a declaration that the requirement of section 408 of the Civil Code, that the petitioner file its articles of incorporation, is a reasonable requirement, but that the further requirement that, as a condition of such filing, the petitioner pay the fee exacted by section 409 of the Civil Code and 416 of the Political Code is illegal. Neither by the terms of the judgment nor by any express language in the opinion itself was the annual license tax declared to be unconstitutional under the authority of the federal cases. But since the Supreme Court of the United States had declared that such fees, when based upon the total capital stock, were invalid exactions for the reasons given, the fear was felt and expressed that even the annual corporation license tax, so founded upon the capital stock, might fall under the same ban, and this court sought to advise the Legislature as to what it conceived the Supreme Court of the United States had declared to be the limit of the law-making power in the matter.

What, then, did the Supreme Court of the United States decide in its cases?

It decided: (a) That it would review and consider the language of each state fiscal act and determine for itself, regardless of the determination of the states' legislative or judicial departments, what in fact the law did mean and what in fact it did accomplish, quoting with approval from Galveston, Harrisburg, etc., Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, to the following effect: "Neither the state courts, nor the Legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. (b) If under the interpretation of the Supreme Court it resulted that a particular statute "either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business." (c) It decided that interstate commerce was illegally burdened by a tax or fee directly on or based on the capital stock of a corporation which, though engaged in local business within a state, was also engaged in interstate commerce. Thus we find the court in Pullman Co. v. Kansas saying that "the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests and business of the company, within and out the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas." Again, we find Mr. Justice Holmes in his dissenting opinion "assuming" and conceding that "a tax on or *measured by* the value of the total stock of a corporation like the Western Union Telegraph Company is void." And again we have him declaring in his dissenting opinion in the Pullman Case: "I think that the tax in question, for I am perfectly willing to call it a tax, was lawful." (d) We find that the unconstitutionality and illegality of the tax so based and levied are declared to exist upon two separate and wholly distinct grounds, which grounds are enunciated and re-enunciated time and again. Those grounds may be thus stated: The requirement to pay a given per cent. of the capital stock as a prerequisite of the right to do a local business exacts burdensome and unconstitutional conditions from the corporation; the first that the state thus taxes the instrumentalities and properties used in interstate commerce which lie without the taxing power of the state, and thus unduly burdens interstate commerce in violation of the commerce clause of the Constitution; and the second that such an act in taxing property without the jurisdiction of the taxing power requires a corporation seeking to do local business within a state to waive its constitutional right of exemption from taxation on its property lying outside of the state. (e) These results are declared to follow from the act of taxing the whole capital stock of such a corporation and are nowhere and nowise declared to be dependent either upon the amount of the capitalization of the corporation nor upon the amount of the tax exacted from that corporation. We perceived, or thought we perceived, the ground for this in the principle that if the power to tax in a given way be conceded, the amount of the tax is vested wholly in the discretion of the taxing power, and we had in mind not only the language of Chief Justice Marshall "that the power to tax involves the power to destroy" (McCullouch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579), but also the language of Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, quoted with approval in the Western Union Case, in reference to such license taxes, that "if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible." (f) That, in thus guarding interstate commerce from unlawful interference, the Supreme Court would be governed not by what a given charge was or was called, but by consideration of what in its operation was its effect upon such commerce. For we find in the Western Union Telegraph Case the following language quoted with approval from Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773:

> "Whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction."

(g) We believed that the Supreme Court meant and declared, for the indicated reasons, that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the capital stock of such corporations was forever inhibited, the Supreme Court saying:

> "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company." Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311.

And to the declaration of Mr. Justice Holmes in his dissenting opinion to the following effect: "If, after this decision, the state of Kansas, without giving any reason sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed,"—we believed that the answer would be, as above indicated, that it was not the *amount* of the charge which determined the invalidity, but the fact that the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights.

These, then, were some of the conclusions which we drew from the decisions of the Supreme Court, and which, with more or less completeness, we sought to declare in Mulford Co. v. Curry. One part of the judgment of the Supreme Court we conceived to be apodictic, and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the Constitution of the United States, and it was under this conviction that we sought in Mulford Co. v. Curry to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation.

There arose in Massachusetts two cases of similar import, Baltic Mining Co., 207 Mass. 381, 93 N. E. 831, and the S. S. White Dental Manufacturing Co. v. Commonwealth, 212 Mass. 35, 98 N. E. 1056, Ann. Cas. 1913C, 805. For convenience we may refer to but one and call that the Dental Company Case. The Dental Manufacturing Company was a Pennsylvania corporation, having no factories in Massachusetts, but engaged in domestic business within the state of Massachusetts, as well as in interstate commerce. The Massachusetts revenue laws provided that:

> "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner, of one-fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000."

The Dental Manufacturing Company objected to the payment of the tax upon the three grounds so clearly enunciated in Western Union Telegraph Company v. Kansas. Those grounds, as stated by the Supreme Court of the United States, to which the case subsequently went on writ of error, being:

> "First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the common-

wealth of Massachusetts; and, third, the tax denies to the plaintiffs in error the equal protection of the law."

The Supreme Court of Massachusetts, after a painstaking review of its taxation history, its peculiar system of taxation and the decisions of its courts, held the tax to be a pure excise tax, "excise tax" as thus employed meaning a privilege tax upon the right to pursue an occupation, and not a tax upon property at all. It declared that it recognized that the Supreme Court of the United States would look through the form to the substance, and determine for itself whether such an impost was or was not a property tax or a burden upon interstate commerce, and to this point cited the decisions of the Supreme Court which we have been considering. But it declared that there were "at least two important and, as we think, vital distinctions between these cases and the one at bar." The first of those distinctions is declared to be the fact that in the cases before the Supreme Court of the United States the corporations, though one and all engaged in domestic commerce, were common carriers, organized for the transportation of intelligence, commerce, and persons between the states, and that their local business could not be given up without impairing their capacity to transact their interstate business. And the second distinction was that the maximum fee allowed by the Massachusetts statute was $2,000, while in the Kansas and Arkansas statutes the tax was graded and increased by the amount of the capital stock, and to the mind of the Supreme Court of Massachusetts "this provision demonstrates that it is not a property tax, but only an excise, so limited that it cannot reach beyond a reasonable license fee." Further, the Supreme Court of Massachusetts points out that a flat rate of $2,000 might have been exacted of all corporations without doing violence to any right guarantied by the Constitution of the United States, and that in fact what Massachusetts has done has been to diminish the burden upon corporations of smaller capitalization. Again, the Massachusetts court points out, as a compelling reason for its determination, that the authorized capital stock of the Dental Company is $1,000,000, while its assets aggregate $5,711,718.29, thus to its mind evidencing the fact that the tax was an excise and not a property tax on or based on its authorized capital stock. And, lastly, the Supreme Court of Massachusetts decided that the act did not apply to common carriers, railroad, telegraph, and telephone, which were taxed upon another plan; that it did not apply to corporations whose sole business within the state was interstate commerce, nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intrastate business was conducted in such close connection with the other that it could not be abandoned without serious impairment of the interstate business. It held that the Dental Company's intrastate business was severably distinct from its interstate business, and that therefore it was liable to the payment of this excise tax for the privilege of carrying on that intrastate business.

These cases (Baltic Mining Co. and S. S. White Dental Mfg. Co. v. Commonwealth of Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127), as has been said, went to the Supreme Court of the United States, and in an opinion handed down by Mr. Justice Day, the judgment of the Supreme Court of Massachusetts, upholding the validity of its foreign corporation license tax law and the liability of the Dental Company to pay this tax, was sustained, Chief Justice White, Mr. Justice Van Devanter, and Mr. Justice Pitney dissenting. The ground of their dissent has not been stated, but we think it beyond peradventure that, looking through form to substance, they believed this Massachusetts tax, call it excise or what you will, was in fact a tax upon the total capital stock of the dental corporation, and thus was a tax within the inhibition declared in the Western Union Telegraph Company v. Kansas and the other like cases.

[2] The Supreme Court of the United States adopts without reservation the determination of the Supreme Court of Massachusetts that this fee was an excise tax as distinguished from a property tax. It may at once be granted that it is that form of an excise tax which is frequently denominated a privilege or occupation tax, but it by no means follows that, being an excise tax, this is conclusive that it is not levied upon property. Indeed, many forms of excise tax are distinctly and admittedly levied upon property, and every definition of excise includes this kind of tax. An excise is "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Patton v. Brady, 184 U. S. 617, 22 Sup. Ct. 496, 46 L. Ed. 713. To say that because a tax is an excise it is not levied upon property is to throw all the reasoning of the Supreme Court in all these cases to the four winds. The argument was made in these cases, and it was a sound argument, that the laws under consideration merely imposed an occupation or privilege tax—in short an excise tax—for the right to do a local business, and this was conceded by all of the justices of the Supreme Court. Their answer, however, to the conclusion sought to be drawn from this was that, notwithstanding that it is an excise tax or privilege or occupation tax, it is levied upon property beyond the taxing power of the state, and by the fact that it is so levied imposes a burden upon property without the state which is engaged in interstate commerce. We are unable to perceive, therefore, how the determination that the Massachusetts tax is an excise tax relieves

it from the condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation. As little do we perceive that the amount of the tax imposed by the Massachusetts law has materiality in the consideration. If the principle upon which its tax is based is a sound one, it may to-morrow increase the amount of the tax to any extent. It is true that in the earlier cases the corporations involved were common carriers, and the Supreme Court of the United States makes mention of that fact in the Dental Case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the Constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers—the instrumentalities by and through which commerce is conveyed—shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation. The Supreme Court of the United States points out very truly that in the Western Union Telegraph Company Case and in the Pullman Case "there was no attempt to separate the intrastate business from the interstate business." No such attempt is made by the Massachusetts law. True, the Massachusetts Supreme Court, under a stipulation of facts, finds that about 5 per cent. of the business of the Dental Company was intrastate. But there is no attempt in the law to impose any tax upon that part of its business nor upon the $100,000 worth of property which represents the company's holdings in the state. It would have been just as easy and as practical to have shown in the Western Union Telegraph Company Case the proportion of its local business as compared with its interstate business, and, indeed, in the case of every common carrier or commercial concern, we venture the assertion that not the slightest practical difficulty will be found in so doing. Indeed, we may recall the fact that this is required to be done in this state as a part of its revenue laws in the case of every common carrier engaged in interstate as well as intrastate business, and we have yet to hear of the slightest complaint touching the difficulty or impracticability of so doing. True it is that in the case of most, and we may say all, common carriers engaged in interstate commerce, the deprivation of local business is an injury and impairment of their business as a whole. But this is equally true of every commercial corporation likewise engaged in interstate and domestic business. Nor have we yet been told, nor are we told by this last decision of the Supreme Court, that this is a fundamental ground for destroying a state privilege tax otherwise constitutional. True, also, it is that in Western Union v. Kansas it is said that:

> "We cannot fail to recognize the intimate connection which, at this date, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business."

But in that same connection it is said that:

> "It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations which, under the guise of regulating local affairs, really burdens rights secured *by the Constitution and laws of the United States.*"

But as a state may absolutely exclude even a common carrier from doing a local business within its territory, and as this has been distinctly and in terms held in Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586, and Pullman v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877, where in the prevailing opinion in the Western Union Telegraph Company Case it is said, referring to these two cases, both dealing with common carriers, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce, and as, in even stronger language, the same principle is declared in Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164, it is not permissible for us to hold that the mere interference with or deprivation of local business by a state statute not in itself otherwise unconstitutional becomes unconstitutional for its indirect influence on the interstate business of the company affected. As little are we able to perceive that the accidental fact that the White Dental Company's capital stock is $1,000,000, while its total assets aggregate $5,711,000 has any determinative value in this consideration. If a corporation called upon to pay a tax of $^1/_{50}$ of 1 per cent. of its total capital stock has assets amounting to five times the par value of its total capital stock, the tax amounts to $^1/_{250}$ of 1 per cent. upon its total assets. If another corporation, however, capitalized for the same amount, has assets to the value of only ⅕ of its capital stock, it results that the property of that corporation is taxed $^1/_{10}$ of 1 per cent. So the burden is the heavier upon the poorer corporation. And in neither case is there any attempt to segregate and impose the tax upon that portion of the property or that portion of the whole business lying within or done within the state imposing the tax. Or, again, if we consider the Kansas law in connection with the Massachusetts law, it is indisputable that both levy a per centum tax in terms upon the total capital stock. An important difference in favor of the Kansas law is that when this charge is once paid, the privilege of engaging in domestic business is continuously and indefinitely assured. It is one single occupation tax. In Massachusetts, however, it is an annual burden year by year. The corporation annually must pay the per centum for the renewed right to continue in business. In Kansas a corporation with a capital stock of $2,500,000 would pay a single tax of $700. In Massachusetts that same corporation would pay annually a tax of $500. It is certainly reasonable to suppose that corporations engaging in interstate and domestic commerce desire to continue their local business for more than one year. In two years the Massachusetts tax upon this corporation would exceed the Kansas charge. So while the Supreme Court of the United States does not follow the reasoning advanced by the Supreme Court of Massachusetts, which the latter court held to differentiate its revenue law from that considered in the Kansas and other cases, it does in its recitals state many of the facts which the Supreme Court of Massachusetts considered to have a determinative bearing upon the question, some of which we have just now ourselves been considering. What the Supreme Court of the United States does say is to reannounce the familiar proposition that every case involving the validity of a tax must be decided upon its own facts, and at the conclusion of this recital to declare as follows:

> "The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

If we analyze this language correctly, it is a declaration that if a state imposes a privilege tax upon the right of a foreign corporation to engage in strictly domestic business within that state (thus we construe the language "the tax levied upon a legitimate subject of such taxation") "this tax is not void because it is imposed (levied or assessed) upon property beyond the state's jurisdiction" for the reason that "the property itself is not taxed. The authorized capital stock is used only as a measure of taxation." Still further paraphrasing this language, we are unable to perceive that it means anything other than if a state desires to impose an occupation tax upon a foreign corporation for the right to do a strictly domestic business within its limits, it may impose this license tax upon the capital stock of the corporation, because, notwithstanding that the tax is imposed upon the capital stock and thus upon property beyond the state's jurisdiction, the Supreme Court of the United States will hold that the tax is valid, because it will say that in the last analysis the property itself is not taxed, but that the capital stock is used only as a "measure of taxation." Again, we fail to perceive how every word of this might not equally well have been said in the Western Union Telegraph Company Case, thus forcing the irresistible conclusion that the Supreme Court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases. But again, unfortunately, we are confronted in the same opinion with the declaration of the court that it has "no disposition to limit the authority of those cases." We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our Brethren of the Supreme Court of Montana are similarly afflicted, for they, too, declare State ex rel. v. Alderson, 140 Pac. 82:

> "We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in Western Union Telegraph Co. v. Kansas, and held to impose a general tax upon all of the property of the company, and the statute of Massachusetts, considered in Baltic Mining Co. and S. S. White Dental Co. v. Commonwealth, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, and held to be a mere excise."

We have said here, as well as in Mulford Co. v. Curry, that we sought to arrive at, and thought we had arrived at, the fundamental and governing principle of the decisions, which was that to tax the total capital stock of a corporation for the indicated purposes compelled the corporation paying the tax to submit to two unconstitutional burdens, and that while in dollars and cents the same charge might be imposed upon the corporation, this particular form of tax could not be permitted. It is apparent from the last decision of the Supreme Court that in some forms it *is* permitted, and only the Supreme Court of the United States can say what are the permitted forms. We have reached the point where, if it be *said* that the state occupation or privilege charge be an excise tax (and every one of them of necessity must be excise taxes), then it is not a property tax. And even if it be in terms a percentage tax upon the capital stock of a corporation, if it be *said* that this is not a tax on the capital stock, but that the capital stock and per centum are taken as constituting merely a convenient measuring rod for fixing the tax, then the property is not taxed, and all constitutional objections are obviated.

[3] As these questions greatly affect the revenues as well as the rights of the states, as the determination of each one of them is

to rest upon its facts, and as, in the event of a decision adverse to a state by its own courts, the state, because of a most unfortunate hiatus in the law, is deprived of a right of a review of the question by the Supreme Court of the United States, we are moved in the present condition of the decisions to hold, and we do hold, that as to both of the license fees in question their payment is exacted as a privilege or occupation tax exclusively upon the right to do a domestic business within the state of California; that these taxes are excise taxes and not property taxes, and that the tax is not on, nor based on, the capital stock of the corporation, but is merely admeasured by that capital stock; that in every case, and so in this case, it is practicable (for what it may be worth) to segregate the strictly domestic business of a corporation from its interstate business; that the case of Mulford Co. v. Curry should no longer be regarded as an authority; that the respondent in this case should pay the fees prescribed by our law; that the general demurrer sustained to defendant and appellant's answer in the trial court should not have been sustained; that the judgment rendered in favor of respondent in the trial court should be reversed and the relief accorded it denied. And in conclusion we may add that if again we are mistaken, at least the doors of the Supreme Court of the United States are open for the correction of our error.

The judgment appealed from is therefore reversed, with directions to the trial court to proceed in accordance with the views herein expressed.

We concur: SULLIVAN, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

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169 Cal. 804

MELVILLE CLARK PIANO CO. v. JORDAN, Secretary of State. (S. F. 6681.)

(Supreme Court of California. Dec. 15, 1914.)

In Bank. Application for mandamus by the Melville Clark Piano Company against Frank C. Jordan, as Secretary of State. Mandate denied.

Judson W. Reeves, of Healdsburg, and Willard P. Smith, of San Francisco, for petitioner.

PER CURIAM. The questions involved in this cause are the same as those considered in Albert Pick & Co. v. Frank C. Jordan, as Secretary of State of the State of California (S. F. No. 6392) 145 Pac. 506, this day decided. Upon the authority of that case the writ of mandate herein prayed for is denied.

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169 Cal. 33

BIAS v. REED et al. (S. F. 6485.)

(Supreme Court of California. Dec. 17, 1914.)

1. Trial (§ 109*)—Direction of Verdict on Opening Statement.

While a verdict should not be directed in advance of the introduction of evidence on the opening statement of one of the parties unless it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or defense, where these conditions are complied with the court may accept the statements and admissions of counsel and direct a verdict required by such statements and admissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270, 367, 388, 395; Dec. Dig. § 109.*]

2. Appeal and Error (§ 927*)—Review—Directed Verdict.

In reviewing an order directing a verdict on the opening statement of one of the parties, every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted as facts which would have been proved had the case been tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

3. Husband and Wife (§ 129*)—Community Property—Estoppel—Knowledge of Husband.

That a wife, to whom her husband had conveyed land, by her acts and conduct intentionally led her husband to believe that she considered the property to be community property, did not constitute an estoppel, where the facts respecting the ownership of the land were as completely known to the husband as to the wife, and the husband was not led, by his belief that she considered the property to be community property, to take or omit any action material to the protection of his interests.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 283, 468–470; Dec. Dig. § 129.*]

4. Deeds (§ 211*)—Evidence—Sufficiency.

In an action by the administrator of a wife against the administrator of her husband to quiet title, evidence that the husband executed a deed to the wife which he handed to her after being advised that a delivery was necessary to vest title in her, and that nothing was said relative to the deed not taking effect unless he died first, made a prima facie case for the wife's administrator.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211.*]

5. Husband and Wife (§ 47*)—Title to Land.

A husband by remaining in possession of land conveyed to his wife, farming it and paying the taxes thereon, and conveying parts of it, could not regain title unless he maintained an adverse possession in the manner and for the time required by the Code.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232–241; Dec. Dig. § 47.*]

6. Husband and Wife (§ 16*)—Adverse Possession of Land.

Where land conveyed by a husband to his wife was occupied by both parties as their home before and after the conveyance, the joint occupancy could not furnish a basis for a claim of prescriptive title by one against the other.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100–106; Dec. Dig. § 16.*]

7. Husband and Wife (§ 16*)—Adverse Possession of Land.

Where a husband conveyed land to his wife by an unrecorded deed, conveyances of part of the land by him did not evidence a claim on his part adverse to that of the wife in the absence of proof that his action was known to her and that she did not assent thereto.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 100–106; Dec. Dig. § 16.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

8. HUSBAND AND WIFE (§§ 47, 263*)—TITLE TO LAND—EVIDENCE.

Where a husband conveyed land to his wife as her separate estate, the subsequent execution of deeds by each party to the other of all of the lands owned by either, including that in question, and the deposit of such deeds with a third person for delivery to the survivor, by which transaction it was not claimed that any title passed, did not tend to show that the land in question belonged to the husband rather than the wife, or that it was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232–241, 915; Dec. Dig. §§ 47, 263.*]

9. HUSBAND AND WIFE (§ 264*)—TITLE TO LAND—EVIDENCE.

The character of property as separate or community property is to be determined from proof showing the mode of its acquisition, rather than by the declarations of the parties, and while the declarations of a wife that property conveyed to her by the husband was community property might have some weight if supported by proof of other facts, or if the evidence regarding the acquisition of title were consistent with either a separate or community character, it was not sufficient alone to overcome proof that the land was conveyed by a deed stating that she was to hold it as her separate estate, and that the husband relinquished all right or claim to it as community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

10. HUSBAND AND WIFE (§ 266*)—COMMUNITY PROPERTY — PROPERTY CONVEYED BY HUSBAND TO WIFE.

Where property was conveyed by a husband to his wife as her separate estate, the husband relinquishing all claim thereto as community property, it could thereafter become community property only by a conveyance by her or an agreement between the husband and wife pursuant to Civ. Code, §§ 158, 159, authorizing a husband and wife to contract with each other respecting property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 925–928; Dec. Dig. § 266.*]

11. EVIDENCE (§ 273*) — ADMISSIONS — DECLARATIONS AGAINST INTEREST.

The declarations of a wife that a deed to her from her husband was not to become effective unless she survived her husband were provable as declarations against interest, if the fact admitted by her was material.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108–1120; Dec. Dig. § 273.*]

12. EVIDENCE (§ 444*)—PAROL OR EXTRINSIC EVIDENCE—DELIVERY OF DEED—CONDITIONAL DELIVERY.

Under Civ. Code, § 1056, providing that a grant cannot be delivered to the grantee conditionally, and that delivery to him is necessarily absolute and the instrument takes effect, discharged of any condition, where a husband who had been advised that delivery was necessary to pass title, delivered to his wife a deed conveying land to her, and no right to recall the deed or revoke the delivery was retained, it could not be shown that the deed was not to be effective unless the wife survived the husband.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929–1944, 2049; Dec. Dig. § 444.*]

13. DEEDS (§ 66*)—DELIVERY—QUESTIONS OF FACT.

Whether or not a deed has been delivered either to the grantee or to a depositary is a question of fact.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 127, 633; Dec. Dig. § 66.*]

14. DEEDS (§ 56*)—DELIVERY—ACTS CONSTITUTING—NECESSITY OF INTENTION.

To constitute a delivery of a deed a manual tradition of the instrument is not sufficient unless accompanied by the intent of presently transferring title, and unhampered by the reservation of a right of revocation or recall.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117–123, 125; Dec. Dig. § 56.*]

In Bank. Appeal from Superior Court, San Mateo County; John Hunt, Acting Judge.

Action by W. H. Bias, administrator with the will annexed of Elizabeth Reed, deceased, against William H. Reed, administrator with the will annexed of James Reed, deceased, and another. From a judgment on a directed verdict for plaintiff, defendants appeal. Affirmed.

Edw. F. Fitzpatrick and Ross & Ross, all of Redwood City, for appellants. Chas. M. Cassin, of San Jose, Harry J. Bias, of Santa Cruz, and James L. Atteridge, of San Jose (Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, of counsel), for respondent.

PER CURIAM. A hearing in bank of this cause was ordered after judgment in department 1.

Upon further consideration of the questions involved we have reached the conclusion that the views heretofore expressed in department are correct, and the department opinion is hereby adopted as the opinion of the court in bank. For the reasons stated in that opinion, the judgment is affirmed.

The following is a copy of the opinion of department 1:

This is an action by the administrator, with the will annexed, of the estate of Elizabeth Reed, deceased, against the administrator, with the will annexed, of the estate of James Reed, deceased, and M. J. Perry, to quiet title to a tract of 152 acres of land in San Mateo county and to recover possession of the same from defendants together with the value of the use and occupation thereof. James Reed and Elizabeth Reed, the testator and testatrix represented by the two administrators here contesting, were husband and wife. The plaintiff's complaint alleged that, at the time of her death, and long prior thereto, his testatrix had been the owner of the tract in controversy. The defendants answered, denying that Elizabeth Reed had at any time been the owner of the property and asserting that James Reed had at all times until his death been the owner and in the possession of said property. Other matters, which so far as they are deemed important will be referred to hereafter, were set up by an amended answer. The action came on for trial before the court and a jury. The plaintiff introduced his evidence and submitted his case. Thereupon one of the attorneys for the defendants made an opening statement detailing the facts that the defendants intended to prove. Upon this statement the plaintiff moved the court to direct the jury to bring in a verdict in favor of the plaintiff and the court granted this motion. From the judgment entered pursuant to this verdict the defendants appeal.

[1] It is no doubt true, as is argued by the appellants, that the practice of directing a verdict, in advance of the introduction of evidence, upon the opening statement of one or the other

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

party, is a dangerous one, and that an order granting such motion can be upheld only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action or a defense, as the case may be. "We would observe," said this court in Emmerson v. Weeks, 58 Cal. 382, "that it would be much better not to nonsuit on an opening statement, unless it is clearly made, and it is * * * evident therefrom that no case can be made out." Where, however, these conditions are complied with, the court is authorized to accept the statements and admissions of counsel and to direct a verdict required by such statements or admissions. 38 Cyc. 1567; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Liverpool, etc., S. S. Co. v. Immigration Com's, 113 U. S. 33, 5 Sup. Ct. 352, 28 L. Ed. 899; Lindley v. A., T. & S. F. R. R. Co., 47 Kan. 432, 28 Pac. 201; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602. In Estate of McNeill, 155 Cal. 333, 100 Pac. 1086, where conflicting petitions for letters of administration of the estate of a decedent were presented, the court, after hearing the proof in support of one of the petitioners and an opening statement on behalf of the other, nonsuited the latter and directed a verdict in favor of the former. The judgment was upheld on appeal; the court concluding that the facts offered to be shown on behalf of the appellant would not have entitled her to a grant of letters.

[2] In reviewing an order directing a verdict on an opening statement, the appellate court must apply rules analogous to those which govern it in reviewing an order granting a nonsuit after the introduction of evidence. Every fact which counsel has stated as among the matters to be proved, together with all favorable inferences reasonably to be drawn therefrom, must be accepted by the court as facts which would have been proved if the case had been allowed to be tried.

It is entirely clear from the record that the opening statement made by the appellants here was full and complete. After counsel had first outlined the facts to be proved, the plaintiff moved the court for the directed verdict. Counsel for the appellant declared his readiness "to argue that proposition right now." The court thereupon directed that the reporter read over the opening statement, suggesting that counsel for the appellants might have omitted something. In response to this suggestion appellants' counsel amplified his statement, whereupon argument on the motion proceeded, and, as already stated, the court directed a verdict in accordance with the motion. Under these circumstances, there is, of course, no ground for the claim that the statement was made without an understanding of the necessity for making it exhaustive or that any substantial fact intended to be proved was omitted therefrom by inadvertence. The further question, then, is whether the facts so offered to be proved, if accepted as true, were such as to have constituted any defense to the action.

The plaintiff had introduced evidence tending to prove the following facts: Elizabeth Reed, the wife, died on December 19, 1908. James Reed, the husband, died on the 19th of October, 1910. In July, 1883, James Reed owned the tract of land in question and other lands in San Mateo; all of said lands being community property. The property in controversy was occupied by Reed and his wife as their home. On July 21, 1883, Mr. and Mrs. Reed were visiting at the home of the plaintiff in Santa Cruz. At the request of James Reed, the plaintiff, Bias, accompanied Reed to the office of Z. N. Goldsby, an attorney at law then engaged in practice at Santa Cruz. Reed stated to Goldsby that he desired to make a deed of the property to his wife. Goldsby wrote a deed of gift of the property in controversy and had such deed ready for execution on the afternoon of the same day, when Reed, accompanied by Mrs. Reed, Bias and John D. Chace, returned to his office. At that time the deed was read over in the presence of these persons (except, perhaps, Mr. Chace), and Reed assented to it. Reed signed the deed and acknowledged it. At the same time a will in which Mrs. Reed was named as sole beneficiary was executed by Reed, Bias and Chace signing as attesting witnesses. They also signed as witnesses to the grantor's signature upon the deed. Prior to this time Mr. Goldsby had advised Reed that it was necessary to deliver the deed in order to vest title in his wife, and after the signing and acknowledgment of the paper Reed handed it to Mrs. Reed. The deed itself was introduced in evidence. The foregoing facts with reference to the signing and delivery of the deed were testified to by Bias and Goldsby. Chace had died prior to the trial. Mr. Goldsby further testified that at the time of the delivery nothing was said with reference to the deed not taking effect unless Reed died before his wife.

Upon Mrs. Reed's death in 1908 search for the deed was made without avail. After James Reed's death a sister of Mrs. Reed prosecuted further inquiries and finally discovered the deed under the linoleum on the floor of the room which had been occupied by the Reeds. The plaintiff's case also included some testimony regarding declarations made by James Reed after the date of the deed in question and tending to support the wife's title. The possession of the land by the defendants was admitted.

This was the state of the case when the defendants made their opening statement. The statement is somewhat protracted, but we think its substance is fairly contained in the following summary: Counsel, after stating that he would introduce deeds showing the acquisition of the property in question by James Reed, went on to state that he would prove that at various times after 1883 James Reed deeded portions of the land to various persons without having his wife join in the conveyances. He declared his intention of showing, further, that in 1901 Mr. and Mrs. Reed sent for one Levy and requested him to prepare deeds from Reed to Mrs. Reed and from Mrs. Reed to Reed of all of the lands owned by either, including the tract in controversy. These deeds were subsequently prepared, were executed and acknowledged by the respective parties and were put in the possession of Levy, who was directed to hold them and upon the death of either Mr. or Mrs. Reed to deliver to the survivor for record the deed of the one so dying. A controversy subsequently arose between the Reeds and Levy, and the Reeds requested one Coburn to draw similar deeds to take the place of the two that had been deposited with Levy. This transaction, however, was never consummated. The opening statement went on to state that in December, 1908, shortly prior to Mrs. Reed's death, she made a will in which she declared that all of the property was community property. It was stated that the appellants would show that Mrs. Reed had stated to one Thompson, a physician, that the deed of July 21, 1883, "was made and given to her with the understanding that it should not become effective unless she should outlive her husband." Just prior to Mrs. Reed's death, she requested Mr. Thompson to prepare a will for her and had declared that the property in question was the community property of herself and her husband, but no will was prepared by Mr. Thompson. Reference was made to other witnesses who would testify to oral declarations of Mrs. Reed that she considered the property community property; that she owned one half of it and Mr. Reed the other half. Another witness, it was stated, would testify that in 1905 both Mr. and Mrs. Reed stated to him that the property was community property and that they had arranged their affairs so that whoever should outlive the other should get all the property. Counsel also undertook to show that at all times down to the death of Reed he had entire charge of the property, farmed it, and paid all expenses in connection with it and during all this time the property had been assessed to and the taxes paid by him.

[3] The answer contains a plea of estoppel and with reference to this counsel incorporated into the opening a statement "to the effect that Mrs. Reed, by her acts and conduct, intentionally led her husband to believe, and that he did believe that she considered all this property to be the community property of herself and her husband and not her separate property." With reference to the matter last quoted, it is quite obvious that the statement of counsel falls far short of meeting the requirements of estoppel in pais. The facts with respect to the ownership of the land were as completely known to Reed as they were to his wife. It was not stated that she induced a mistaken belief regarding any such fact. All that counsel claimed was that Mrs. Reed led her husband to believe that she "considered" the land to be community property. It is not apparent that her opinion of the legal status of the property could have any bearing upon her husband's rights or conduct, and the statement of counsel contains no intimation that Reed, if he was induced by her to believe that she "considered" the property to be community, was led by this belief to take or omit any action material to the protection of his interests. Without further discussion of this question, we simply refer to Boggs v. Merced M. Co., 14 Cal. 279, 367, 368, where the court, in considering the necessary elements of estoppel in pais, defined those elements in language which has been quoted and followed many times.

[4] That the plaintiff made out a clear prima facie case is not to be doubted. If the issues had been submitted to the jury on the plaintiff's evidence alone, the court could not properly have sanctioned a verdict in favor of the defendants. The question, then, is whether the matters which defendants declared they would prove—and which we must assume they were able to prove—were, in law, sufficient to meet or overcome the prima facie case established by the plaintiff.

[5-7] The fact that James Reed remained in possession of the land, farming it and paying taxes upon it, would not be effective to weaken or impair the title of his wife. If title had passed to her by a conveyance executed in 1883, no ownership or control asserted by her husband thereafter would revest title in him, unless he had maintained an adverse possession in the manner and for the time required by the Code. There is nothing here to indicate that the possession was adverse at all. The tract was occupied by both parties as their home, before and after the conveyance to Mrs. Reed. The occupancy was consistent with an ownership by either husband or wife. It was, in fact, a joint occupancy, and could not, on the facts offered to be shown, furnish the basis for a claim of prescriptive title by one against the other. First N. B. v. Guerra, 61 Cal. 109; Mauldin v. Cox, 67 Cal. 387, 7 Pac. 804. The same conclusion applies to the statement that James Reed had conveyed parts of the land after 1883. Since the record title remained in him, this was a convenient mode of transfer, and it would not evidence a claim adverse to that of the wife, in the absence, at least, of proof that the husband's action was known to the wife and that she did not assent to it. The matters just discussed, which, as we have seen, did not make out a title by prescription, could certainly have had no effect as bearing directly upon the transaction of July 21, 1883. The force of an executed conveyance is not to be impaired by subsequent acts or declarations of the grantor.

[8] Another part of the opening statement had to do with the deposit with one Levy of deeds from Reed to his wife and from her to him. It is not claimed that any title passed by this transaction. See Kenney v. Parks, 125 Cal. 146, 57 Pac. 772. This being so, we are unable to see that the offered testimony tended in any way to meet the case already made by the plaintiff. The fact that the Reeds made an ineffectual attempt to provide for the transfer, upon the death of one of them, of all property owned by either to the survivor, does not indicate that any particular parcel of that property belonged to one, rather than the other, or that it was community property. The subsequent talk with Coburn, looking to a second arrangement of like kind, was never consummated, and is, of course, entitled to no greater weight than may be given to the deposit of the deeds with Levy.

[9, 10] The opening statement contained, in addition to the various items already discussed, a promise to prove certain acts and declarations of Mrs. Reed. Counsel undertook to show that in her will, made shortly before her death in December, 1908, Mrs. Reed had declared that the property was community property. Oral statements to the same effect had been made by her to different persons at various times. This court has, on several occasions, expressed the view that the character of the ownership of property, whether separate or community, is to be determined by the proof showing the mode of acquisition, rather than by any declaration of one of the parties that the property was or was not community property. Estate of Grannis, 142 Cal. 1, 75 Pac. 324; Estate of Learned, 156 Cal. 311, 104 Pac. 315; Estate of Claiborne, 158 Cal. 648, 112 Pac. 278. It would seem, however, that such declaration is admissible in evidence against the declarant or his successors in interest. In re Bauer, 79 Cal. 304, 21 Pac. 759. In the very recent case of Estate of Hill, 138 Pac. 690, the admissibility of such declarations was asserted in an opinion which had the concurrence of only three members of the court, three of the remaining justices joining in the judgment upon grounds which did not require them to state their views on this point. But, assuming the admissibility of Mrs. Reed's declarations that the property was community, we think this evidence standing alone cannot be deemed sufficient to overcome the uncontradicted proof that the land was conveyed to her by her husband by means of a deed which, in express and elaborate terms, stated that she was to hold the land as her separate estate, the grantor relinquishing "all right or claim to the same or any part thereof as community property." A declaration that the property was community estate might properly be regarded as having some weight, if supported by proof of other facts pointing in the same direction, or if the evidence regarding the acquisition of title were consistent with either the separate or community character of the ownership. But under the evidence which had been here introduced, the husband had conveyed the property to the wife by a deed which, by its express declarations, as well as by the presumptions of law (Estate of Klumpke, 139 Pac. 1062) made the property her separate estate. It could become community property thereafter only by an agreement between herself and her husband. Civ. Code, §§ 158, 159; Yoakum v. Kingery, 126 Cal. 33, 58 Pac. 324. There was no offer to prove either a conveyance by her or an agreement with her husband. It having been clearly shown that the property had been acquired by her as her separate estate, her mere declaration that it was community would not, we are satisfied, be enough to sustain a finding that she had conveyed to her husband or had agreed with him that it should belong to the community.

[11-14] The only remaining piece of evidence

which defendants announced their intention of introducing consisted of the declaration of Mrs. Reed to Mr. Thompson that the deed of July 21, 1883, had been made and given with the understanding that it should not become effective unless she should outlive her husband. As a declaration against interest this was admissible if the fact thus stated by Mrs. Reed militated in any way against the validity of the title claimed by plaintiff as her administrator. We think the alleged fact could have no such operation. Whether or not a deed has been delivered, either to the grantee or to a depositary is a question of fact. A manual tradition of the instrument is not sufficient, unless the passing of the paper is accompanied by the intent of presently transferring title to the property, and be unhampered by the reservation of a right of revocation or recall. Follmer v. Rohrer, 158 Cal. 758, 112 Pac. 544.

"No precise form of words and no particular character of act is necessary. * * * Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title conveyed, are sufficient. * * * When a deed is executed and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered." Moore v. Trott, 162 Cal. 275, 122 Pac. 462.

The deed here in question was handed by the grantor to the grantee. No third party was interposed as depositary. Before the signing of the deed James Reed had been advised that in order to pass title it was necessary for him to make delivery to the grantee. If Mr. Thompson had been allowed to testify as it was stated he would testify, the declaration of Mrs. Reed could have had no greater force than to show that the paper had been delivered to her upon the condition that, if she did not survive her husband, the property would not pass to her, but that, if he died first, the title should vest in her. No right to recall the deed or to revoke the delivery was retained. In one event title was to pass. In the other it was not. But it was not contemplated that under either contingency anything further was to be done. If the fact upon which the title was to pass (i. e., the death of Reed during the life of his wife) should occur, the deed was to become operative by virtue of the delivery made on the 21st day of July, 1883, which was the only delivery which the parties ever had in mind. We have, then, the case of a delivery, to the grantee, upon a condition which may, according to the outcome, make the transfer effective or nugatory. Such a delivery, if made to a third party, might have been ineffectual. But where the deed is handed to the grantee personally, the situation is different. In that case, the condition is, by the law, discarded, and the delivery is regarded as absolute. Such is the express declaration of our statutes. Section 1056 of the Civil Code provides:

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

Under this section, the proof offered would not have justified the court in ruling that anything but an absolute delivery, free of condition, has been shown. The precise point was involved in Mowry v. Heney, 86 Cal. 471, 25 Pac. 17, and the court there held, on a state of facts identical, so far as the point under discussion is concerned, with those here presented, that the deed was operative as an immediate, absolute conveyance. See, also, Elliott v. Merchants B. & T. Co., 22 Cal. App. 536, 132 Pac. 280; Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216.

Such cases as Kenney v. Parks, 137 Cal. 527, 70 Pac. 556, Black v. Sharkey, 104 Cal. 279, 37 Pac. 939, and Denis v. Velati, 96 Cal. 223, 31 Pac. 1, are not in conflict with the views herein expressed. In Kenney v. Parks, the parties were under the mistaken belief that a deed, although delivered, did not transfer title until recordation, a mutual mistake which, as is said in Hammond v. McCollough, supra, "conclusively established the absence of an intent to create a present and a new vestiture of title." Black v. Sharkey and Denis v. Velati were decisions laying down the unquestioned rule that the manual tradition of a deed unaccompanied by the purpose or intention of passing title is not a good delivery. In none of these cases was the court dealing with a situation of a delivery made to the grantee, both parties intending that in a certain event title should pass by virtue of the delivery then and there made.

The conclusion to be drawn from the foregoing discussion is that the facts contained in the opening statement of defendants, if proved, would not have raised a substantial conflict authorizing the jury to find against the plaintiff's claim of title. This being so, it was not error for the court to direct a verdict in plaintiff's favor. No other points are made.

The judgment is affirmed.

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PEOPLE v. HARRIS. (Cr. 1848.)

(Supreme Court of California. Dec. 18, 1914.)

1. Homicide (§ 179*)—Evidence—Insanity.

Where insanity is a defense, the mental condition of any of the relatives of accused is material, and on that subject a reasonable latitude should be allowed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

2. Criminal Law (§ 452*)—Competency of Witnesses—Opinion as to Sanity.

A witness cannot give his opinion as to the sanity of relatives of accused, relying on insanity, without preliminarily showing that he is qualified to express an opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053–1055; Dec. Dig. § 452.*]

3. Criminal Law (§ 452*) — Competency of Witnesses—Opinion as to Sanity.

The mother of accused, who was charged with murder and relied on insanity as a defense may not express her opinion as to whether, on one occasion, when the father of accused fell to the floor at home and frothing at the mouth, his condition resulted from intoxication or temporary insanity in the absence of a preliminary showing that she is qualified to express an opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053–1055; Dec. Dig. § 452.*]

4. Homicide (§ 339*)—Appeal—Evidence—Harmless Error.

Where the mother of one charged with murder and relying on the defense of insanity testified fully as to the circumstances of the birth of accused and as to his health, conduct, habits, peculiar temperament, and the physical and mental defects of his infancy and manhood, as she observed him, the refusal to permit her to testify whether she, before his birth, suffered inconvenience or pain, and whether at his birth a physician had not difficulty in causing the child to breathe, was not prejudicial to accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

5. Homicide (§ 179*) — Evidence — Admissibility.

Where accused, defending a charge of murder on the ground of insanity, had spent a great deal of his time in attempting to perfect inventions, refusal to permit him to show what the inventions were, with a view of having them introduced in evidence to show that a systematic defect ran through all of them, was not erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

6. HOMICIDE (§ 339*) — EVIDENCE — ADMISSIBILITY.

Where accused admitted the killing of decedent and taking her money, and his mother testified that she had given him money when he wanted it and had never refused to do so, and an uncle testified that he had given him money, and there was evidence that accused was usually occupied and in the receipt of wages, refusal to permit the mother to testify whether, at the time of the killing, she had money and whether accused knew it, and the refusal to permit the uncle to testify whether he had ever refused to give accused money, was not an unreasonable curtailment of the right of accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

7. HOMICIDE (§ 179*)—INSANITY—EVIDENCE—ADMISSIBILITY.

The acts and declarations of accused, relying on insanity, made a reasonable time before and after the crime, may be shown on the question of insanity at the time of the criminal act, where they appear to have any tendency to show his mental condition at that time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 380; Dec. Dig. § 179.*]

8. CRIMINAL LAW (§ 670*)—EVIDENCE—OFFER OF EVIDENCE—NECESSITY.

Refusal to allow the mother of one accused of murder and relying on insanity as a defense to state a conversation which she had with him at supper the evening of the crime was not erroneous, in the absence of any offer of what was intended to be shown by it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593–1596; Dec. Dig. § 670.*]

9. CRIMINAL LAW (§ 1141*) — APPEAL — REVERSIBLE ERROR.

Error warranting a reversal of a conviction must affirmatively appear in the record, so as to permit the court on appeal to determine whether a substantial right of accused was prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. § 1141.*]

10. CRIMINAL LAW (§ 449*)—EVIDENCE—GOOD CHARACTER OF ACCUSED—ADMISSIBILITY.

Accused may not show the opinion of witnesses as to his truthfulness and honesty, but he is limited to evidence of general good character, and the rule is not different where insanity is a defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1034–1037, 1040–1057; Dec. Dig. § 449.*]

11. CRIMINAL LAW (§ 667*)—TRIAL—READING OF EVIDENCE TO JURY.

Denial of a motion of accused to have the testimony given by him and his mother read to the jury on the ground that much of the testimony was given in so low a tone of voice as not to be heard by the jury was not erroneous, where their answers, when inaudible, were either read by the reporter or repeated by them and where the jury, though hearing the motion, did not express any desire to hear the testimony read though asked if they desired it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1599, 1601; Dec. Dig. § 667.*]

12. HOMICIDE (§ 340*)—INSTRUCTIONS— MALICE.

The giving by the court, in its instructions, of the general definition of malice in Pen. Code, § 7, subd. 4, was not prejudicial error, where the definition in section 188 of malice essential to constitute homicide was also given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715–717, 720; Dec. Dig. § 340.*]

13. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.

Where the court in its main charge correctly stated the law on the burden of proving insanity and on other issues raised, accused could not complain because the court gave, at his request, a conflicting erroneous instruction that where accused was charged with homicide, and offered evidence to show that the condition of his mind, through predisposition, was such that he was incapable of deliberation, the reasonable doubt as to capacity for deliberation should be resolved in his favor to the extent of acquitting him of the higher grade and convicting him of the lower grade.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. § 1172.*]

14. HOMICIDE (§ 237*) — INSANITY — PREPONDERANCE OF EVIDENCE.

Accused, charged with murder in the first degree, must sustain his defense of insanity by a preponderance of the evidence where the facts of the killing leave no other rational inference than that it was done with deliberate intention if he was sane.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 237.*]

15. HOMICIDE (§ 144*)—BURDEN OF PROOF—INSANITY.

The burden is on the prosecution to prove the elements of the crime, which involves proof of a mind sufficiently sane to be capable of committing the crime or any degree thereof, but affirmative proof of sanity is not required.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 261; Dec. Dig. § 144.*]

16. CRIMINAL LAW (§ 311*) — BURDEN OF PROOF—INSANITY—PRESUMPTIONS.

The presumption of sanity of accused is equivalent to proof of sanity as a fact, until the contrary is shown, and the presumption is conclusive in the absence of evidence of accused contravening it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742–744; Dec. Dig. § 311.*]

17. CRIMINAL LAW (§ 939*) — NEW TRIAL — GROUNDS—NEWLY DISCOVERED EVIDENCE.

A new trial on the ground of newly discovered evidence is properly denied in the absence of any showing of any diligence to discover or produce it at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318–2323; Dec. Dig. § 939.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Wells, Judge.

Burr L. Harris was convicted of murder in the first degree, and he appeals. Affirmed.

E. Burton Ceruti, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

LORIGAN, J. Defendant was tried for the crime of murder, convicted of murder of the first degree, and sentenced to death. He appeals from the judgment and an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Upon the trial the homicide by defendant was admitted. The sole defense was insanity. As there was no dispute on the trial respecting the circumstances attending the killing of deceased by defendant and no question is raised on this appeal as to the sufficiency of the evidence to sustain the finding of the jury (necessarily implied from their verdict) against the defense of insanity interposed by defendant or the verdict returned against him, a general statement of these matters need only be made.

The victim was a Mrs. Rebecca P. Gay, a Christian Science practitioner having her office in the H. W. Hellman building in the city of Los Angeles. Defendant visited her office on the afternoon of September 26, 1913. He was not acquainted with her nor had he ever seen her before. He told her that he was seeking a Mrs. Wallace, whom he expected to meet at the office. He was told by Mrs. Gay that she knew no one by that name nor expected a visit from such a party. Defendant, however, insisted that this Mrs. Wallace would call there, and was permitted to sit in the reception room of the office and wait her expected arrival. He waited there about an hour—until nearly 5 o'clock—when a patient whom Mrs. Gay had been attending in the inner office departed, leaving defendant and Mrs. Gay alone in the reception room. That was the last seen of the latter alive. Next morning her dead body was, by a janitress of the building, found lying in the office. Letters and papers were scattered over her body. A handbag and purse in which Mrs. Gay carried her money was found in the office, the latter empty. An autopsy showed—to state it briefly—that Mrs. Gay had been killed by repeated blows from some blunt instrument on her face and head which had fractured the skull in numerous places. Defendant was suspected of the homicide, and arrested in the city of San Diego on October 5, 1913, and confessed that he had done the killing. He also testified as a witness on the trial and detailed the circumstances of Mrs. Gay's death at his hands. He testified that for some three years previous to the homicide he had at occasional times suffered from fits resulting in a loss of consciousness; that at those times, covering a period of from days to several weeks, he would have spells of sickness accompanied by lapses of memory; that sometimes also during these spells he would hear voices of unknown and unseen persons telling him that he was threatened with great injury or death by some person, and urging him to seek and kill such person to protect himself, and the voices kept constantly urging him to do the things they said; that he was made angry and fearful at these times by these suggestions and promptings; that a feeling or impulse to do as the voices urged would come over him, which he would try to resist, but which he could not succeed in doing; that for a week previous to his killing of Mrs. Gay, he was suffering under one of these spells, during which the voices kept constantly telling him that a Mrs. Wallace (a person he did not know) intended to kill him and that he must seek and kill her; that he would find her somewhere in the Hellman building; that when he called at Mrs. Gay's office he thought he would find this Mrs. Wallace there or that she would come in during that afternoon; that after he had been sitting in the reception room for about half an hour he heard these voices again, and they kept telling him that Mrs. Gay was this Mrs. Wallace he was seeking and that he must kill her; that when a patient on whom Mrs. Gay was attending left the office he and Mrs. Gay were alone; that immediately the telephone in the office rang, and as Mrs. Gay was seated at the desk answering it he approached and struck her on the head with a piece of iron pipe which he had brought with him wrapped in newspaper and with which the voices had directed him to kill Mrs. Wallace; that when struck Mrs. Gay fell to the floor, and as she lay there he struck her again with the iron pipe about the head four or five violent blows. Satisfied that she was dead, he looked through her desk and scattered the papers therefrom on the floor; that while so engaged, hearing some one approaching towards the outer door of the office, he sprung the inner lock of it to prevent entrance. He took the contents of Mrs. Gay's purse—amounting to $25—and left the office, departing from the Hellman building by the back stairs. He left the piece of gas pipe used in killing the deceased by the side of her body. That night he buried the clothes he wore at the time he killed the deceased, which were spattered with blood, in a field near the residence of his mother, where he was living. The next day he departed on an early train for San Diego. At the time of his confession and on the trial he claimed that he had no remembrance of killing deceased until after his arrest by the officers when they told him of his visit to the office of Mrs. Gay, the apparent circumstances under which she was killed, the wounds inflicted, and the weapon found beside her body; that he then for the first time remembered that he had done the killing and recalled all the circumstances under which it was done.

As to the defense of insanity: It was not claimed that appellant was insane at the time of the trial, but only that he was insane when he committed the homicide. Testimony on this subject was presented to the jury quite fully on both sides. The claim on behalf of the appellant was that he was subject to intermittent attacks of a particular phase of epileptic insanity defined by the medical experts called in his behalf as psychic epileptic equivalent, a condition where instead of the usual convulsive phenomena ordinarily known as epileptic fits there are substituted from time to time certain disturbances of mentality during which the consciousness of the individual aflicted is so altered that he is deprived of the full possession of his usual faculties; he acts in a manner wholly foreign to his usual conduct, habits, and mode of thought, and thinks things are true that are not and acts upon them because he believes they are true; that a characteristic of this phase of insanity is that while suffering under it the individual may become dominated with an idea entirely imaginary that he is being persecuted or threatened with injury from some source, and will make a sudden and violent attack on some person his diseased mind suggests is the one persecuting or intending to injure him.

These medical experts gave it as their opinion from the evidence in the case and personal examination of the defendant that he was suffering from a spell of this phase of insanity when he killed deceased and was insane when he did so; that by reason thereof he was incapable of having a malicious intent to kill and incapable of deliberating upon the act of killing which he committed. The court permitted these experts to testify that from the nature of his insanity when defendant killed the deceased he was incapable of resisting an impulse to do it, but the court at the same time stated that nevertheless it would instruct the jury that in this state the doctrine of irresistible impulse as an excuse for crime did not exist, and did subsequently so instruct the jury.

On the part of the prosecution the opinion of medical experts based also on the evidence in the case and personal examination of the defendant was that he was not suffering from epileptic insanity when he killed the deceased; that he was entirely sane at the time, having mental capacity to know and understand the nature and character of the act he was committing.

As we have said, the appellant raises no question but that the evidence was sufficient to sustain the finding of the jury that he was sane or to sustain the verdict of murder of the first degree. His claim on this appeal is only that certain rulings of the court prejudicially prevented him from fully presenting to the jury all the testimony which he was entitled to present for their consideration on the issue of insanity; that the court also erred in other of its rulings and in the matter of the instructions given by it to the jury.

As to the rulings on the admission of testimony: Many errors on that ground are assigned by appellant, but we deem it necessary only to consider some of them. The assignments as to the others are clearly without merit.

[1, 2] In the course of the trial defendant introduced testimony which it was claimed had a tendency to show that his maternal uncle had at one period of his life become temporarily insane, and that in the infancy of the defendant his father had on one occasion fallen to the floor at home and frothed at the mouth. The mother of the defendant was asked by counsel for appellant what phase of insanity the uncle was afflicted with at that time, and a Dr. Nelson, a physician who knew the uncle, was asked whether it appeared to him that the latter was possessed of an insane delusion. These questions were objected to and the objection sustained on the ground that no foundation for the inquiries had been laid. Undoubtedly, where insanity is a defense, the mental condition of any of the relatives of the defendant is material, and on that subject, as on all inquiries relating to insanity, a reasonable latitude should be allowed. But this does not mean that the rules as to the admissibility of evidence should be relaxed. The rule is that before the opinion of witnesses as to sanity of a person or a particular phase of it can be given—and the inquiries here were simply calling for the opinion of the witnesses on that subject—it must be preliminarily shown that the witness is qualified to express it, and clearly this was not shown here.

[3] Nor can error be predicated on the ruling of the court refusing to allow the mother of the defendant to express her opinion as to whether on one occasion in their early married life, when the father of the defendant fell down and frothed at the mouth after returning home in an intoxicated condition (referred to above), this resulted from the drunken spell or was not from the cause of drink. Not only was there no showing that she was qualified to give her opinion on the subject, but it further appears that she testified that she did not know what led up to that condition.

[4] The mother of the defendant was not permitted to answer whether while he was en ventre sa mere she suffered inconvenience or pain, and whether at the birth of the defendant a physician had not difficulty in causing him to breathe. Without any infringement on the rights of the prosecution, the court might have let this testimony in. But as it is not suggested how this circumstance could have been important, particularly in view of the fact that the mother testified fully regarding the circumstances attending the birth of defendant, her long period of labor and necessarily resulting pains, and the use of instruments to effect her delivery, and, further, as to the health, conduct, habits, peculiar temperament, and physical and mental defects in infancy and manhood of the defendant as she observed him, we cannot say that this particular ruling worked such prejudice to the rights of the defendant as would make a sufficient showing to warrant a reversal.

[5] There was testimony tending to show that the defendant was employed a great deal of his time in attempting to perfect certain inventions, and it was sought to show what these inventions were, with a view to having them—some half dozen or more—introduced in evidence. The testimony respecting their character and the right to offer them was rejected by the court. Counsel for appellant claims this was error; that, if he had been permitted to introduce the inventions, it would have shown that a systematic defect ran through all of them; that, as an invention is a creation of the mind, if it be shown that the same defect is found in each of them this would have a tendency to show that there was a corresponding defect in the mind of defendant. But this evidence would have no tendency to show insanity unless as a rule it may be said—which, of course, it cannot—that unsuccessful inventors are in a measure insane. These prevailing defects would only show that the appellant was not successful in perfecting the idea contemplated in his inventions. They would have no tendency to show he was insane.

[6] The mother of the defendant, and also his uncle Lafayette Taylor, were not allowed to answer whether at the time of the killing of Mrs. Gay the mother had money and whether defendant knew it, and the uncle whether he had ever refused to give the defendant money. Counsel for appellant insists that he had a right to show that the defendant could have gotten money from his relatives if he had wanted it in opposition to the theory of the prosecution that the defendant killed Mrs. Gay for the purpose of getting money. But as the testimony of the mother in the case was that she had given the defendant money when he wanted it and had never refused to do so, and that the uncle had also given it to him, and, further, that defendant was usually occupied and in the receipt of wages, there was no unreasonable curtailment of the right of defendant in sustaining the objections to these particular inquiries.

[7-9] The court refused to allow the mother to state a conversation which she had with the defendant at supper time the evening of the homicide; or to permit her to answer whether she had "ever known him to steal anything"; or had she "always known him to be truthful"; or to permit another witness, from his association with appellant, to answer how the defendant impressed him "as to his honesty and truthfulness," and whether he observed "that he was truthful and honest." As to the inquiry of the mother concerning any conversation with the defendant, she testified that she had a conversation with him, and was asked, "What was it?" It is the rule, as claimed by appellant, that when the insanity of an accused is interposed as a defense, his acts and conduct and declarations, made a reasonable time before and after the alleged criminal act is committed may be given to the jury on the question of his insanity at the time the criminal act was committed, if they appear to have any tendency to show his mental condition at that time. People v. Willard, 150 Cal. 544, 89 Pac. 124. But here the question proposed did not indicate in the slightest that the conversation sought to be elicited would have any such tendency. Before the exclusion of a conversation which may or may not be pertinent on the question of insanity can be assigned as error it is the duty of counsel to state the nature of the statements claimed to have been made by defendant, because unless this is done the trial court cannot intelligently determine whether the matter sought to be elicited could have any bearing on the question of insanity or not. Nor can this court, in the absence of such showing, determine whether the right of the defendant had been prejudicially affected by the ruling of the court. All conversations are not admissible, but only those which have a tendency to prove the insanity of the accused. Counsel in this case, if he deemed the matter of sufficient importance, should have made a formal statement or offer of what he intended to prove. Such a proceeding is in harmony with the rule governing appeals that error warranting a reversal must affirmatively appear in the record and to also permit this court to determine whether a substantial right of a defendant has been prejudiced by a ruling assigned. People v. Brotherton, 47 Cal. 388; People v. Brent, 11 Cal. App. 674, 106 Pac. 110.

[10] As to the inquiry directed to the truthfulness and honesty of the defendant: What was sought was only the individual opinion of the witnesses respecting these traits of character of the defendant from observation or association with him. But such evidence is not admissible. The rule is that, where good character of an accused for certain traits is proper to go before a jury, it is only evidence of general good character which must be shown. There is no difference in the rule when insanity is a defense than of other defenses in which good character may be shown.

[11] Error is assigned in the refusal of the court on the motion of counsel for appellant to direct that the testimony given by the defendant and his mother during the trial be read to the jury at the close of the case. The claim of counsel was that much of their testimony was given by these witnesses in so low a tone of voice as to be inaudible to the jury. It is true, as it is not unusual during trials, that these witnesses sometimes answered questions in such a low tone of voice that some of the jury, the court, and counsel requested them to speak louder. But the record shows that whenever their answers were inaudible this was called to their attention by either

court or counsel, and their answers either read by the reporter or repeated by the witnesses. This motion was made in the presence of the jury and they were told that if they desired the testimony of these witnesses read the court would have it done; that if they were satisfied that they had heard it no purpose could be subserved by reading it again. None of the jury expressed any desire to hear it re-read, and it must be assumed that they heard it all and did not need to have any part of it re-read to them.

[12] As to the instructions complained of: The court in its instructions on "malice," which is an element of the crime of murder, gave the general definition of that word as found in subdivision 4 of section 7 of the Penal Code. Appellant claims that the giving of this definition of malice in a case where the crime charged is murder was erroneous. It is true that the malice defined in that section of the Code is not the malice which is essential to constitute the crime of murder. The malice essential to constitute it is something distinct from the malice defined by the section referred to, and is particularly defined by section 188 of the Penal Code, a definition which was also given by the court. Prejudicial error, however, did not follow because both definitions were given. In giving the definition from section 7 the court only gave the general import of the word "malice." When it came to defining the crime of murder, with its essential elements, it correctly defined the "malice" constituting one of such elements as it is particularly defined in section 188. Under similar circumstances, it is held that the giving of the general definition, where the special definition as found in section 188 is also given, is no ground of substantial complaint. People v. Dice, 120 Cal. 201, 52 Pac. 477.

The principal contention, however, of appellant with reference to the instructions is that in its charge to the jury the court gave contradictory, confusing, and misleading instructions with reference to the defense of insanity, the burden of proof, and weight of evidence, and sets out in his brief the particular instructions which he asserts present this condition. He does not discuss particularly the instructions which he claims present it. He simply sets forth a number of them, makes the point, and cites authorities which he claims sustain his contentions.

The court gave full and clear instructions on the defense of insanity; announcing the well-established rule that, in order to be available for that purpose, it must appear that the defendant was suffering from such a diseased and deranged condition of his mental faculties as to render him incapable of distinguishing between right and wrong with reference to the particular act with which he was charged. It also instructed as to partial insanity, and further told the jury that the doctrine that under some forms of insanity a person may know the nature of the act fully, and at the same time cannot prevent it through paralysis of the will power, and which is sometimes known as uncontrollable or irresistible impulse, has no legal standing in this state and is not a legal defense to crime.

It further gave the instruction common to all criminal cases, that the burden of proof was on the prosecution to prove every fact essential to a conviction; defined reasonable doubt, and gave the usual instruction, in connection therewith, that if, after a full and fair consideration of all the evidence, the jury were satisfied there was such reasonable doubt of the guilt of the defendant they should acquit him. As to the burden of proof, it charged, further, that while such burden was generally upon the prosecution this was subject to the exception that when insanity is relied on as a defense to crime the burden of proving his insanity was upon the defendant and he must show by a preponderance of the evidence the existence of such insanity; that it was not proven by raising a doubt whether it existed or not. The legal accuracy of these instructions, as announcing correct principles of law for consideration by the jury as to all the matters to which they related, is not questioned by the appellant.

[13] But in addition to these instructions the court at the request of the appellant, gave the following instruction to the jury: "It is logical to hold that where the accused is charged with deliberate homicide, and offers evidence to show that the condition of his mind through predisposition was such that he was incapable of deliberation, the reasonable doubt as to such capacity for deliberation should be resolved in favor of the accused to the extent that it acquits him of the higher grade and convicts him of the lower grade of the offense." The "predisposition" referred to in the instruction doubtless was a predisposition to insanity.

It is this quoted instruction, considered in connection with the general instructions just referred to, which counsel for appellant contends created the condition of contradictory, confusing, and misleading rules given to the jury respecting the subject of insanity, the burden of proof, and the weight and sufficiency of the evidence. There is an apparent condition of conflict in these instructions, though what its effect is, as far as being prejudicial to the appellant, is a matter for subsequent consideration. While the court in its main charge correctly instructed the jury that the rule in this state is that the defense of insanity, when interposed by a defendant, must be made out by a preponderance of the evidence on his part (People v. Myers, 20 Cal. 518; People v. Allender, 117 Cal. 83, 48 Pac. 1014; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; People v. Wells, 145 Cal. 138, 78 Pac. 470), in this quoted instruction it nevertheless informed them that if from the evidence introduced of a predisposition to insanity they should entertain a reasonable doubt of the capacity of the defendant to deliberate in killing deceased (deliberation being essential to constitute murder of the first degree), the defendant should be given the benefit of it and acquitted of that higher degree of murder.

[14] There is no warrant in the law of this state for any such doctrine as declared in the quoted instruction. Counsel for appellant defends it as properly applicable to the degrees of murder on the theory that while a charge of murder is established by proof simply of the killing by defendant, that such a showing constitutes only murder of the second degree; that in order to constitute murder of the first degree, it is incumbent on the prosecution to prove something more than the killing itself, namely, that the killing was committed with a deliberate intention to kill; that this deliberate purpose to kill is an essential fact necessary to be proven to constitute murder of the first degree, and the burden of proving it beyond a reasonable doubt is on the prosecution; that if a reasonable doubt of such deliberate purpose arises from the evidence, whether produced from the evidence on the issue of insanity or otherwise, the accused is entitled to the benefit of it and to an acquittal of the higher offense. All that counsel contends for as to the degrees of murder, the necessity of proving deliberation to constitute murder of the first degree, and as to the burden of proof being on the prosecution is undoubtedly true. But the fact that the defendant is accused of murder which involves degrees, and that his guilt of the higher degree can only result from proof of a deliberate intent on his part to kill, does not differentiate the rule in this state that the burden is on the defendant where the facts and circumstances of the killing leave no other rational inference than that it was done with deliberate intention if he was sane, and he asserts incapacity to have entertained such intent by reason of his insanity to sustain this defense by a preponderance of the evidence.

[15] The burden of proof is always on the prosecution to prove all the elements necessary to constitute the guilt of the defendant, and this involves proof of a mind sufficiently sane to be capable of committing crime or any degree of crime involved in the offense charged. But the law presumes all men are sane; not some degree of sanity, but that they have full mental capacity to commit any crime or degree of crime which the facts in the case establish. Express or affirmative proof of the sanity of a defendant is not required to be made by the prosecution.

[16] The presumption which the law raises is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proven the sanity of the defendant beyond a reasonable doubt. This presumption is conclusive in the absence of any evidence on the part of the defendant contravening it. If none is introduced by him the presumption prevails, and the burden on the prosecution of proving beyond a reasonable doubt the capacity of the defendant to commit the crime charged which the facts and circumstances otherwise show beyond such doubt was committed by him is sustained. The rule prevailing in this state, and in the majority of jurisdictions elsewhere, requiring the defendant, where insanity is interposed as a defense by him, to prove it by a preponderance of the evidence, does not affect the rule that the burden of proving sanity is on the prosecution. That burden is always on it, and it is met in the first instance by the presumption which the law raises of sanity and which must prevail until it is overcome. The rule casting upon the defendant the burden of establishing his insanity by a preponderance of the evidence does not shift this burden of proof from the prosecution to him, but only shifts the burden of introducing evidence, and declares the amount or quantum of evidence which he must produce to overthrow the presumption and show his insanity. Now, in this case, the claim of the prosecution was that the defendant was guilty of murder of the first degree from the facts and circumstances shown of the killing. There was no dispute as to the facts and circumstances under which the killing of deceased by defendant was done. They were conceded, and show that the killing was committed by defendant under circumstances of peculiar atrocity and in a manner which could leave no rational inference but that it was done with deliberate purpose and intent to kill if the defendant was sane. Unless he was insane, no other verdict than that of murder of the first degree could have been returned against him. His sole defense was that he was insane to a degree that he was incapable of entertaining the deliberate intent essential to constitute first-degree murder. But the law presumed him sane, which involved the mental capacity of entertaining the deliberate intent which the conceded facts surrounding the killing rationally showed. By reason of the presumption the jury must remain convinced of his sanity or they must be convinced by a preponderance of the evidence that he was insane. There is no middle ground or intermediate rule or any rule of reasonable doubt as to insanity recognized in this state, and hence no warrant for the giving of this quoted instruction by the trial court. It had otherwise correctly instructed the jury on all matters respecting insanity as a defense and the rules under which it must be considered by the jury. As is apparent from our discussion of the subject, it was not exactly correct for the court to tell the jury that there was an exception to the rule as to the burden of

proof being on the prosecution where insanity is interposed as a defense, but this does not affect the matter under consideration. It may be said that in giving the usual general instructions in criminal cases as to the right of a defendant to an acquittal if the jury, from a consideration of all the facts and circumstances, are not satisfied that the state has established every fact essential to a conviction, the court should, with regard to the defense of insanity set up by a defendant, specifically inform them of the qualification in such cases to this general rule, namely, that such defense must be established to their satisfaction by a preponderance of the evidence in his favor, and that the rule of reasonable doubt does not apply as to such a defense.

But while generally the giving of conflicting or misleading instructions will warrant a reversal, this rule is subject to the exception that when this condition is not only invited by the defendant, but that its result is solely to his advantage, he has no ground of complaint. This was the situation created here. Of course, no prejudice was worked the appellant through the correct instructions given by the court. The giving of conflicting and misleading rules proceeded from the quoted instruction. But obviously the giving of this quoted instruction was decidedly to the advantage of appellant. It submitted his only defense of insanity for the consideration of the jury under the rule of reasonable doubt (to say nothing of a predisposition to insanity being any defense at all) much more favorably than he was entitled to, and hence no prejudice resulted to him nor any valid ground of complaint.

The court gave the jury an instruction with respect to the discretion vested in them should they find the defendant guilty of murder of the first degree as to whether he should be hanged or suffer life imprisonment. It is unnecessary to set forth the instruction here. It is the same instruction as was given word for word by the trial court in People v. Rogers, and the correctness of which was the subject of consideration on an appeal to this court in that case. People v. Rogers, 163 Cal. 476, 126 Pac. 143. We held there that the giving of such an instruction was not erroneous.

[17] It was not error for the court to deny the motion for a new trial on the ground of newly discovered evidence. There was no showing whatever of reasonable or any diligence to discover or produce at the trial the single item of evidence bearing upon the insanity of appellant which was claimed subsequently to have been discovered, and which is referred to in the affidavit of the mother filed in support of defendant's motion.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

HENSHAW, J. (concurring). I concur in the foregoing opinion and judgment. The condition of our law touching instructions to the jury in the matters above discussed I take it briefly to be this: In general, if, after their review of all of the evidence, the jury entertain a reasonable doubt of the guilt of the defendant, it is the jury's duty to give the defendant the benefit of that doubt and to acquit him. This doctrine of reasonable doubt goes not only to the whole evidence, but equally to every material issue in the case. Thus, if upon any one material issue the jury entertain such a doubt, their verdict must be acquittal. When, however, our law says, as it does with equal positiveness, that when insanity is relied upon as a defense it must be proved to the satisfaction of the jury by a preponderance of evidence, there is presented an apparent conflict between the two doctrines. But this conflict is only apparent. When insanity is interposed as a defense, that one particular issue is removed from the operation of the rule of reasonable doubt. It forms an exception to it. Our law is this: If the jury entertain a reasonable doubt concerning the proof of any material issue in a criminal case, it must give the defendant the benefit of that doubt and acquit him, unless the particular issue be that of insanity. As to this issue a reasonable doubt is not sufficient to justify an acquittal at the hands of the jury, but they must be convinced that the defense of insanity is established by a preponderance of evidence. It would tend to clarify our criminal law if trial judges, where the occasion arises, would define this matter to the jury in some such way as that above indicated.

I concur: SHAW, J.

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168 Cal. 790

LONG v. HAMMOND. (Sac. 2170.)

(Supreme Court of California. Dec. 15, 1914.)

1. Landlord and Tenant (§ 322*)—Lease—Construction—Rights of Lessee.

A lessee may not sell or otherwise dispose of the lessor's property, unless expressly or impliedly authorized so to do by the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. § 322.*]

2. Landlord and Tenant (§ 322*)—Lease—Construction—Rights of Lessee.

A lease of a farm and enumerated live stock for a rental of half of the increase of the stock, which provides that at the end of the term the lessee shall surrender the premises and make the number of stock good and one-half of all increase, does not authorize the lessee to sell any of the demised stock, but means that at the end of the term he must deliver up that stock and replace any portion lost during the term.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1353, 1354, 1357; Dec. Dig. § 322.*]

3. Appeal and Error (§ 909*)—Disposition of Case on Appeal—Presumptions.

Where a lease sued on by the lessor was unambiguous and clearly sustained his claim, the court, on appeal from a judgment for the lessee on the judgment roll alone, could not, to sustain the judgment, presume that the trial court received parol evidence to justify it to construe the lease so as to support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

In Bank. Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by J. C. Long against S. P. Hammond. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Cornish & Robnett, of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

ANGELLOTTI, J. This is an appeal on the judgment roll by plaintiff from a judgment given in favor of defendant. The only question presented by the appeal is whether, under the terms of a certain lease made by plaintiff to defendant, defendant had the right to sell any of the live stock constituting a part of the demised property. If he had no such right, the judgment must be reversed.

By the lease, executed May 22, 1911, plaintiff leased to defendant a tract of land containing 160 acres, together with all farming implements and machinery on the premises, a wagon, a cart, and certain harness, and "4 cows, 12 yearlings, 7 of which are heifers and 5 steers and one bull, * * * 7 head of horses, consisting of 3 work horses, 1 three year old filly, 2 two year old geldings and one yearling filly," for the term of five years "for the rental value of one-half the increase of said stock; i. e., that is to say, that, at the end of said term of five years, the said lessee shall surrender to the lessor the said premises in good condition, wear, tear, and the elements excepted, make the number of stock herein contained good, and one-half of all increase, together with all personal effects, herein described as going with the land such as wagons, harness, farming implements, etc."

Defendant, having entered into possession of the demised property some time prior to the commencement of this action (April 13, 1912), sold the bull, three head of two year old steers, and four horses for the sum "of about $240," and, as admitted by the pleadings, appropriated the proceeds to his own use. The lower court concluded that, under the terms of the lease which we have substantially set forth, defendant was authorized to sell such property.

[1, 2] We are unable to find in the provisions of the lease any authorization to defendant to sell any of the demised property belonging to plaintiff. We have here a lease of certain specified real and personal property, including certain live stock, for the term of five years, the rental prescribed being "one-half of the increase of said stock," with covenants relative to the return of the property at the expiration of the term. No authority rests in a lessee to sell or otherwise dispose of the lessor's property, unless there be express provision therefor in the lease, or unless, by fair implication from the terms of the lease, such authority may be inferred. Certainly no such express provision was here contained, and there is no basis at all for any claim that such authorization may be inferred, except in so far as such claim may be based on the provision that at the end of the term the lessee shall surrender the premises, farming implements, etc., and "make the number of stock herein contained good." To our minds this provision furnishes no sufficient basis for any such claim. Obviously it was inserted for the purpose of requiring the lessee to replace such of the stock as might die or in some way be lost during the term. He must bear the loss and return all of the stock leased, together with one-half of the increase thereof, making good by replacing the same any portion of the stock that may have been lost during the term. This, in our opinion, is the only reasonable construction to be given to the language of the lease. It is to be observed that the only rental prescribed is one-half of the increase of the live stock that was demised. This necessarily contemplates a retention of the very live stock demised. Under defendant's theory, he might sell all of the live stock, for if he can sell any he can sell all, and refrain from replacing any of the same until the termination of the lease, thus practically depriving the lessor of rental altogether. We see no warrant in the language of the lease for the construction placed upon it by defendant.

[3] There is nothing in this case warranting the assumption that the trial court may have received parol evidence sufficient to justify it in construing the lease as authorizing the lessee to sell any of the stock demised. To our minds there is no such ambiguity in the language used with regard to any matter involved in this appeal as to have justified a resort to parol evidence to show that it was intended to give the lessee authority to sell any of the demised property. There is no question in the case as to the meaning of any or all of the words used in the provision requiring the lessee to "make the number of stock herein contained good," and neither party disputes that the words were used "in their primary and general acceptation." Code Civ. Proc. § 1861. The question is whether, when taken as so used, they can be held to imply a power of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sale in the lessee. The finding of fact of the trial court, taken in connection with its conclusions of law, are consistent only with the theory that it concluded purely as a matter of law from the provisions of the lease alone, which to our minds are plain and unambiguous, that the lessee had the right under the lease to sell the property that he has disposed of.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.

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168 Cal. 788

HIGUERA v. COREA. (S. F. 6384.)

(Supreme Court of California. Dec. 15, 1914.)

1. JUDGMENT (§ 743*)—RES JUDICATA—RIGHT TO EASEMENT—ACTION TO QUIET TITLE.

In an action to quiet title to a strip of land over which defendant claimed an easement for a roadway, a judgment in a previous action between the same parties, declaring that defendant was entitled to such easement, which judgment was affirmed on appeal, was conclusive as to the rights of the parties in the present action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275–1277, 1284; Dec. Dig. § 743.*]

2. QUIETING TITLE (§ 44*)—EVIDENCE—FORMER JUDGMENT.

In an action to quiet title to land over which defendant claimed an easement for a roadway, a judgment rendered in a previous action between the same parties, and declaring that defendant was entitled to such easement, was admissible in evidence as proof of defendant's right to the easement.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

Department 1. Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by Bernardo Higuera against Frank Corea. From judgment for defendant, denial of new trial, and denial of motion to set aside the judgment as contrary to the findings, plaintiff appeals. Affirmed.

William B. Hardy, of San Jose, for appellant. William H. Johnson, of San Jose, for respondent.

SHAW, J. The complaint of the plaintiff states a cause of action to quiet plaintiff's title to a tract of land. The prayer is that the defendant be required to set forth the interest he claims therein, and that the same be adjudged void. The defendant answered, alleging that he was the owner of an easement over the land claimed by the plaintiff, consisting of a roadway leading from the defendant's land across the plaintiff's land to a public highway. Judgment was given for the defendant, declaring him to be the owner of said easement. Plaintiff appeals from the judgment, also from an order denying his motion for a new trial, and from an order denying his motion to set aside the judgment as contrary to the findings.

On the trial the defendant introduced in evidence the record of a previous action by Frank Corea against Bernardo Higuera, wherein judgment was given in favor of Corea, declaring that he was entitled to the identical easement over Higuera's land that is here in controversy. An appeal was taken in that case to this court and the judgment therein was affirmed on April 29, 1908. 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018. The amended complaint in the present action was filed September 29, 1911, and the trial was had in the following December. The description of the roadway in the judgment in the former action was in somewhat general terms. The court here, however, found that the roadway therein described was identical with that described in the defendant's answer herein.

[1, 2] The plaintiff claims that the evidence is insufficient to show that defendant had title to the easement in question. We do not think it necessary to set out the evidence in full. While it is somewhat conflicting, there is ample evidence to show the defendant's right thereto, as adjudged by the court, and that without aid from the probative effect of the former judgment. That judgment is, in itself, conclusive of the rights of the parties in this action. The finding that the description of the roadway in the former action is identical with the description in this action is not attacked by the plaintiff in his briefs. As we understand his argument, it is that the former judgment is inadmissible in evidence in this action in proof of the defense alleged, because that matter had been adjudicated and cannot be introduced in evidence in another action involving the same right. No discussion is necessary to dispose of this argument. Practically the sole purpose of resorting to courts for a judgment establishing a right is to furnish the party with a record on which he can rely as conclusive proof of his right whenever it is again disputed. It was not necessary to set up the judgment in the previous action as a former adjudication. It could be introduced in evidence as proof of the right of the defendant to the easement alleged in his answer.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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168 Cal. 783

SCOTT v. McPHERSON. (L. A. 3336.)

(Supreme Court of California. Dec. 14, 1914.)

1. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—PLEADING—VARIANCE.

Under a complaint, in a servant's action for personal injury, alleging negligence in failing to provide a safe place to work, proof of negligence of a fellow servant was a material variance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861–876; Dec. Dig. § 264.*]

2. PLEADING (§ 237*)—AMENDMENT—SAME CAUSE OF ACTION.

Under Code Civ. Proc. § 469, providing that no variance is material unless it has actually misled the adverse party, and that even then the court may order the pleadings to be amended on terms, where the complaint, in a servant's action for injury, was based on negligence in not furnishing a safe place to work, and the only proof was negligence of a fellow servant, in view of St. 1911, p. 796, § 1, declaring negligence of a fellow servant to be no defense to a servant's action for injury, the court could allow an amendment by adding allegations of negligence of a fellow servant, since the cause of action was not changed thereby; St. 1911, p. 796, § 1, having taken away the defense of fellow servant's negligence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603–619; Dec. Dig. § 237.*]

3. PLEADING (§ 239*)—AMENDMENT—TERMS—CONTINUANCE.

In a servant's action for personal injury, where he pleaded failure to supply a safe place to work, and he was allowed to amend to conform to proof by charging negligence of a fellow servant, the defendant was entitled to meet the new allegations by demurrer and answer and to any time reasonably necessary to enable him to obtain available evidence material to them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 626–635; Dec. Dig. § 239.*]

4. MASTER AND SERVANT (§ 281*)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injury from a piece of steel dropped by a fellow servant working on an upper story, evidence *held* to sustain a finding that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987–996; Dec. Dig. § 281.*]

5. DAMAGES (§ 173*)—IMPAIRMENT OF EARNING CAPACITY—EVIDENCE.

In a servant's action for personal injury, evidence whether he had any means by which he could support himself and family other than his daily labor was incompetent to show that he did not have some other occupation which he might follow if his shoulder was lame.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490–492, 501; Dec. Dig. § 173.*]

6. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Such error was harmless, where the court, trying the case without a jury, did not consider the plaintiff's financial condition or his obligation to support others in fixing the amount of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

Department 1. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by James H. Scott against W. E. McPherson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lewis R. Kirby and J. T. Reed, both of San Diego, for appellant. Young C. Burkhart, of San Diego, for respondent.

ANGELLOTTI, J. Plaintiff brought this action to recover damages alleged to have been suffered by him by reason of injuries received while working for defendant in the construction of a building. The case was tried by the court without a jury. Judgment was given in favor of plaintiff for the sum of $400. Defendant appeals from such judgment and from an order denying his motion for a new trial.

On November 6, 1911, plaintiff was working for defendant as a carpenter and laborer in the construction of this building, and at the time of the accident was working in an air well about 3½ feet deep and 9½ feet wide. The building had been constructed one story above the street level, and on the upper floor several men employed by defendant in the construction of this building were working. One of these men, T. B. Thompson, was engaged in cutting off the ends of projecting steel. He was using a saw for this purpose. Having used the saw on an end projecting over the air well, and not being able to detach it with his hand, he struck it with a hand axe, thereby breaking it off and causing it to fall some 20 feet to where plaintiff was working in the air well. The piece thus detached was from 5 to 8 inches in length and from one-half to five-eighths of an inch in thickness. It struck plaintiff on the left shoulder, causing a fracture of the acromion. There was testimony sufficient to support a conclusion that the plaintiff was thereby prevented from following his avocation for a short time, and that use of the arm would be permanently impaired to a slight degree.

[1, 2] 1. The only negligence on the part of the defendant alleged in the original complaint, which was unverified, was that defendant had failed to provide plaintiff with a safe and proper place in which to work. The answer contained a general denial of all the allegations in the complaint, and set up as defense contributory negligence on the part of plaintiff, and that the injury was caused by the negligence of a fellow servant of plaintiff. At the close of plaintiff's case, defendant moved for a nonsuit, upon the ground, among others, that plaintiff had shown no such negligence on the part of defendant as was alleged in the complaint. The trial judge very correctly took this view of the matter, saying substantially that the only negligence shown by the evidence introduced by plaintiff was that of Thompson, a fellow servant of plaintiff. He further stated substantially that, if such negligence on the part of Thompson was alleged in the complaint as the cause of plaintiff's injury, defendant would be liable therefor to plaintiff, if the proof sustained the allegation. In this the trial judge correctly stated the law, in view of the provisions of the act relative to liability of employers for injuries or death sustained by their employés, etc., approved

April 8, 1911 (Stats. 1911, p. 796), which was in force at the time of the accident. That act provided, in section 1, that it shall not be a defense that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant. He therefore permitted plaintiff to amend his complaint by adding allegations in this behalf, and denied the motion for a nonsuit. A demurrer to the complaint as amended was overruled, and the original answer was allowed to stand as an answer to the complaint as amended. A continuance asked for by defendant in view of the amendment was refused, but the court expressly stated to defendant's counsel that, if it was made to appear that a continuance was necessary to enable defendant to obtain the attendance of witnesses to meet the allegations thus added to the complaint, a continuance would be granted.

There was no error on the part of the court as to any of these matters. The cause of action was in no way changed by the amendment. The action was one for damages for a personal injury suffered because of the negligence of defendant. There was a variance between the allegations and the proof as to what the negligence of the defendant was in the matter. Instead of being his failure to provide a safe and suitable place for plaintiff to work in, it was his negligence in the matter of detaching the end of the steel rod and allowing it to fall upon plaintiff in the place where he was working, for, under the act to which we have referred, Thompson's negligence was his negligence. The trial court had the right to order the complaint to be amended upon such terms as might be just. Section 469, Code Civ. Proc.

[3] Of course defendant was entitled to meet the new allegations by demurrer and answer, which he did, and also to any time reasonably necessary to enable him to obtain available evidence material to the issue of Thompson's negligence. No showing of the necessity for any continuance was attempted to be made, although the trial judge expressly stated that the continuance would be granted, if such a showing were made. It is to be borne in mind that defendant had alleged in his answer as a defense substantially the matters set up by the amendment. It is not suggested even now that defendant was not able to procure or did not procure and introduce all the evidence that he desired to introduce on this issue.

[4] 2. It does not appear to be disputed in appellant's brief that the evidence introduced by plaintiff was sufficient to support a conclusion that Thompson was negligent in the matter of detaching the end of the steel rod. We are of the opinion that it was sufficient for this purpose. It is urged, however, that plaintiff was guilty of contributory negligence in that, by the exercise of reasonable care for his own safety, he would have perceived the danger of his situation and guarded himself from injury. We are of the opinion that the conclusion of the trial court that plaintiff was not guilty of contributory negligence at all is fully sustained by the evidence. Apparently he had no reason whatever to imagine that any workman above him would negligently allow a substance capable of injuring him to fall upon him. He had the right to assume that the workmen above would exercise reasonable care for the safety of those below from injury at their hands. It did not follow from the fact that Thompson was engaged in sawing off the ends of these steel rods that he would allow the portion detached to fall to the ground, and plaintiff had no notice or means of notice of any threatened danger.

[5, 6] 3. On the examination of plaintiff, he was asked by his counsel as follows:

> "I will ask you if you have any support otherwise, for yourself and those dependent upon you, than your daily labor?"

This was objected to, and plaintiff's counsel explained his question as follows:

> "I ask if he had any other means of revenue by which he could support himself and family other than that of his daily labor."

The objection was overruled, and the witness answered: "No, sir." The trial judge expressed the view, in regard to another question of somewhat like nature immediately following this, that the testimony was competent for the purpose of showing that he did not have some other occupation that he might follow if his shoulder was lame. This appears to have been the sole reason of the judge in admitting such evidence. He had just previously sustained objections to such questions as, "How large is your family?" and "Have you any children residing with you in San Diego?" We think the objection to the question above set forth should have been sustained. It had no bearing on the matter suggested by the judge and was irrelevant and immaterial to any issue in the case. But we think it is manifest from the record that the trial judge did not consider the financial condition of plaintiff or the obligation of support of others incumbent on him as matters to be considered in fixing the amount of damage. It is to be borne in mind that the action was tried by the court without a jury. The cases cited by appellant are cases in which the jury was substantially instructed by the court that it could consider the financial condition of the plaintiff as an element in determining the amount of damages. We cannot conceive that any injury resulted to defendant by reason of the admission of this evidence, and must hold that the error was without prejudice.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

169 Cal. 46

GALE v. TUOLUMNE COUNTY WATER CO. (Sac. 2232.)

(Supreme Court of California. Dec. 18, 1914.)

1. Contempt (§ 66*) — Judgment of Contempt—Appealability.

Under Code Civ. Proc. § 1222, declaring that judgments and orders of the court or judge made in cases of contempt are final, a judgment adjudging one guilty of contempt for violating a perpetual injunction is not reviewable by appeal, though the court acted without jurisdiction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

2. Judgment (§ 678*) — Conclusiveness — Parties Bound—Successors in Interest.

Under Code Civ. Proc. § 1908, providing that a judgment is conclusive between the parties and their successors in interest by title subsequent to the judgment, a successor in interest of the original defendant in a suit involving water rights is bound by the judgment rendered prior to the transfer of the interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195–1199, 1221; Dec. Dig. § 678.*]

3. Courts (§ 52*)—Jurisdiction—Establishment of Superior Courts.

Under Const. art. 22, § 3, abolishing district courts and providing for the transfer of records, books, papers, and proceedings to the superior courts created, and declaring that the superior courts shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein, a violation in 1914 of a perpetual injunction granted by the district court in 1870 is a contempt of the superior court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 184–192; Dec. Dig. § 52.*]

4. Contempt (§ 43*)—Violation of Injunction — Proceedings — Party Entitled to Initiate.

One who acquires property of a plaintiff who has obtained a judgment establishing water rights thereby acquires the rights established by the judgment, and may initiate contempt proceedings for a violation of a perpetual injunction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 125–127; Dec. Dig. § 43.*]

5. Contempt (§ 66*)—Violation of Perpetual Injunction—Appealability of Judgment—Constitutional Provisions—"Independent Proceeding"—"Case in Equity."

A contempt proceeding, though arising in a case in equity based on a violation of a perpetual injunction, is an "independent proceeding," and is not a "case in equity," within Const. art. 6, § 4, providing for an appeal in all cases in equity.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

6. Contempt (§ 66*)—Judgment — Appealability—Statutory Provisions.

Code Civ. Proc. § 963, providing for an appeal from a special order after final judgment, is general, and is controlled by section 1222, providing that judgments and orders in contempt cases are final, and does not authorize an appeal from a judgment of contempt for a violation of an injunction.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

7. Contempt (§ 66*) — Judgment — Appealability—Statutory Provisions.

Code Civ. Proc. § 1222, making judgments and orders in cases of contempt final, makes no distinction between direct and constructive contempts as to the right of appeal.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

8. Contempt (§ 66*) — Appeal — Statutory Provisions—Validity.

Code Civ. Proc. § 1222, making judgments in contempt cases final, construed to deny a right of appeal in cases of constructive contempt, is not unconstitutional, for the Constitution does not expressly or impliedly give a right of appeal in such cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

9. Contempt (§ 66*) — Judgment — Appealability.

A judgment adjudging one guilty of contempt for violating an injunction against diverting waters, granted in a suit determining title to the waters diverted, does not determine title to the waters, and is not appealable on the ground that the judgment determined title.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

In Bank. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Proceedings by Anna A. Freitas, as successor to O. P. Gale, for the punishment of the Sierra & San Francisco Power Company as successor to Tuolumne County Water Company, for contempt of court for violating an injunction. From a judgment adjudging defendant guilty of contempt, it appeals. Dismissed.

Chickering & Gregory and Donald Y. Lamont, all of San Francisco, for appellant. J. P. O'Brien, of San Francisco, for respondent.

SULLIVAN, C. J. Motion to dismiss appeal from judgment adjudging appellant guilty of contempt.

In February, 1870, O. P. Gale, the owner of a certain water ditch and water rights in Tuolumne county, commenced an action in the district court of the Fifth judicial district of this state in and for the county of Tuolumne, against the Tuolumne County Water Company (hereinafter called the "Water Company") to enjoin the company from diverting waters from Mormon creek. In September, 1870, a judgment in favor of plaintiff was entered in the district court, by the terms of which the defendant and its agents, employés, and servants were perpetually "enjoined, inhibited, and restrained from interfering with the natural waters of Mormon creek and its tributaries above the head of plaintiff's ditch, so as to prevent said water from coming to the head of plaintiff's ditch, unless defendant turned out to plaintiff an amount of water equivalent to the natural water of said Mormon creek." On appeal the judgment was affirmed. Subsequently Anna A. Freitas acquired from Gale his ditch and water rights involved in the action, and the Sierra & San Francisco Power Company (hereinafter called the "Power Company") succeeded to all of the property rights and business of the water company. The defendant at the time the action was commenced and determined was engaged in collecting waters in the vicinity of Mormon creek and selling the same, and using said creek and its tributaries and the waters thereof in the conduct of its business.

On September 26, 1913, Anna A. Freitas filed in the superior court of Tuolumne county her affidavit, in which she alleged that the power company had, at divers times in 1912 and 1913, "wrongfully violated the terms, conditions, and provisions of said judgment and decree and perpetual injunction, with the intent then and there to violate the same, etc.," by diverting the waters of Mormon creek and its tributaries. She also alleged that she had suffered great and irreparable injury by the diversion of the waters to which she was entitled, to her damage in the sum of $5,000. Upon her affidavit an order was issued and served upon the power company, requiring it to show cause why it should not be punished for contempt for violating the injunction. On the hearing of the order to show cause, the charging affidavit was amended in some respects; the most important amendment being that at all times in 1912 and 1913 the power company "had notice of and was bound by said judgment and decree and perpetual injunction."

In its answer to the amended affidavit the power company did not deny this allegation, but denied that it had in any manner violated the injunction, and also denied that Anna A. Freitas had suffered any injury or damage. On the hearing of the order to show cause, oral and documentary evidence was introduced. Upon the conclusion of the hearing the court adjudged that the power company had at divers times in August and September, 1913, "willfully and intentionally disobeyed and violated the terms, provisions, and mandates of the judgment and decree and perpetual injunction made, given, and entered in said district court on September 15, 1870, as aforesaid, and that by reason thereof the said Sierra & San Francisco Power Company, a corporation, is guilty of contempt of the authority of said district court and of this court, the successor thereof, as charged." As punishment for its contempt the court fined the power company $500. It appears from the evidence and judgment in the contempt proceeding that the Springfield Tunnel & Development Company (hereinafter called the "Springfield Company") carried on mining operations in close proximity to Mormon creek, at a point above the head of the Freitas ditch; that in its operations it sunk shafts, ran tunnels, and made other underground workings and excavations, which extended below the bed of Mormon creek and its tributaries. The judgment of contempt recites:

> "That during the month of August and the first ten days of the month of September, 1913, the said underground workings and excavations tapped the natural waters of Mormon creek and its tributaries and diverted them into the underground workings of the said mining properties operated by the said Springfield Tunnel & Development Company. That the said company pumped the said waters to the surface of its said property, and during the month of August, 1913, and the first ten days of September, 1913, delivered a substantial part thereof to the Sierra & San Francisco Power Company, who received the same through its weir situate upon Mormon creek, and the said Sierra & San Francisco Power Company, during said time, conveyed the same through its ditches in Mormon creek, and appropriated the water so received to its own use. That the waters so pumped by the Springfield Tunnel & Development Company from its mining property, and the portion thereof delivered to, and received by, the Sierra & San Francisco Power Company, as aforesaid, were a portion of the natural waters of Mormon creek and its tributaries, and the same were wrongfully and in violation of the terms and provisions of said judgment and decree, and perpetual injunction, appropriated by the said Sierra & San Francisco Power Company to its own use."

[1] From the judgment of contempt the power company has attempted to appeal to this court. We say attempted to appeal, because no appeal lies from the judgment. "The judgments and orders of the court or judge made in cases of contempt, are final and conclusive." Section 1222, Code Civ. Proc. Necessarily a judgment, which by the Code is made final and conclusive, is not appealable. This court has repeatedly held that by reason of its finality and conclusiveness the judgment in a contempt case is not appealable. Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414; In re Vance, 88 Cal. 262, 26 Pac. 101; People v. Kuhlman, 118 Cal. 140, 50 Pac. 382; Estate of Wittmeier, 118 Cal. 255, 50 Pac. 393. An appeal does not lie from such a judgment, even though it appear that the court adjudging one guilty of contempt has acted without jurisdiction. The party aggrieved in such a case must resort to other remedies. People v. Kuhlman, supra.

[2, 3] The power company, successor in interest of the original defendant water company, was bound by the judgment rendered in 1870, and to the same extent as was the water company before the latter transferred its property. Section 1908, Code Civ. Proc. The Constitution of 1879 abolished the district courts, but in so doing it provided for the transfer on the 1st of January, 1880, to their successors—the superior courts—of all records, books, papers, and proceedings of the district courts and gave the superior courts "the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein." Const. art. 22, § 3. Therefore a violation in 1914 of the perpetual injunction granted by the district court in 1870 constituted contempt of the superior court of Tuolumne county.

[4] Anna A. Freitas, having acquired from the original plaintiff the properties, the subject of dispute in the case of Gale v. The Water Co., became entitled to all the benefits which Gale acquired under the judgment of the district court, and she had the same right to initiate contempt proceedings which Gale would have had if he had never disposed of his properties. The power company being bound by the judgment and injunction, as the successor of the water company, its violation of the injunction, with notice thereof, constituted contempt of court. Lake v. Superior Court, 165 Cal. 192, 131 Pac. 371; Ahlers v. Thomas, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820; Merriam Co. v. Saalfield, 190 Fed. 927, 111 C. C. A. 517.

[5] The power company claims that, inasmuch as the action of Gale v. Water Company was a case in equity, it has a right of appeal by virtue of section 4, art. 6, of the Constitution, which provides for an appeal from the superior court to the Supreme Court "in all cases in equity except such as arise in justices' courts." A sufficient answer to this contention, in addition to the authority of the cases cited supra, is that a contempt proceeding, though it may arise in a case in equity, is an independent proceeding between the contemner and the court, criminal or quasi criminal in its nature, and is not itself a "case in equity."

[6] To sustain its appeal, the power company further claims that, as the judgment adjudging it guilty of contempt was made after final judgment in the case of Gale v. Water Company, it has the right of appeal therefrom under section 963, Code of Civil Procedure, which provides that an appeal lies "from any special order made after final judgment"; but, as this provision is general in character, it is controlled by the special law contained in section 1222, Code of Civil Procedure, which makes a judgment of contempt final and conclusive and therefore nonappealable.

[7] Appellant asserts that section 1222, Code of Civil Procedure, making judgments and orders in cases of contempt final and conclusive, does not apply to constructive contempts. For certain purposes the law recognizes a difference between a direct contempt, or that committed in the immediate view and presence of the court, and constructive contempt, or that committed elsewhere. But our Code makes no distinction whatever as far as the right of appeal in either case is concerned, and we can make none.

[8] Appellant further claims that section 1222, Code of Civil Procedure, if applicable to cases of constructive contempt, is unconstitutional. The right of appeal is derived from our Constitution or statutes. The Constitution nowhere, expressly or impliedly, gives a right of appeal in cases of contempt. Therefore section 1222 cannot be unconstitutional.

[9] The main contention of the power company is that in the contempt proceeding "there was a distinct question of title both heard and determined; that this injunction has either taken the form of an order made after final judgment, and is therefore appealable, or it is in itself a judgment, which is also appealable." The appellant is in error in claiming that the judgment of contempt determined title. The judgment against the defendant is nothing more nor less than one adjudging it guilty of contempt of court. Title to the waters which it diverted was determined by the district court, in the case of Gale v. Water Company, to be in Gale. The same title was in his successor in interest at the time of the wrongful diversion. By reason of the judgment of the district court, concluding alike the defendant and its successors in interest, the lower court was bound to recognize the title of Anna A. Freitas to the waters of Mormon creek and its tributaries. No question of title to these waters was raised in the contempt proceeding, and none was determined. If the original defendant water company, after the judgment rendered against it by the district court, had by underground workings and excavations under the bed of Mormon creek and its tributaries tapped the waters thereof and wrongfully diverted the same to its own use, it would have been guilty of contempt, as much so as if the diversion had taken place on the surface. If the original defendant, instead of directly appropriating the waters in question, had obtained them through the Springfield Company, or some other agency which had diverted the waters by underground methods or surface connections, it likewise would have been guilty of contempt of court. As the power company occupies in relation to the case the same position exactly that the water company would have occupied if it had not transferred its properties, the power company was guilty of contempt if directly or indirectly, by underground methods or otherwise, it wrongfully diverted the waters of Mormon creek and its tributaries, title to which waters was in Anna A. Freitas. The issue before the lower court was: Did the power company take waters from Mormon creek and its tributaries in violation of the injunction granted by the district court? That issue was decided adversely to the appellant. The lower court may have been egregiously mistaken in its judgment, but, whether mistaken or not, its judgment must stand. It cannot be reviewed on appeal or otherwise.

It follows that the attempted appeal taken by the Sierra & San Francisco Power Company from the judgment of the superior court of Tuolumne county adjudging it guilty of contempt must be, and the same is hereby, dismissed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; MELVIN, J.

169 Cal. 28

DOUGLAS v. BERLIN DYE WORKS & LAUNDRY CO. (L. A. 3791.)

(Supreme Court of California. Dec. 17, 1914.)

1. Evidence (§ 556*)—Examination of Experts—Medical Authorities.

Where a physician stated on cross-examination that he based an opinion partly on experience, without stating that he relied on any medical authority, the cross-examining party, desiring to know what medical authority, if any, he relied on, should ask him directly on that point, and not erroneously assume that he relied on medical authority, as indicated by the question, "What authority do you rely on in regard to that?" and the sustaining of an objection thereto was not erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2377; Dec. Dig. § 556.*]

2. Trial (§ 236*) — Instructions — Weight and Credibility of Evidence.

A requested charge by defendant that, in determining the weight and credibility of the evidence of a party to the contest, the jury may consider his interest in the result of the verdict, was properly refused, because intended to particularly caution the jury, based on plaintiff's interest in the result.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531–533; Dec. Dig. § 236.*]

3. Damages (§ 132*)—Personal Injuries—Excessive Damages.

A person 54 years old, in good health, received an injury causing a fracture of the base of the skull, accompanied by concussion of the brain and hemorrhage, producing permanent traumatic diabetes, and impairing his hearing and eyesight. His left knee was injured; the ligaments holding the kneecap being torn entirely across. He also received injury to the spinal column and displacement of several of the vertebræ. The injury to the knee caused a permanent displacement of the kneecap, so as to make it impossible for him to walk without the use of crutches or a cane, and then only with care and constant liability to danger of the kneejoint slipping out. The injury to the spine produced physical sexual inability. *Held*, that a verdict for $10,000 would not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372–385, 396; Dec. Dig. § 132.*]

4. Appeal and Error (§ 1004*)—Effect of Verdict—Excessive Damages.

It is the province of the jury to determine the damages for a personal injury, subject, if excessive, to the control of the trial court, and a verdict approved by that court will not be disturbed on appeal, unless it is wholly disproportionate to the injuries received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by C. K. Douglas against the Berlin Dye Works & Laundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff in a collision on a public thoroughfare between an automobile in which he was riding and an automobile delivery wagon operated by defendant; the claim being that the accident occurred through the negligence of the latter. Plaintiff had a verdict and judgment thereon for $10,000. A motion for a new trial was denied and defendant appeals from the order of denial and the judgment.

On the trial of the action defendant admitted that its negligence, as charged, caused the injury to plaintiff, and its liability therefor; the only issue presented to the jury being as to the amount of damages sustained by the plaintiff.

At the time of the accident plaintiff was 54 years of age, in good health, free from mental or physical trouble. In the head-on collision between the vehicles he was thrown violently to the ground. As the result thereof, aside from cuts and bruises about his face and body, there was a fracture of the base of the skull, accompanied by concussion of the brain and hemorrhage from the ear and nose; his left knee was injured, a deep gash being cut in it and the ligament that held the cap of the knee to the large bone had been torn entirely across; there was also injury to his spinal column and displacement of several of the vertebræ. The evidence shows that the plaintiff became affected with permanent traumatic diabetes as a result of the injury at the base of his brain, and that his hearing and vision had become permanently and seriously impaired therefrom; that the injury to the ligament at the kneejoint occasioned a permanent displacement of the kneecap, so as to make it impossible for plaintiff to walk without the use of crutches or a cane, and then only with great care and caution and constant liability to danger of the kneejoint slipping out; and that the injury to the spine had produced physical sexual inability in the plaintiff. In addition to these particular results of the injury, and aside from the great pain and suffering which resulted therefrom, there was a general impairment of the mental and physical condition of plaintiff. His nervous condition has become very low; there has been a failure of memory; and he still suffers, and will continue to suffer, from the injuries inflicted on him.

Appellant bases its right to a reversal upon three grounds only: That the court erred in sustaining an objection of plaintiff to an inquiry made by defendant on cross-examination of one of the witnesses produced by the plaintiff; that it erred in refusing to give an instruction to the jury requested by defendant; and it is further claimed that the verdict of the jury is excessive in the award of damages.

As to the first point: Dr. H. M. Coulter, the attending physician of the plaintiff, in the course of his direct examination, testified that plaintiff was permanently affected with traumatic diabetes, which, in his opinion, was the result of the fracture of the base of the skull received in the accident. As a final question on cross-examination of the doctor by the attorney for defendant, the following took place:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "Q. Isn't from 50 to 60 the most common period of life, that the percentage of diabetes among people of that age is much greater than at any other period of life? A. I should say from 30 to 50, partly from my own experience. Q. What authority do you rely on in regard to that?
>
> "Mr. Drake (Attorney for Plaintiff): I object to that, as it is not cross-examination. He does not claim to base it on anything but his experience.
>
> "Mr. Hickcox (Attorney for Defendant): He has testified as to his professional—
>
> "Mr. Drake. He has made the statement that it was from 30 to 50, on his experience.
>
> "Mr. Hickcox. He said he based his statement on Keene and Osler.
>
> "The Court. Sustained."

[1] It is claimed by counsel for appellant that it was error on the part of the court not to permit an answer to the question above quoted. It is insisted that when an expert, called on behalf of one of the parties, gives his opinion on a scientific question, opposing counsel have a right on cross-examination to inquire upon what the opinion of the expert is based, whether upon his own experience, or upon accredited authorities of his profession, or both; so that, if the witness asserts that his opinion is based on standard authorities, counsel may, if such authorities relied on do not sustain his claim, show that fact to the jury for the purpose of discrediting his opinion or statement on the subject. As a legal proposition, this may be conceded. Rogers on Expert Testimony (2d Ed.) § 37; Gallagher v. Market St. Ry. Co., 67 Cal. 17, 6 Pac. 869, 51 Am. Rep. 680, note. But we hardly think that there was either such a clear violation of the rule or a denial of a substantial right of appellant thereby in sustaining the objection to the inquiry as would warrant this court in reversing the cause for such alleged error, the only one claimed to have occurred on the trial, where a considerable number of witnesses testified. At most, what appellant insists it had a right to do was to find out whether, in fact, the witness relied on any medical authority in support of his opinion, with a possible chance that, if he did so rely, an examination of the authority referred to might show that it did not agree with him. But, strictly speaking, there was no error committed by the court in its ruling. Counsel for appellant asserted his right to ask the question not upon any suggestion of the rule, but upon the assumption that the witness had "based his statement on Keene and Osler"—medical authorities, we assume. If he had so testified, then the question had already been answered. As matter of fact, however, the witness had not testified that he based his opinion on such authority or any authorities at all. All he said was he based it "partly upon my own experience." It is evident from what was said in discussing the objection to the question that this part of the answer had escaped the attention of the attorneys on both sides and the court. Counsel for respondent and the court were of the opinion that the witness had testified that he based his opinion on his own experience, and counsel for appellant was of the impression that he had mentioned certain authorities. All of them were mistaken in the matter. In this situation of misunderstanding there was nothing to prevent appellant from asking the witness directly whether he relied on any medical authority in support of his opinion, which was the proper inquiry to have made, instead of erroneously assuming, as his inquiry did, that the witness had testified to that effect.

[2] The next complaint of appellant is the refusal of the court to give an instruction to the jury asked by defendant as follows:

> "In determining the weight and credibility of the evidence of a party to the contest, you may take into consideration his interest in the result of the verdict."

Coming from the appellant, and as is evident from its phraseology, this instruction was intended to particularly caution the jury as to its consideration of the evidence of the plaintiff because of "his interest in the result of the verdict." An instruction of this character has been so often condemned that there is no necessity of discussing it. Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; People v. Wardrip, 141 Cal. 231, 74 Pac. 744; People v. Maughs, 149 Cal. 253, 86 Pac. 187; People v. Ryan, 152 Cal. 364, 92 Pac. 853; Dow v. City of Oroville, 22 Cal. App. 215, 134 Pac. 197.

[3, 4] As to the last claim of appellant that the verdict is excessive: We have set forth in main the mental and physical results to plaintiff consequent on the injuries he had sustained. It was the province of the jury to determine the amount that he should receive as compensation therefor, subject, if it was excessive, to consideration and control by the trial court. That court on the motion for a new trial made before it, in which this same ground was urged, has approved the verdict. Under these circumstances we could not disturb it, unless it appear that it was wholly disproportionate to the injuries received by the plaintiff, and this we cannot say.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(168 Cal. 777)

PEOPLE v. BUNDY. (Cr. 1860.)

(Supreme Court of California. Dec. 14, 1914.)

1. Criminal Law (§§ 1023, 1134*) — Order Denying Motion in Arrest of Judgment —Review.

An order denying a motion in arrest of judgment is not directly appealable, but is reviewable on appeal from the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583–2598, 2653, 2986–2998, 3056, 3067–3071; Dec. Dig. §§ 1023, 1134.*]

2. Criminal Law (§ 331*)—Insanity—Evidence.

Accused, relying on insanity, must show that he was deranged mentally when committing the criminal act, and that he was not conscious of its wrongful nature, and did not know that it was criminal; but if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act, if he has knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he is responsible for his act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742–744; Dec. Dig. § 331.*]

3. Criminal Law (§ 769*)—Instructions—Giving Requested Instructions.

Omission to state which instructions are given at the request of the prosecution, and which at the request of accused, is not blameworthy, but commendable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803–1806; Dec. Dig. § 769.*]

4. Criminal Law (§ 773*) — Instructions — Misleading Instructions.

An instruction, which states that while the defense of insanity must be weighed fairly, and when established commends itself to the sense of humanity, yet the jury must examine it with care, lest a counterfeit of mental infirmity may furnish immunity to guilt, given before requested instructions of accused on the subject, is not objectionable as nullifying the effect of accused's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821–1828; Dec. Dig. § 773.*]

5. Criminal Law (§ 311*)—Insanity—Evidence—Absence of Apparent Motive.

The jury may not safely infer the existence of an irresistible influence controlling accused solely from lack of apparent motive for the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 742–744; Dec. Dig. § 311.*]

6. Homicide (§ 340*)—Evidence—Instructions—Harmless Error.

Where accused admitted that he killed decedent because he was afraid that decedent would inform against him for robbing him, an instruction, that the jury could not safely infer the existence of an irresistible influence of a homicidal tendency from lack of apparent motive alone, was not prejudicial, though it might have been omitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715–717, 720; Dec. Dig. § 340.*]

7. Witnesses (§ 305*)—Compelling Accused to Testify—Waiver of Privilege.

The provision of Const. art. 1, § 13, that no person shall be compelled to be a witness against himself in any criminal case, does not prevent accused from voluntarily disclosing facts implicating him, and the prosecution may then prove his statements and admissions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053–1057; Dec. Dig. § 305.*]

8. Witnesses (§ 305*)—Compelling Accused to Testify—Waiver of Privilege.

Where physicians examined accused to determine his sanity, and he made no objections thereto, but conversed freely with them, and no fraud was perpetrated by any one, the disclosures made by him were not within Const. art. 1, § 13, declaring that no person shall be compelled in any criminal case to be a witness against himself, though his counsel were not notified of the proposed examination and had no knowledge thereof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1053–1057; Dec. Dig. § 305.*]

9. Homicide (§ 347*)—Punishment—Review—Modification of Sentence.

The Supreme Court may not set aside or modify a judgment imposing the death penalty for murder in the first degree, merely on the ground that accused at the time of the homicide was not 18 years of age.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 725; Dec. Dig. § 347.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Louis Bundy was convicted of murder in the first degree, and from an order denying a motion in arrest, and from the judgment of conviction, he appeals. Appeal from order dismissed, and judgment affirmed.

Earl Rogers and Frank E. Dominguez, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Asst. Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of murder in the first degree and adjudged to suffer death. He appeals from the judgment, and also from orders denying his motion for a new trial and his motion in arrest of judgment.

[1] As we have often pointed out, no appeal lies from an order denying a motion in arrest of judgment, but the order may be reviewed on the appeal from the judgment. It is not claimed that the order was erroneous in this case, and manifestly the motion was entirely without merit.

[2] It is not claimed that the evidence was in any way insufficient to warrant the verdict that was rendered, and in view of the facts shown by the record no such claim could reasonably be made. Unless defendant was insane at the time he killed Harold Ziesche, which admittedly he did, he was clearly and indisputably guilty of murder in the first degree. The defense interposed was insanity. The evidence was sufficient to sustain the verdict on this issue. It is to be remembered that, in order that insanity may be available as a defense, it must appear that the defendant was so deranged mentally when the act with which he is charged was done by him that he was not conscious of the wrongful nature of the act and did not know that it was wrong and criminal. As

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said by the trial judge in his instructions to the jury:

> "If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct."

[3] Certain suggestions were made on the oral argument as to the instructions given by the trial judge to the jury. We find nothing therein that would warrant a reversal. The omission of the judge to state which instructions were given at the request of the prosecution and which at the request of the defendant was commendable, rather than blameworthy. No reason appears to us why the jury should be told which of the parties requested a requested instruction given by the court, or that it was requested by either party.

[4] The judge gave certain instructions cautioning the jury substantially that while the defense of insanity was to be weighed fully, fairly, and justly, and when satisfactorily established is one that must commend itself to the sense of humanity and justice of the jury, they must examine it with great care, lest an ingenious counterfeit of this mental infirmity shall furnish immunity to guilt. It is admitted that no instruction was given in this connection that would warrant a reversal, in view of previous decisions of this court; but it is suggested that the giving of such cautionary instructions prior to the giving of any of defendant's instructions on insanity "practically nullifies the effect of defendant's instructions." We see no force whatever in this claim. The instructions given in regard to what the court called "moral insanity" were correct, and the evidence was such as to make the giving of these instructions advisable and proper. The same is true as to the instructions as to "partial insanity." There was no conflict in the instructions given upon this subject.

[5, 6] The instruction upon the subject of lack of apparent motive and the supposed claim of defendant's counsel, based thereon, that defendant must have been acting under a powerful and irresistible influence of homicidal tendency, was not happily worded in all respects, and probably should not have been given at all. But we are unable to see that any prejudice could have been caused defendant by the giving of this instruction. The jury could not reasonably have understood this instruction otherwise than as telling them substantially that they could not safely infer the existence of such an influence from the lack of apparent motive alone, which is entirely true. A reading of the evidence on the trial discloses no case of lack of apparent motive. According to his own admissions made before the trial, defendant killed young Ziesche, because, having just violently assaulted and robbed him, he was afraid that Ziesche would inform against him. As we have said, the instruction might well have been omitted, but it was not prejudicial.

[7, 8] The ground mainly urged for reversal is that the trial court improperly allowed two doctors called as witnesses by the district attorney to give their opinions on the question of defendant's sanity. The opinion of each of these witnesses, who were sufficiently shown to be experts on the subject, was based upon examinations, both physical and mental, of the defendant by the witness. Dr. Reynolds examined him twice and Dr. Orbison once. Dr. Reynolds' second examination was had three days before he testified, and Dr. Orbison's two days before the trial commenced. At the time of the second examination by Dr. Reynolds and the examination by Dr. Orbison, defendant had counsel, and they were not notified that any examination was to be had and had no knowledge thereof. Defendant was in custody, confined in the county jail, where the examinations were had. He was informed by Dr. Orbison prior to his examination that he (Orbison) was employed by the district attorney to make an examination. Dr. Reynolds had first examined him the day after his arrest, and when asked by the doctor if he objected to being examined, said, "No, sir." Dr. Reynolds examined him very thoroughly on this occasion, and on the second examination simply made a few tests, tested his sense of smell, his sense of taste, and his eyesight. The first examination by Dr. Reynolds was not made at the instance of the authorities, but at the request of a newspaper editor. Defendant made no objection whatever to being examined at any time, and conversed very freely with each of the doctors. The claim of counsel is that, by allowing the doctors to give their opinions based upon their examinations, defendant was compelled to be a witness against himself, in violation of section 13, art. 1, of the Constitution, which provides that "No person shall * * * be compelled, in any criminal case, to be a witness against himself. * * *" See, also, section 1323, Pen. Code. It may freely be admitted that, in view of this provision, one accused of crime may not be compelled to divulge to another, to be used by that other as basis for his testimony on the trial, facts which he has a right to hold secret. Whether one accused of crime can properly be compelled to submit to an examination by medical experts for the purpose of determining whether or not he is of sound mind is a question that it is not necessary to discuss here. There is nothing in the constitutional provision relied on that prohibits such a person from furnishing evidence against himself if he chooses to do so. He shall not be compelled to do so, but whatever fact he may disclose without force or compulsion of any kind, or whatever testimony he may voluntarily give, is not within the inhibition. Jones on Ev. § 400. No decision brought to our attention

holds to the contrary. And with special reference to examinations for the purpose of ascertaining whether an accused is of unsound mind, it is said in 4 Wigmore on Evidence, § 2265, that:

> "The use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to."

Perhaps utterances induced by fraud might likewise fall within the dubitable cases. In the case at bar an appellate court would certainly not be warranted by the record in holding that any force or compulsion was used, or that the accused did not voluntarily submit to the examinations. There was nothing in the nature of fraud on the part of the medical men, the authorities, or anybody else. The fact that defendant's counsel were not notified of the proposed examinations and had no knowledge thereof in no way affects the question of the admissibility of the evidence complained of. There is nothing in the law that makes notice or knowledge to counsel essential to a voluntary disclosure of facts by an accused person. Nor does the fact that the defendant was only just 18 years of age materially affect the question. For the purpose of a determination of the question whether the trial court erred in the admission of this evidence, that court must be assumed here to have held upon the testimony that no force or compulsion was used and that the defendant voluntarily submitted to the examinations. The testimony was such as to fully support such a conclusion.

[9] A careful examination of the record discloses no reason to doubt that defendant had a fair and impartial trial. No error was committed that can be held to have prejudiced him. Of course, learned counsel for defendant, by his suggestion that the penalty of death should not be inflicted for a crime committed by one who at the time of such commission was not quite 18 years of age, does not mean to intimate that this court has power to set aside or modify the judgment on any such ground. It is needless to say that this court has no such power.

The appeal from the order denying the motion in arrest of judgment is dismissed. The judgment and order denying a new trial are affirmed.

We concur: SULLIVAN, C. J.; SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

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25 Cal. App. 746

PEOPLE v. ALLISON. (Cr. 335.)

(District Court of Appeal, Second District, California. Nov. 13, 1914.)

1. Sodomy (§ 5*) — Indictment — "Carnal Knowledge."

An indictment accusing defendant of the infamous crime against nature, and alleging that he committed the crime on one "Frank B. Love" by "having carnal knowledge of the body of said Frank B. Love," is insufficient to charge the crime against nature, since, if "Frank B. Love" was a female, as the court must assume, it merely charged defendant with sexual intercourse with a female; "carnal knowledge" meaning sexual intercourse.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. § 6; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, First and Second Series, Carnal Knowledge.]

2. Criminal Law (§ 304*) — Evidence — Judicial Notice.

The court cannot take judicial knowledge of the sex of a person on whom a crime is alleged to have been committed from the name alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. § 304.*]

3. Indictment and Information (§ 117*)—Statutory Offenses—Sufficiency of Indictment.

Though an indictment is sufficient where the crime is substantially alleged in the words of the statute or their equivalent, yet, where the facts stated are capable of two constructions, on one of which the facts may be true and not constitute a crime, the indictment is insufficient, and cannot be aided by presumptions.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 310; Dec. Dig. § 117.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

James F. Allison was convicted of crime, and he appeals. Reversed.

Thomas Rhodes, of San Luis Obispo, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was prosecuted under section 286 of the Penal Code, which provides that:

> "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."

Defendant appeals from the judgment of conviction and attacks the indictment, to which he interposed a demurrer upon the ground that the facts stated in the indictment did not constitute a public offense, which was overruled. The indictment is as follows:

> "James F. Allison is accused by the grand jury * * * of the infamous crime against nature, committed as follows, to wit: The said James F. Allison * * * did willfully, unlawfully, and feloniously commit the infamous crime against nature with and upon one Frank B. Love, by then and there having carnal knowledge of the body of said Frank B. Love. * * *"

[1] Whether Frank B. Love was a male or female person is not made to appear, other than by the statement that defendant had carnal knowledge of the body of said person, an act which could not have occurred save and except upon the theory that Frank B. Love was a female. Carnal knowledge is

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defined in Bouvier's Law Dictionary as sexual connection. This definition is approved in Commonwealth v. Squires, 97 Mass. 61, Noble v. State, 22 Ohio St. 541, and Maxey v. State, 66 Ark. 523, 52 S. W. 2, which hold that carnal knowledge is synonymous with and means sexual intercourse. While, therefore, the indictment accuses defendant of committing the infamous crime against nature, it states facts which preclude the idea of the commission of such crime by showing the act of defendant was sexual connection with Frank B. Love. If, therefore, Frank B. Love was a female, which we must assume, since the contrary does not appear, then the defendant is merely charged with having sexual intercourse with a female, which does not constitute a crime.

[2] As said in People v. Carroll, 1 Cal. App. 4, 81 Pac. 681, which is almost identical with the case at bar:

> "We cannot take judicial knowledge of the sex of a party upon whom the crime is alleged to have been committed from the name alone. The name Frank is generally given to males, but it is sometimes given to females."

It follows that the facts stated in the indictment might be true and yet the defendant be innocent of any crime.

[3] While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged. People v. Terrill, 127 Cal. 99, 59 Pac. 836. As stated, the facts of the case are practically identical with those involved in People v. Carroll, supra, and upon the authority thereof, as well as for the reasons given, we are constrained to hold that the indictment is insufficient, in that it fails to charge defendant with the commission of a public offense.

Since, under our views, the judgment must, for the reasons given, be reversed, it is unnecessary to discuss other alleged errors.

The judgment and order denying defendant's motion for a new trial are reversed.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 749

COLBURN v. PARRETT. (Civ. 1648.)

(District Court of Appeal, Second District, California. Nov. 13, 1914.)

1. APPEAL AND ERROR (§ 392*)—DISMISSAL—WAIVER OF GROUND.

The giving of an undertaking for appeal, required by Code Civ. Proc. § 940, is waived by the statement of respondent's counsel that he relied only upon another ground stated in his motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2089–2094; Dec. Dig. § 392.*]

2. APPEAL AND ERROR (§ 417*)—NOTICE—SUFFICIENCY.

A notice of appeal from a judgment and order overruling a motion for new trial, made upon a bill of exceptions duly settled by the trial court, which states that notice is given that the appellant appeals to the appellate court from that order of the superior court denying motion for the new trial and also from the judgment therein, is sufficient under Code Civ. Proc. § 940, providing that the appeal may be taken by filing, with the clerk of court in which the judgment or order appealed from is entered, a notice stating the appeal from the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by John E. Colburn against F. B. Parrett, executor of the estate of Rosa Page, deceased. Judgment for the plaintiff, and defendant appeals. Motion to dismiss the appeal denied.

Porter, Morgan & Parrot, of Los Angeles, for appellant. W. C. Shelton, of Los Angeles, for respondent.

SHAW, J. [1] The grounds of the motion as stated in the notice thereof are the insufficiency of the notice of appeal and the fact that appellant failed to file an "adequate bond on appeal" within five days after service of notice thereof. At the hearing of the motion this last ground was not specified as a ground for dismissal; on the contrary, respondent's counsel expressly stated that "there is but one point, and that is the question of the sufficiency of the notice of appeal."

The giving of the undertaking on appeal prescribed in section 940, Code of Civil Procedure, may be waived, and respondent's statement in open court, in connection with the fact that in making the motion the failure to give the undertaking was not specified as ground for dismissal, renders it unnecessary to consider the same.

[2] There are two methods of taking an appeal (Mitchell v. Steamship Co., 154 Cal. 731, 99 Pac. 202): One as prescribed in section 940, Code of Civil Procedure; the other as prescribed in section 941b. The appeal under consideration was had and taken from the judgment and an order denying appellant's motion for a new trial made upon a bill of exceptions duly settled by the trial court; the notice of appeal being as follows: "Notice is hereby given that T. D. Parrett, through his attorneys, Porter, Morgan & Parrot, appeals to the appellate court of the state of California from that order of the superior court denying a motion for a new trial and also from the judgment therein"—signed by

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

attorneys for appellant, which notice was duly served upon the attorney for respondent. Section 940, Code of Civil Procedure, provides that an appeal may be taken "by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, * * * and serving a similar notice on the adverse party, or his attorney." Statutes making provisions in aid of appeals should be liberally interpreted, and, thus construed, it was a sufficient notice of appeal as provided in section 940, supra. The appeal does not purport to have been taken pursuant to section 941b; hence it is unnecessary to determine whether or not the notice was sufficient if tested by the provisions of that section.

The motion to dismiss is denied.

We concur: CONREY, P. J.; JAMES, J.

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25 Cal. App. 740

PEOPLE v. TRENT. (Cr. 542.)

(District Court of Appeal, First District, California. Nov. 13, 1914. Rehearing denied by Supreme Court, Jan. 11, 1915.)

1. Criminal Law (§ 543*)—Evidence—Deposition of Prosecuting Witness—Admissibility—Foundation.

That a proper foundation had been laid for the admission in evidence of the deposition of the prosecuting witness taken at the preliminary hearing was within the discretion of the trial court, where the people showed returns of sheriffs of quite a number of counties of the state, including the county which was the last known residence of the witness, in which each sheriff certified that after due search and diligent inquiry the witness had not been found, and where it was further shown that a diligent search had been made for the witness in the county where the crime occurred and where the witness had been staying and had directed his letters sent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

2. Criminal Law (§ 1043*)—Evidence—Objections—Sufficiency.

Objections by accused to the admission in evidence of the deposition of the prosecuting witness taken at the preliminary hearing, on the ground that the proper foundation had not been laid, made during a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the witness, did not refer directly to the failure to produce the reporter's certificate; and, where the certificate was in court at the trial and could have been produced had specific objection directing attention to its omission been made, accused could not complain of the admission of the deposition without the proper certificate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Leslie R. Trent, alias James Riley, was convicted of grand larceny, and from a judgment of conviction and from an order denying a new trial he appeals. Affirmed.

Frank J. Murphy and Melvin E. Van Dine, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. This is an appeal from a judgment of conviction of the defendant of grand larceny and from an order denying a new trial. The appellant urges two points upon this appeal, both of which relate to the regularity of the court's action in admitting in evidence the deposition of the prosecuting witness taken upon the preliminary examination and without the presence of which in evidence it is conceded the defendant could not have been convicted of the alleged crime.

[1] The first contention of the appellant is that the court erred in admitting the deposition in evidence without having the proper foundation therefor laid in a sufficient showing that the prosecuting witness could not, after due diligence, be found within the state. The people relied for such showing upon returns of the sheriffs of quite a number of counties of the state, including the county which was the last known place of residence of the desired witness, in which these officials each certified that after due search and diligent inquiry, they had been unable to find the witness. It was further shown that a diligent search had been made for the witness in San Francisco, where the crime occurred and where the witness had been staying and had directed his letters sent. We think that the question as to whether these constituted a showing of due diligence lay largely in the discretion of the trial court; and we are unable to say from this record that the court has in any way abused that discretion. People v. Dene, 20 Cal. App. 137, 128 Pac. 339; People v. Lederer, 17 Cal. App. 369, 119 Pac. 949.

[2] The next and final contention of the appellant is that the deposition was improperly admitted in evidence for the reason that the amended record shows that the certificate of the official reporter of the magistrate upon the preliminary examination, who took and transcribed such deposition, was not presented or admitted in evidence, and hence that the proper foundation for the admission of the deposition itself was not laid. Our examination of the record, however, discloses that the objection of defendant's counsel to the introduction of the deposition was couched in the general form, "that the proper foundation had not been laid," without in any way directing the attention of the court or of opposing counsel to the specific defect upon which he now relies. The record further discloses that the foregoing general objection was made during the course of a discussion as to the sufficiency of the preliminary showing as to due diligence in seeking to locate the missing

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

witness, and did not refer directly to the defect in the omission to produce the reporter's certificate, which is now sought to be taken advantage of. It is further disclosed by the amended record that the said certificate of the reporter was in fact in court at the time of the trial, and could easily have been produced and offered had the specific objection directing attention to its omission in evidence been made. Under these circumstances, we think the objection of the defendant to the admission of the deposition without this preliminary proof was too general to be relied on here. People v. Buckley, 143 Cal. 375, 383, 77 Pac. 169.

No other error appearing in the record, the judgment and order denying a new trial are affirmed.

25 Cal. App. 771

MINAKER v. SUNSET BUILDING & REAL ESTATE CO. et al. (Civ. 1392.)

(District Court of Appeal, First District, California. Nov. 16, 1914.)

1. Specific Performance (§ 114*) — Complaint — Sufficiency — Fairness of Contract.

A complaint for specific performance which sets out a contract whose terms were fair and reasonable, and which states that the purchase price was the fair and reasonable value of the property at the time, satisfies the statutory requirement that a complaint for specific performance shall show that the contract is fair and equitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

2. Specific Performance (§ 114*) — Complaint—Sufficiency—Waiver by Vendor.

A complaint for specific performance is not demurrable because it alleged that the vendor waived a requirement for payment upon specific dates, where it appeared that such variations from the contract had been fully executed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–370, 372; Dec. Dig. § 114.*]

3. Pleading (§ 34*)—Presumptions in Aid of Pleading.

Where a complaint for a specific performance alleged that the vendor had duly waived the requirement of the contract for certain payments, it will be presumed on demurrer that the waiver was in writing if a writing was required therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. § 34.*]

4. Vendor and Purchaser (§ 212*)—Subsequent Purchaser—Right to Payments—Notice.

A subsequent purchaser is not entitled to have the payments, made under a prior contract for the purchase of the land of which he had notice, made to him, unless he definitely notifies the prior purchaser of his purchase and his claim to such payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436–439; Dec. Dig. § 212.*]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by A. J. Minaker against the Sunset Building & Real Estate Company, Interurban Real Estate Company, and others. Judgment for the plaintiff, and defendants Interurban Real Estate Company and others appeal. Affirmed.

H. D. Newhouse and Abram M. Marks, both of San Francisco, for appellants. J. W. Henderson and Frank D. Macbeth, both of San Francisco, for respondent.

PER CURIAM. This is an action brought by A. J. Minaker against the Sunset Building & Real Estate Company, Interurban Real Estate Company, and Hugo D. Newhouse, for the specific performance of a contract alleged and shown to have been entered into between A. J. Minaker and the Sunset Building & Real Estate Company (or that corporation under another name), for the purchase of certain lots, a portion of a larger subdivided tract of land for the sum of $1,075, plaintiff alleging that he had completed and complied with the terms of that contract and that he was entitled to have his contract specifically enforced, not only against the immediate vendor named in that contract, but also against the subsequent incumbents and purchasers, named also as defendants in this action.

[1] The first point made by the appellants is that the complaint is defective in that it does appear sufficiently from the face of the complaint that the contract is a fair and equitable contract, or, in other words, such a contract as a court of equity will enforce. The complaint sets up in hæc verba the contract itself, and further states that the purchase price of the property stipulated in that contract was the fair and reasonable value of the property at the time the contract was made. We think the allegation that the purchase price of the property was fair and reasonable, taken in connection with the terms of the contract and set out fully in the complaint, suffices to satisfy the statute in that respect, and that the first point urged by the appellant is not well taken. Reese Co. v. House, 162 Cal. 740, 124 Pac. 442.

[2, 3] The point is also made upon the demurrer in the briefs of counsel that the allegation in the complaint that a strict compliance with that part of the contract requiring all payments of the purchase price to be made upon certain days and in certain amounts was duly waived by the defendant and the Sunset Building & Real Estate Company would cause a variation in the rule which has just been announced by the court, and that, further, since a contract in writing can only be modified by a contract in writing, the alleged waiver set forth in the complaint would be void. To this there are two answers: First, that it appears from the face of the complaint that whatever change in the contract was made in this respect, whatever vari-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ation was accomplished, was a fully executed variation as between the original parties to the contract; but the second and better answer is that upon the face of the complaint it does not appear as to whether the waiver of this particular provision of the contract was or was not in writing, the only allegation being that the terms of the contract in that respect were duly waived by the respective parties thereto. The Supreme Court has held in a number of cases that whenever it is necessary that a contract or modification of a contract should be in writing, and the complaint alleges that the contract or modification of the contract was actually made and entered into between the parties, the presumption will be that the contract or modification was in writing, in the absence of an averment to the contrary.

It is admitted that the contract between the plaintiff and the Sunset Building & Real Estate Company was duly recorded, and that thereafter and while the plaintiff was proceeding to execute the same, the Sunset Building & Real Estate Company made two deeds of trust to certain parties named Newhouse, and later on that Hugo D. Newhouse, one of the defendants, became the purchaser of the property upon the sale thereof under these deeds of trust. The original contracts being recorded, it follows that whatever rights the defendant Newhouse or his successors in interest, the Interurban Real Estate Company, obtained by virtue of those deeds of trust or by virtue of the sale of property thereunder, or the subsequent conveyance to the Interurban Real Estate Company, they took subject to the contract made with the plaintiff, and to their knowledge and notice of said contract, imparted by the fact of its recordation. The plaintiff continued to make payments due under his original contract to his original vendor, the Sunset Building & Real Estate Company; and, with the exception of one payment of $50 made to Newhouse, completed payment of his installments under his contract, and thereupon demanded a deed of the property, which, being refused, he brought this action for specific performance, making all the aforesaid parties defendants to the action.

[4] The appellants contend that the defendant Newhouse, having taken a subsequent deed of trust to the property, and having later become the owner thereof through sale under that deed, was entitled to have the subsequent payments after the date of the latter deed made to himself rather than to the original vendor; and the appellant also contends that the evidence sufficiently shows that the plaintiff Minaker had knowledge of the rights acquired by Newhouse under these deeds of trust, under the deed of grant made in pursuance thereof, and that, having such knowledge, he was not entitled to continue to make his payments to the original vendor. An examination of the record, however, will show that there is a failure of proof on the part of the defendants in this respect, and that the defendant Newhouse does not seem to have brought clearly home to the notice of the plaintiff the fact of his succession to the title of the property and the claim which he now makes that he was entitled to the subsequent payment upon the installments of the purchase price.

We think that the subsequent purchaser of property, with notice of the existence of a previous contract for its sale to the original vendee, before he can claim that the payments which such vendee is to make under his contract should be made to himself, must definitely advise the original vendee of the fact of his ownership of the property and his claim to such payment, and this the defendant Newhouse does not appear from the evidence to have done. We think, therefore, that the original vendee was entitled to continue to make his payments to the Sunset Building & Real Estate Company, his original vendor, and, having done so, he was entitled to demand the specific performance of the contract, not only from the original vendor, but from all those that had succeeded in interest with notice of his contract, and in this respect we think that the point made by the appellant is not well taken—that the plaintiff was not entitled in this action to the specific performance of his contract against the subsequent purchasers with notice of his rights.

Upon the whole, we are satisfied that the evidence of the case sustains the findings of the trial court, and that there is no error in the record justifying the reversal of the case and for these reasons the judgment and order denying a new trial are affirmed.

25 Cal. App. 771

WESTERGREEN et al. v. BEER et al.

(Civ. 1391.)

(District Court of Appeal, First District, California. Nov. 17, 1914.)

1. TENANCY IN COMMON (§ 19*)—PURCHASE AT JUDICIAL SALE.

A tenant in common may purchase at a judicial sale the interests of the cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55–59; Dec. Dig. § 19.*]

2. TENANCY IN COMMON (§ 19*)—PURCHASE AT JUDICIAL SALE.

Where a will devised real estate to infants and an adult, share and share alike, a sale of the interests of the infants under order of court, on petition of their guardian, is a judicial sale, and the adult is not disqualified from becoming a purchaser.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 55–59; Dec. Dig. § 19.*]

3. INFANTS (§ 40*)—PURCHASE OF PROPERTY—FIDUCIARY RELATIONSHIP.

The relationship of sister and brother, standing alone, does not create a fiduciary relation, and the sister, who is an adult, may purchase the interest of the infant brother at a sale ordered by the court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 90, 91; Dec. Dig. § 40.*]

Appeal from Superior Court, San Mateo County; James M. Troutt, Judge.

Action by Carl A. Westergreen and another against Alice E. C. Beer and another. From a judgment for defendants, rendered on sustaining a demurrer to the amended complaint without leave to amend, plaintiffs appeal. Affirmed.

William F. Herron, of San Francisco, for appellants. Ross & Ross, of San Mateo, for respondents.

PER CURIAM. In this action the defendants' demurrer to the plaintiffs' second amended complaint was sustained by the court below without leave to amend. Judgment was thereupon entered in favor of the defendants, from which the plaintiffs have appealed.

The grounds of the demurrer were that the complaint did not state a cause of action and that the plaintiffs did not have legal capacity to sue. The action was one to declare a resulting trust in certain real property, and to compel a conveyance to plaintiffs of their alleged respective interests therein, and is founded upon the following alleged facts:

Ida Danielson, the mother of the plaintiffs and of the defendant Alice E. C. Beer, died, leaving an estate consisting of certain real property in the county of San Mateo. She left a will, which was duly admitted to probate, and in accordance with the terms of the will the property which is the subject of the action was distributed share and share alike, to her children, namely, the defendant Alice E. C. Beer, one Lizzie M. Westergreen, and Carl A. and John A. Westergreen, the plaintiffs. Both of the plaintiffs were then minors, and shortly after the decree of distribution was made one Crow, the public administrator of San Mateo county, was appointed their guardian by the superior court. On or about December 1, 1902, Crow, as the guardian of the estates of the said minors, filed in the superior court of San Mateo county a petition for an order of sale of the minors' interests in said property, alleging that a sale was necessary in order to prevent the state and county taxes thereon from becoming delinquent and to prevent the same from being sold for taxes. The petition was granted by the court, and the order of sale made, pursuant to which the interests of the plaintiffs in the property were sold, and at said sale were purchased for the defendant Alice E. C. Beer by her husband, who acted as her agent in the matter, and who afterwards conveyed the property to her by deed of gift. The sale was confirmed by the superior court, and Crow, as the guardian of the plaintiffs, executed a deed to the property to the purchaser. At the time of the sale the plaintiffs were minors, and the defendant Alice E. C. Beer was an adult. The complaint further alleges that at the time of the sale and for some time prior thereto Alice E. C. Beer was occupying and residing upon the property in question.

[1] It is the contention of the plaintiffs that inasmuch as said defendant, their adult sister, was a joint devisee with the plaintiffs, and had acquired her interest in the property under the terms of their mother's will (which left it to the four children, share and share alike), she was therefore a tenant in common with them. This may be conceded; and likewise it may be conceded, as is contended, that the law prohibits a tenant in common from purchasing for his own benefit an outstanding incumbrance upon the common property. The rule of law in this behalf, however, has no application in our opinion to the facts pleaded in the plaintiffs' complaint. The law does not prohibit one cotenant from purchasing the interest of another tenant in common at a judicial sale. In the early case of Gunter v. Laffan, 7 Cal. 589, our Supreme Court said that:

> "Tenants in common, or partners, have a right to acquire their cotenants' or copartners' interests, by purchase under an execution sale; there being nothing in their relations to forbid it."

And in Freeman on Cotenants and Partition, § 165, it is said:

> "The reasons which prevent a cotenant from purchasing and asserting an outstanding title do not apply with equal, and generally not with any, force against his purchasing the title of his cotenants, whether the sale be voluntary or involuntary. Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase at an execution or judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired as fully as though he was a stranger to the judgment defendant."

[2] The sale complained of in the present case was undoubtedly a judicial sale. That a cotenant, irrespective of the origin or mode of creating the cotenancy, is not disqualified from purchasing the interest of any of his cotenants at such a sale is supported by the following authorities: Credle v. Baugham, 152 N. C. 18, 67 S. E. 46, 136 Am. St. Rep. 787; Snell v. Harrison, 104 Mo. 158, 16 S. W. 152; Peck v. Lockridge, 97 Mo. 549, 11 S. W. 246; Hopper v. Hopper, 79 Md. 400, 29 Atl. 611; Starkweather v. Jenner, 216 U. S. 524, 30 Sup. Ct. 382, 54 L. Ed. 602, 17 Ann. Cas. 1167; Gunter v. Laffan, supra.

[3] There is no merit in the contention that Mrs. Beer stood in a fiduciary relation to the plaintiffs because of her blood relationship to them. The mere relationship of sister and brother, standing alone and by itself, does not create a fiduciary relationship. Odell v. Moss, 130 Cal. 352, 62 Pac. 555;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bacon v. Soule, 19 Cal. App. 428, 126 Pac. 384. It will be noted that the complaint does not aver any fraud, undue influence, collusion, inadequacy of consideration, or any other fact tending to show that defendant Alice E. C. Beer took advantage of her situation with reference to the property or her relationship to the plaintiffs.

We are of the opinion that the demurrer was properly sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It is therefore unnecessary for us to decide the question as to whether or not the demurrer is well taken upon the ground that the plaintiffs did not have legal capacity to sue.

The judgment appealed from is affirmed.

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25 Cal. App. 751

PEOPLE v. WARNER. (Cr. 273.)

(District Court of Appeal, Third District, California. Nov. 13, 1914.)

1. Burglary (§ 20*)—Indictment—Identification of Building.

An indictment for burglary, charging that defendant did willfully, etc., enter that certain building in the town of G. in which the United States post office was then located, which building was then and there owned by D., etc., sufficiently described the building burglarized.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51–54; Dec. Dig. § 20.*]

2. Burglary (§ 41*)—Evidence.

In a prosecution for burglary, evidence *held* sufficient to identify defendant as a participant in the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94–103, 109; Dec. Dig. § 41.*]

3. Witnesses (§ 268*)—Cross-Examination—Identity of Coins.

Where an incriminating circumstance in a prosecution for burglary was a smooth quarter found on defendant, defendant's counsel having first shown to a witness on cross-examination another smooth quarter and asked him to point out any differences between the two coins, the court did not err in limiting the cross-examination, as to the witness' ability to identify the coin in question, to testimony as to the means or method whereby he assumed to be able to distinguish the coin from other like coins.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. § 268.*]

4. Criminal Law (§ 345*)—Evidence—Relevancy.

Where the prosecution claimed that the alleged burglary was committed jointly by defendant and M., evidence that witness saw defendant in company with M. at a certain hotel on the day of the burglary was admissible, though there had been no direct evidence of the commission of the burglary by more than one person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 765, 777; Dec. Dig. § 345.*]

5. Criminal Law (§ 1169*)—Appeal—Rulings on Evidence—Prejudice.

In a prosecution for burglarizing a post office, accused was not prejudiced by the erroneous admission of evidence of the finding of two five-cent postage stamps on a railroad track near the town where the burglary was committed, without evidence connecting the stamps with accused, where there was other ample evidence to establish defendant's connection with the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. § 1169.*]

6. Criminal Law (§ 448*)—Evidence—Relevancy.

Defendants having been arrested for burglary after they had alighted from a railroad train, evidence of the deputy sheriff who accomplished the arrest that while standing in the baggage car he opened the door slightly, peeped through into the passenger coach, and "located the two gentlemen that I was looking for," was not objectionable as equivalent to a statement that defendant and his companion had committed the burglary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035–1039, 1041–1043, 1045, 1048–1051; Dec. Dig. § 448.*]

7. Criminal Law (§ 693*) — Trial — Reception of Evidence—Objections.

Where a question was answered before an objection was made thereto, a subsequent objection is unavailable; the only remedy being by motion to strike.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1630; Dec. Dig. § 693.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Henry Warner was convicted of burglary, and he appeals. Affirmed.

T. J. Butts, of Santa Rosa, and **Charles Peery**, of San Francisco, for appellant. **U. S. Webb**, Atty. Gen., and **J. Charles Jones**, Deputy Atty. Gen., for the People.

HART, J. The defendant and one Joe Malone were jointly charged by an information filed in the superior court of Sonoma county with the crime of burglary. The accused demanded and were given separate trials, and the defendant was convicted of the crime charged. This appeal, supported by a transcript of the testimony duly prepared under section 1247 of the Penal Code, is presented by the defendant from the judgment.

[1] The first point made by the defendant is that the building in which the burglary is alleged to have been committed is not so described in the information as to identify it with that definiteness necessary to the protection of the accused against a second prosecution for the identical offense which it was the intention to charge. The information alleges that the defendants "did willfully, unlawfully, feloniously, and burglariously enter that certain building in the town of Guerneville, in said county, in which the United States post office was then and there located, and which building was then and there owned by Mrs. R. S. Drake, with felonious intent then and there to commit larceny." We think the building was thus so described in the information as to have fully informed the defendant of the particular building which he was charged with having burglariously entered and to render available a plea of once in jeopardy and former conviction or acquittal in case a second prose-

cution for the same offense should be inaugurated against him. Indeed, the statement that the building entered was the one in which the United States post office at Guerneville is located would have been a sufficient description, since there is but one post office in said town. But the description goes further by declaring that said building was owned by Mrs. R. S. Drake. The evidence confirms this allegation and further shows that the post office was in the building owned by her. The description was clearly sufficient for all purposes. See People v. Edwards, 59 Cal. 359; People v. Bitancourt, 74 Cal. 188, 190, 15 Pac. 744; People v. Main, 114 Cal. 634, 46 Pac. 612; People v. Parker, 91 Cal. 91, 27 Pac. 537; People v. Price, 143 Cal. 351, 77 Pac. 73.

[2] The next point urged for a reversal is that the evidence is insufficient to support the verdict.

The evidence upon which the defendant was convicted was purely circumstantial, and, while it is to be conceded that it does not appear at first blush to be very strong, still, after a careful analysis of the circumstances thus developed, we are persuaded that the conclusion reached by the jury is well supported. The facts, narratively stated, are as follows: Between the hours of 5:35 p. m. of the 20th and 5:25 a. m. of the 21st day of May, 1913, the post office at Guerneville was entered, the safe therein blown open by dynamite, and its contents rifled; there having been taken therefrom $171.07 in cash and $1,151.75 in postage stamps. The money so taken consisted of two or three $20 pieces, a considerable lot of $5 pieces, and a quantity of dimes and nickels. Among this money was a quarter of a dollar which had worn perfectly smooth and which had been in the possession of the postmaster for several weeks prior and up to the time of the burglary. An inspection of the post office premises early on the morning of May 21st, after the postmaster had discovered that the office had been burglarized, revealed the fact that the door of the building had been pried open by means of picks, which had been taken from the toolhouse of the railroad company. The safe was badly shattered from the effect of the concussion. In the post office there was picked up from the floor something over $11 in money, which had evidently been dropped by the burglars, perhaps because of their haste in getting away from the scene of their crime.

It appears that the defendant and Malone, his codefendant, were first seen in the neighborhood of Guerneville on the 18th day of May, 1913—two or three days previously to the commission of the crime. On that day they ate dinner at a hotel at Occidental, a small town situated several miles from Guerneville. By various persons they were thereafter seen either at Guerneville or at points near that town both before and on the day that the building was entered. On the morning of the 20th of May, at about the hour of 10 o'clock, they were seen lying under a tree on the roadside near a place called Rio Nido, which place is located about a mile from Guerneville. At 12 o'clock noon of the 20th of May they were seen sitting in front of one of the places of business at Guerneville about a block distant from the post office. At about 15 minutes to 6 o'clock of the morning of the 21st day of May, the defendant and his companion appeared at the hotel at Occidental and there and at that time had breakfast. At about 6:40 a. m., the conductor on a narrow gauge railroad whose trains carry passengers from Occidental to Sausalito, where the road connects with the boats for San Francisco, saw the defendant and Malone, just as the train was about to move, running from behind the depot at Occidental to catch said train. The two men boarded the train without having first purchased tickets at the depot, paying their fares to Camp Meeker, a station on the line of said road a short distance from Occidental, to the conductor. When the train reached Camp Meeker, both men alighted, one going down the track in the direction in which the train was then going. The other went in the opposite direction. The train remained at Camp Meeker for upwards of 35 minutes and then resumed its journey south. Both the defendant and Malone had boarded the train, the former having purchased a ticket to Fairfax and the latter a ticket to Pacheco, a small flag station, at which, the conductor testified, the train rarely ever stopped or had occasion to stop. On entering the passenger coach, the defendant took the rear seat and Malone a seat in the front part of the car, and thus they traveled until Fairfax was reached. It appears that, the sheriff's office of Marin county having previously been apprised of the burglary by the authorities of Sonoma county, a deputy sheriff of the first-named county boarded the train before it arrived at Fairfax; he having been given information that two persons who were suspected of having perpetrated the crime were aboard of said train. The deputy took a position in the baggage car and, peeping "through the crack of the door," saw the two men seated in the passenger coach, as above indicated. When the train reached the Fairfax depot, the officer, having stepped into the passenger coach just before the train came to a standstill, followed the two men out of the car. Before they got off the car, the defendant, in a whisper, but so that the officer heard it, directed Malone to walk down the track. As Malone started down the track, the defendant started towards the town. Before either had taken many steps in the respective directions in which they had started, the officer halted and proceeded to question them, asking them their names, where they came from, etc. The defendant gave his name as Lawson and at a subsequent interview with the two men Malone declared that his name was Murray.

"I asked them," testified the officer, "where they boarded the train—I asked the gentleman (the defendant) where he boarded the train, and he would not answer me. I asked him the second time, and he pulled a card out of his pocket—that is, a time-table, and was looking over the time-table. He seemed to be quite nervous. Well, he was nervous. He would not answer me at all. I asked him the second time. I says, 'How far are you going?' He says, 'I am going to San Francisco.' I says, 'What made you get off here?' He says, 'You tell me something and I will tell you something'—that is the remark he made. He did not tell me why he got off at Fairfax. * * * That train runs through to connect with the boat for San Francisco—it runs to Sausalito, which is a transfer station to San Francisco."

The officer then placed the two men under arrest and conveyed them to the sheriff's office at San Rafael. There the two men were searched, and from the person of the defendant the sum of $78.70 was taken, and upon that of Malone the sum of $78.60 was found. Among the pieces of coin found on the defendant was a quarter of a dollar which had become perfectly smooth. No postage stamps were found in the possession of either of the two men.

Thus we have detailed all the circumstances disclosed by the evidence purporting to fasten guilt upon the defendant and upon which the jury founded their verdict of conviction. Readily it will be observed that the strongest circumstance developed at the trial against the defendant was the fact of his possession, at the time of his arrest, which occurred within a few hours after the burglary, of the smooth two-bit piece referred to above. Mr. Duncan, the postmaster, having been shown the smooth two-bit piece taken from the defendant, testified, upon an examination of the coin, that it "was the two-bit piece that was in the safe the night of the robbery, after I locked it up. I received it from Mr. Johnson that runs the mercantile store there. He brought it in one morning and asked me if I thought it was good for stamps. I was in a hurry and told him I thought it was." He said that he placed the quarter in the post office receipts till, where he left the stamp money, but that, because it was "so slick," he took occasion to examine it several times while it was in his possession. He observed on the coin a little depression below the right side of the eagle, and from that mark, which was perhaps made in the milling of the piece, he felt satisfied that the coin taken from the defendant was the same smooth two-bit piece which he received from Johnson and which was in the post office safe on the night of the robbery.

C. D. Johnson, from whom the postmaster received, under the circumstances as explained by the latter, a smooth 25-cent piece, testified, in part, as follows:

"Q. Mr. Johnson, I show you a quarter marked People's Exhibit 1 for identification, People v. Warner. Did you ever see that quarter before? A. Yes. Q. When did you first see that? A. Oh, after the 1st of September a year ago * * * in the safe of the Guerneville Rochdale Company. (The witness was connected with said company.) * * * It remained in the safe in a little box until along about January and I took it out. There were four quarters. I took the four of them out and put them in my pocket. * * * Two of them I still have. * * * This particular quarter I gave when I went to the post office. I asked Mr. Duncan (the postmaster) if he would take it for stamps. This occurred in February or March, perhaps February (1913). * * * I had it in my pocket over a month or six weeks. * * * I took the four quarters out (of the safe). Two of the quarters were marked. * * * Two of the coins had no mark on them. * * * This is the coin I turned over to the postmaster for postage stamps."

The witness proceeded to testify that, after the robbery of the post office, the quarter taken from the defendant's possession at the time of his arrest was exhibited to him (witness) by the sheriff of Sonoma county, and that he identified the coin as the one delivered by him to the postmaster. He said he was able to identify the coin from the fact that on its date side it was perfectly smooth, the date and the "Goddess of Liberty" being wholly obliterated, and from the further fact that on the reverse side thereof the eagle, while considerably worn, was plainly visible, and that to the right and under the eagle there was a peculiar depression.

The defendant did not take the stand in his own behalf. One Robert Wall, however, testifying for him, said that he was engaged in the business of selling newspapers at a news stand at the ferry building, in San Francisco; that he was acquainted with the defendant, who had, during the recent Portala festival in San Francisco, worked for the witness; that on the 17th day of May, 1913—about four days prior to the time of the commission of the crime charged—the defendant bought a newspaper from him and in payment therefor handed the witness a $5 gold piece; that he (witness) in returning to the defendant the change gave the latter, among other denominations of coin, a quarter of a dollar which had been so worn that it was perfectly smooth. The witness inspected and examined the quarter taken from the defendant and declared that he was "pretty sure that was the quarter that I gave him at that time."

Thus it is to be noted that a conflict arises in the evidence upon the question whether the "smooth quarter" found in the possession of the accused at the time of his arrest was the one which the postmaster declared was in the safe of the post office. While it may be conceded that the identification of a particular piece of coin is, as a general proposition, an act most difficult of accomplishment, still, in this case, it is made to appear that the particular coin whose identification was singularly vital to the determination of the ultimate issue was so peculiarly marked that in that respect it was plainly different and so removed from the ordinary coins of its denomination that the witnesses for the people, having frequently examined it, could identify it as one which they had seen and handled previously to the time at which it was found in the possession of the accused. It was therefore with no less propriety than as to any other question of fact in the case, with the jury to decide the truth of the controversy and so determine whether the identification of the coin by the witnesses Duncan and Johnson was to be accepted as correct or erroneous or of so doubtful a character as to justify its rejection. The jury evidently accredited the identification of the coin by said witnesses, and thus the fact of the possession by the defendant, so soon after the burglary, of the 25-cent piece in question became and constituted a circumstance which, unexplained, although not of itself sufficient to warrent a conviction, the jury were nevertheless authorized to consider, in connection with the other circumstances, such as they were, in passing upon the question of the guilt or innocence of the accused. And whether the circumstance of the possession of stolen property has been satisfactorily explained is a question solely for the jury's determination.

The case, then, as to the facts, stands thus: That the defendant and his companion, Malone, strangers in and around the town of Guerneville, were engaged in loitering about that and neighboring places for several days before and on the day of or preceding that on which the burglary was committed; that neither of the men appeared to have any special business, at least of a legitimate nature, in that locality; that early in the morning of the 21st day of May, and within a few hours after the burglary, they, at the town of Occidental, were seen running from behind the depot to catch a train which was about to start; that they boarded said train, without first procuring tickets, paid their fares to the conductor to Camp Meeker, a short distance from Occidental, and then alighted and departed, one going in one direction and the other in the opposite; that they again took that train and occupied seats in the coach far apart from each other, going to Fairfax, where they alighted, the defendant directing his companion to walk on down the track, while he himself started in an opposite direction and towards the business part of said town; that, upon being accosted by the officer and questioned by him as to their names, where they came from, and where they were going, the defendant betrayed nervousness, refused to answer the officer's questions as to the point at which they boarded the train and where they had been, and both gave the officer fictitious names; that the two men each had in his possession approximately the same amount of money; and that in the defendant's possession was a piece of coin which was identified as the one in the safe at the time that it was rifled.

That the circumstances, as thus recapitulated, strongly point to the defendant's guilt, no reasonable person will for a moment deny or even attempt to controvert. And, while the defendant was at liberty to remain mute at the trial and his silence not to be considered against him, yet the fact conspicuously stands out that none of those circumstances was controverted or its incriminatory force impeached or impaired by adverse testimony, except the single circumstance (as to which, as shown, there is some conflict in the testimony) of the finding in the possession of the defendant of a two-bit piece which corresponded in certain respects, unusual to coin, with a piece of money of the same denomination which was shown to have been in the post office safe at the time of the burglary. In the absence of satisfactory or any explanation of those circumstances, the jury were required to answer for themselves, by a consideration of all the circumstances together, these questions: (1) Why did the defendant and his companion conceal themselves behind the depot at Occidental, at an early hour in the morning, and then hastily take the train, as it was about to move, without first providing themselves with tickets in the usual way? (2) Why did they separate when arriving at Camp Meeker and alighting from the train and then again take the same train for Fairfax? (3) Why did they separate themselves in the coach, one taking a seat in the extreme rear of the coach and the other seating himself in the extreme forward end of the car? (4) Why, upon reaching Fairfax, did the defendant request Malone to walk on down the track and he start to go toward the business part of the town? (5) Why did they give assumed or false names to the deputy sheriff? (6) Why, if, as the defendant declared was true, they were bound for San Francisco, did they leave at Fairfax the train on which they were riding and which would have given them direct connection with the ferry boats at Sausalito for San Francisco? (7) Why did they refuse to answer the deputy sheriff when he questioned them as to the place at which they boarded the train and as to where they had been? (8) What was the occasion of the betrayal of nervousness by the defendant when first accosted and questioned by the officer? (9) What was the purpose of the two men in loitering around the neighborhood of Guerneville? Men traveling together as companions may, with perfectly righteous motives, act as the defendant and Malone acted, yet such conduct in men who, as friends, are journeying together over the country, is so peculiar and unusual or so far the reverse of the ordinary demeanor of men traveling together that it is open to very serious suspicion that there is some sinister or questionable motive behind it, and, when viewed by the light of other connected circumstances tending in some measure to fasten guilt of crime upon persons so demeaning themselves, it may well be expected to lead the mind from the grade of mere suspicion to that of conviction that it is actuated by a criminal purpose. And so the jury could with sound reason have viewed, and presumptively did view, the actions of the defendant and his companion as thus shown by the testimony, and, as before declared, we cannot see how a court of review can justly say that their interpretation of all the circumstances, considered together and in connection with each other, as represented by their verdict, is, as a matter of law, erroneous.

It is next contended that numerous prejudicial errors were committed in rulings upon the evidence. Some of these will be noticed.

[3] Counsel for the defendant, having first shown to the witness Duncan another smooth quarter of a dollar than the one found on the defendant, asked him to point out the distinguishing difference, if any, between the two pieces of coin. The obvious purpose of such examination of the witness was to show, if thus it could be done, that there was nothing in the coin taken from the defendant which would enable a person to distinguish it from any other equally smooth two-bit piece. The court interrupted counsel to say that, as far as he could go in the matter of testing the ability of the witness to identify the coin in question was to question, by proper cross-examination, the means or method whereby he assumed to be able to identify or distinguish said coin from any other like coin. The court's course in this regard is assigned as error.

While we think that the court could, without serious legal impropriety, have allowed the witness to compare the two pieces of coin and point out or, as counsel for the defendant undoubtedly expected would be the result, fail to point out, any difference between the two that would facilitate a ready distinction between them, it is clear that, strictly speaking, the ruling was not erroneous, for, after all, the question whether the two-bit piece, the identification of which was of vital importance in this case, was or was not in any respect different from any other smooth quarter of a dollar was one whose solution was for the jury and not for the witness. As a matter of defense, it would have been proper and competent for counsel for the defendant to have put in evidence another or other quarters of the same general appearance as that of the one taken from the defendant and thus have submitted to the determination of the jury the proposition whether the piece of coin found on the defendant could by any means or for any reason be differentiated or distinguished from the ordinary coin of like denomination, worn smooth by use. This course counsel did not adopt.

[4] It is urged that, inasmuch as there was presented no direct evidence of the commission of the burglary by more than one person, it was error for the court to permit a witness to testify that he saw the defendant in the company of Malone at the Monte Rio Hotel on the afternoon of May 20th. The theory of the prosecution was that the crime was committed jointly by the defendant and Malone, and upon that theory the testimony objected to was peculiarly pertinent. But even if the prosecution had proceeded upon the theory that the defendant alone committed the deed, testimony of the fact that, just prior to the burglary, he had been seen near the scene thereof in the company of another party, who was not accused or even suspected of complicity in the commission of the crime, could not possibly prejudice his rights.

[5] It appears that, at about 6 o'clock of the morning of the 21st of May, one Lincoln Stewart, while on his way to his place of employment, found two 5-cent postage stamps on the railroad track between Guerneville and Monte Rio, and a short distance from the former place, and over objection by defendant, Stewart was permitted to testify to the fact of finding said stamps, and objection was also likewise but unavailingly made to the admission of the stamps in evidence. The defendant was not shown to have had any connection with said stamps, and therefore the testimony disclosing the fact that they were found as indicated could have no tendency to establish his guilt. We can conceive of no legal reason justifying the admission of the testimony. We are of the opinion, however, that the other circumstances were, unaided by the circumstance of the finding of the stamps, amply sufficient to generate in the minds of reasonable men the conviction that the defendant was, beyond a reasonable doubt, guilty of the crime charged. In other words, we are convinced that, had the circumstance of the finding of the stamps been eliminated from or not brought into the record, the jury could have justly concluded from the other circumstances that the defendant was guilty. In this view of the record, the testimony objected to cannot well be held to have operated prejudicially against the accused.

[6] The witness Emerald, the deputy sheriff who arrested the defendant and Malone, testified that, upon going into the baggage car, he opened the door thereof slightly, peeped through and into the passenger coach, and "located the two gentlemen that I was looking for." Counsel for the defendant moved to strike out the words "I was looking for," contending that the statement of the witness as phrased by the latter "was equivalent to telling the jury that the defendant and the other man, Malone, had committed the robbery at Guerneville." The court refused to order said words stricken out. The statement could not have been so understood by the jury, since the testimony of the officer did not show that he had such knowledge of the two men or their connection with the crime as would induce the jury to attach any

significance to any statement by him which might be so construed as to involve a declaration or the expression of an opinion by him that they were guilty of the charge. His testimony clearly disclosed that all that he knew about the defendant and Malone or their connection with the commission of the crime for which he arrested them was what he might have acquired through his interpretation of their actions or conduct when he placed them under arrest, and it is only reasonable to say that intelligent men would not, in the face of such testimony, pay any attention to what might be viewed, by possible construction, as an opinion of the witness that the accused were the guilty persons.

[7] It is complained that the ruling permitting the deputy sheriff who arrested the defendant to testify that he found, among other articles, a "skeleton key" in the possession of the latter, when arrested, was erroneous and prejudicial. It may perhaps be unnecessary to explain that a "skeleton key" is a burglar's implement and is commonly known to be habitually carried by professional burglars, it being capable of opening door locks to which it had not been specially fitted. The specific objection to this testimony is, however, that, inasmuch as it was quite clearly shown that entrance into the building was effected by the prying open of the door by means of a pick and not by the use of a key, the fact that the defendant had upon his person a skeleton or burglar's key could have no pertinency to any issue in the case. But it appears that counsel for the defendant first opened up the matter objected to by asking the witness, on cross-examination, if he found any burglar's tools of any kind in the possession of the accused. On redirect, the following question was asked by the district attorney: "You said you did not find any burglar's tools. Did you find a burglar key? A. We found a skeleton key." Counsel for the defendant then interposed: "We object to that as leading, 'Did he find a key?' Answer, by witness: 'Yes, a skeleton key.'" Subsequently, and after the question had been answered, counsel for the defendant objected to the testimony upon the ground that it was "incompetent, irrelevant, and immaterial." These objections having been made after the question was answered, there was nothing before the court upon which to predicate a ruling, and therefore no ruling was made. Counsel's remaining remedy was in a motion to strike the testimony from the record, and, having failed to make such a motion, there is no warrant for a review by this court of the error in admitting the testimony, if error it was.

We have now considered herein all the assignments of error in the rulings of the court upon the evidence that we have thought merited special notice. We can see no just reason for interference with the jury's conclusion upon the ultimate question in this case, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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25 Cal. App. 764

PEOPLE v. MALONE. (Cr. 274.)

(District Court of Appeal, Third District, California. Nov. 13, 1914.)

1. BURGLARY (§ 41*)—EVIDENCE.
In a prosecution for burglary, evidence *held* to sustain a finding of defendant's complicity in the crime.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94–103, 109; Dec. Dig. § 41.*]

2. BURGLARY (§ 36*)—EVIDENCE—RELEVANCY.
Evidence that defendant when arrested for burglary gave a fictitious name to the officer, that he had in his possession a certain amount of money, which with that found on his codefendant equaled the sum stolen from the building burglarized, that a 25-cent piece found in the codefendant's possession was worn and like one kept by complainant in the office burglarized, together with the moneys taken from both defendant and his codefendant, was relevant and admissible against accused.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 90; Dec. Dig. § 36.*]

3. CRIMINAL LAW (§ 339*)—EVIDENCE—IDENTITY.
In a prosecution for burglary, a sheriff having testified to having taken accused and his codefendant to the store of C. for identification, it was not error for the court to exclude on cross-examination a question intended to show that the persons at such store could not identify them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 767–772; Dec. Dig. § 339.*]

4. CRIMINAL LAW (§ 359*)—EVIDENCE—RELEVANCY.
In a prosecution for burglary, evidence that the sheriff of the county, on first learning of the burglary, entertained a suspicion that another person was the author of the crime, was irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 789, 790; Dec. Dig. § 359.*]

5. CRIMINAL LAW (§ 829*)—TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.
A request to charge that, when all the evidence is before the jury, the burden of proof remains where it started, with the prosecution, was covered by instructions that the state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror beyond a reasonable doubt, and that the law presumes every man innocent until his guilt is established beyond a reasonable doubt, which presumption attaches at every stage of the case and to every fact essential to a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.
A request to charge that if the jury in considering the evidence can reasonably account for any fact in the case on a theory which will admit of defendant's innocence, and if they have a reasonable doubt of his guilt they should acquit, was covered by an instruction given that, when circumstantial evidence is relied on for a conviction, it is not only necessary that the circumstances all concur to show that defend-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant committed the crime, but that all are inconsistent with any other rational theory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Sonoma County; Henry C. Gesford, Judge.

Joe Malone was convicted of burglary, and he appeals. Affirmed.

T. J. Butts, of Santa Rosa, and Charles Peery, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against, jointly with one Henry Warner, by the district attorney of Sonoma county, for the crime of burglary, and, having been convicted of the crime so charged, prosecutes this appeal from the judgment of conviction.

An opinion in the case of the defendant's codefendant, Henry Warner (Crim. No. 273), affirming the judgment therein, was this day handed down by and filed in this court. 145 Pac. 545. As the charge against both Warner and the defendant grew out of precisely the same transaction, the general facts are, of course, the same in both cases, and, having fully stated the facts in the Warner Case, supra, it is not considered necessary to repeat them here.

The defendant in the present case makes the points that the information is fatally defective in that the description of the building alleged to have been burglarized is not sufficiently definite to apprise him of the particular building thus referred to and that the evidence is so wanting in probative power that it is incapable of upholding the verdict. Upon both these points our views are expressed in the Warner Case, supra, and we have discovered no reason for holding them to be any less untenable in this than in that case. We therefore hold, upon the authority of the Warner Case, that the information is not amenable to the criticism to which it was there and is here subjected and that the evidence is amply sufficient to support the verdict in this case.

[1] It is argued in this case, however, that, inasmuch as none of the stolen property was found in the personal possession of Malone, as was true in the case of Warner, the evidence here discloses no circumstance whatever tending to connect the defendant with complicity in the commission of the crime. But the fact that a certain part of the stolen property was found in the possession of Warner, the defendant's alleged companion in the commission of the crime, was shown in this case, and, under all the circumstances developed against both men through the evidence in both cases, that fact, unexplained, constituted a material inculpatory circumstance against Malone. And in this case no attempt was made, as was done in the case of Warner, to explain the latter's possession of certain of the stolen property.

As shown in the opinion in the Warner Case, the two men, when seen at all, were in the company of each other from the time they were first observed in the immediate neighborhood of Guerneville up to and including the time at which they were apprehended by the deputy sheriff of Marin county. Moreover, in addition to that circumstance and the other circumstances detailed in the opinion in the Warner Case, the more or less significant circumstance was developed in this case that Malone carried his money in different parts of his clothing—"some in his coat pocket, some in his pants pocket, and some pinned in his clothes in the band of his trousers," so testified the deputy sheriff who arrested the two men. In brief, all the circumstances, independent of that of the possession by Warner of a smooth two-bit piece, identified as the same piece of coin of that description that was in the safe at the time of the burglary, indicated the guilt of Malone no less than that of Warner, or, in other words, indicated, if anything at all of an incriminatory nature, so far as Malone and Warner were concerned, that the crime was the consummation of their combined or joint action. Therefore, we say, the fact of the finding of a part of the property stolen from the safe by one of the two men, within a few hours after the property was so taken, constituted a relevant and material circumstance against the other, to be accorded, however, such weight in the proof of guilt as the jury might conceive it to be entitled to after comparing and considering it with all the other circumstances in the case.

[2] Complaint is made of the rulings whereby the following testimony was allowed to go to the jury, the defendant having objected to the same on the usual general grounds, claiming as the specific ground of his objections that no showing was made that the burglary was committed by more than one person, viz.: (1) That Warner, when arrested, gave his name as "Lawson" to the officer making the arrest; (2) that the defendant had in his possession a certain amount of money; (3) admitting in evidence the smooth quarter of a dollar found in the possession of Warner and above referred to; (4) admitting in evidence the moneys taken from both the defendant and Warner. But the very purpose of all this testimony was to disclose to the jury circumstances tending to show that the defendant, who had all along been the companion of Warner, was implicated with the latter in the commission of the crime. Clearly, all those circumstances were relevant and competent as against the defendant. Their weight or evidentiary value was, of course, a matter whose determination was solely with the jury.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] It appears that, after the arrest of the two men and prior to their trial, the sheriff took them to Guerneville to ascertain whether any of the residents of that place would be able to identify them as persons whose presence at or near said town they had observed shortly anterior to the time at which the crime was committed, and that among the places in Guerneville to which the two men were so taken was the store of a Mr. Cobb. Counsel for the defendant asked the sheriff the following question on cross-examination, "And they could not identify them there at Cobb's?" to which question the court sustained an objection by the district attorney. It is here contended that said ruling was erroneous and prejudicial, but the contention is clearly untenable. Doubtless the sheriff could have brought the men into the presence of many of the residents of Guerneville that had never seen them prior to the time they were so brought before them, but that fact itself would not constitute proof that they were not in Guerneville on the day that the burglary was committed or the day preceding that day. The fact is that the uncontradicted testimony of several witnesses shows that the two men were seen in Guerneville and the immediate neighborhood thereof on the afternoon of the 20th day of May, only a few hours before the crime with which they were charged was perpetrated.

[4] Nor was it error for the court to refuse to allow the defendant to show that the sheriff of Sonoma county, upon learning of the burglary, entertained a suspicion that a character known to him as "Big Otto" was the author of the crime. It is not conceivable that the fact, if it was a fact, that the sheriff suspected some other person than the accused of having committed the crime could shed any light upon the question of the guilt or innocence of the defendant. As independent or substantive proof, such testimony would obviously be incompetent in that it would involve the expression of the mere opinion of the sheriff, and there was nothing testified to by the sheriff in his direct examination which seemed to justify, on cross-examination, inquiry into the question whether he had conceived and entertained such a suspicion.

[5] It is insisted that the court made a mistake to the serious disadvantage of the accused by rejecting the following instruction requested by him:

> "The court instructs you that, when all the evidence in the case is before the jury, the burden of proof remains where it started, with the prosecution."

The principle thus stated was sufficiently covered by the court in its general charge to the jury. Therein the court declared to the jury, among other statements of the law pertinent to the case, that:

> "The state must prove by competent evidence every essential element of the crime charged, to the satisfaction of each and every juror, beyond a reasonable doubt."

Thus the jury were plainly told where the burden of proof lay. Again, the court instructed them that "the law presumes every man to be innocent until his guilt is established beyond a reasonable doubt," and that "this presumption attaches at every stage of the case, and to every fact essential to a conviction." Very clearly, by the foregoing language, the jury were in effect instructed, not only that the burden of proof rested upon the people, but that such burden there remained throughout the entire case and until a verdict was arrived at.

Instruction No. 7, proposed by the defendant and rejected by the court, merely contained, in effect, a statement of the rule as to reasonable doubt, which rule was fully and clearly amplified by the court in its general charge. Besides, the rejected instruction was not in proper form, so far as this case is concerned, inasmuch as it would, as proposed, have told the jury that "Henry Warner is the only person on trial before you for this alleged offense," which, obviously, was not true. However, as stated, the fact that the court did submit to the jury the principle therein declared is a sufficient answer to the complaint that its rejection was erroneous.

[6] Error is assigned in the action of the court in rejecting the following instruction, requested by the defendant:

> "In considering the evidence, if you can reasonably account for any fact in this case upon a theory or hypothesis which will admit of the defendant's innocence, and if you have a reasonable doubt of his guilt, you should acquit him."

The principle thus declared was substantially stated in the following given instruction:

> "When circumstantial evidence is relied upon to obtain a conviction, it is not only necessary that the circumstances all concur to show that the defendant committed the crime, but that all are inconsistent with any other rational theory."

See, also, given instructions Nos. 11, supra, 14 and 15, Clerk's Trans.

In a number of instructions given to the jury at the request of the defendant, the court fully and correctly stated the rules of law relating to the recent possession of stolen property by one accused of stealing the same, etc., and therefore the rejection of instruction No. 16 (page 39, Clerk's Trans.), proposed by the defendant, and covering precisely the same proposition, was not prejudicial.

Instruction No. 19, proposed by the defendant and refused by the court, is literally in the language of one of the given instructions, and its rejection was therefore proper.

There are no other points calling for special notice in this opinion.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

25 Cal. App. 743

HAYES et al. v. BUTLER, County Clerk.
(Civ. 1649.)

(District Court of Appeal, Second District, California. Nov. 13, 1914.)

1. Pleading (§ 85*)—Allowance after Time—Terms—Statutory Provisions.

Under Code Civ. Proc. §§ 472, 473, providing that when a demurrer to a complaint is overruled and there is no answer filed, the court may, on terms, allow an answer, and empowering the court to allow on terms an answer after the time limited by the Code, the court in the exercise of its discretion may impose terms, as a condition of answering, after expiration of the statutory time on overruling a demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172–178; Dec. Dig. § 85.*]

2. Pleading (§ 85*)—Allowance after Time—Terms—Statutory Provisions—"Allowed by Law."

The inhibition in Code Civ. Proc. § 129, as amended by St. 1913, p. 90, empowering every court of record to make rules not inconsistent with the laws, but such rules shall not impose any tax, charge, or penalty on any legal proceeding, or for filing any pleading "allowed by law," is against the making of rules imposing a charge for the filing of a pleading allowed by law, but an answer after the expiration of the time fixed therefor can only be filed under an order made by the court in the exercise of discretion vested in it by sections 472, 473, and is not a pleading, the filing of which is "allowed by law," and courts may not make an arbitrary rule applicable alike to all cases whereby terms are imposed as a precedent condition to filing an answer after time allowed therefor by law has expired and after overruling a demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172–178; Dec. Dig. § 85.*

For other definitions, see Words and Phrases, First and Second Series, Allowed by Law.]

3. Pleading (§ 85*)—Overruling Demurrer with Leave to Answer — Conditions — Construction.

An order, granting to defendant the right to answer on terms after the expiration of the time for answer and on the overruling of his demurrer to the complaint, must be considered in its entirety, and without compliance with the terms, the order must be construed as one denying the right to answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 172–178; Dec. Dig. § 85.*]

Petition for writ of mandate by J. Chauncey Hayes and others against J. T. Butler, County Clerk and ex-officio Clerk of the Superior Court of the County of San Diego, to compel the clerk to file an answer of the petitioners. Writ denied.

Wright & Winnek, of San Diego, for petitioners. A. J. Lee, of San Diego, for respondent.

SHAW, J. Joseph C. Hunter instituted an action in the superior court of San Diego county against petitioners, who interposed a demurrer to the complaint. This demurrer, submitted without argument, was overruled, at which time the court made an order as follows:

> "Defendant is permitted to answer within 10 days upon terms of payment of $10 to plaintiff or his attorneys."

Defendants (petitioners here), without paying to plaintiff or his attorneys the sum imposed as a condition of answering, presented to the county clerk, with request that he file the same, their answer to the complaint. The clerk refused to file the answer, alleging as a reason for his refusal the fact that defendants had failed to comply with the condition prescribed in the order. Petitioners ask for a writ of mandate directed to the clerk of the court requiring him to file the answer.

[1] Section 472, Code of Civil Procedure, provides, among other things, that:

> "When the demurrer to a complaint is overruled, and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed."

Section 473 contains a like provision. Under this provision no question exists as to the power of the court, in the exercise of its discretion, to impose terms as a condition of answering after the expiration of the time given by law therefor. In the absence of an order granting leave so to do, defendants had no legal right to answer.

[2] Section 129, Code of Civil Procedure, as amended in 1913 (St. 1913, p. 90) provides:

> "Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules shall neither impose any tax, charge or penalty upon any legal proceeding, or for filing any pleading allowed by law, nor give any allowance to any officer for services."

Petitioners contend that by virtue of this section as amended, and notwithstanding the provisions of section 472, the court was without power to impose terms as a condition of permitting the answer to be filed. This contention can only be sustained upon the theory that the provisions of sections 472 and 473 cannot be reconciled with section 129, and hence the later statute works a repeal by implication of the provisions of the former. We cannot assent to this view. In addition to the provision of 472, under which the court may, after the overruling of a demurrer and the expiration of the time to answer, permit an answer to be filed upon terms, section 473, among other things, provides that the court may allow, upon such terms as may be just, an amendment to any pleading or proceeding—

> "and may upon like terms allow an answer to be made after the time limited by this Code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The imposition of terms as a condition of doing any of these things could not be imposed if petitioners are right in their contention. Clearly it was not the intention of the Legislature to repeal such provisions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The inhibition contained in section 129 is against the making of rules imposing a charge for the filing of a pleading *allowed by law.* An answer, after the expiration of the time fixed therefor, can only be filed by virtue of an order of court made in the exercise of the discretion vested in it by the provisions of said sections 472 and 473 (Billesbach v. Larkey, 161 Cal. 653, 120 Pac. 31); hence, it is not a pleading the filing of which is *allowed by law*, and therefore does not fall within the provisions of section 129, under which the court is empowered to make rules not inconsistent with the laws of this state. Sections 472 and 473 provide that the court may, in the exercise of its discretion and upon such terms as may be just, permit certain things to be done which *under the law* the party has no right as of course to do. Courts cannot make an arbitrary rule applicable alike to all cases, whereby terms are imposed as a precedent condition of filing an answer after demurrer overruled and time allowed therefor by law has expired. To do so would be to divest themselves of the exercise of that discretion in each particular case which the law in express terms enjoins upon them.

[3] Moreover, since the right of defendant to answer is by virtue of an order made, such order must be considered in its entirety, and without compliance with the terms thereof it must be construed, in our opinion, as an order of denial of the right to answer unless the condition imposed therein be complied with.

The writ prayed for is denied.

We concur: CONREY, P. J.; JAMES, J.

25 Cal. App. 784

SAM AFTERGUT CO. v. MULVIHILL.

(Civ. 1408.)

(District Court of Appeal, First District, California. Nov. 19, 1914. Rehearing Denied Dec. 19, 1914. Denied by Supreme Court Jan. 18, 1915.)

1. Sales (§ 29*)—Requisites of Contract—Execution.

Where it was the express intention of the parties that their oral agreement for the sale of milk should be reduced to writing and signed by them, and where the seller had no knowledge that it had been reduced to writing and left with their agent for his signature, and did not see the written contract or consent to its terms, it was not binding on either party.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 56; Dec. Dig. § 29.*]

2. Work and Labor (§ 28*)—Action for Price—Quantum Meruit.

Where defendant admitted that the milk was received and used by him in view of a contract to be entered into covering such delivery, and that the price claimed in the complaint was the reasonable value of the milk delivered by plaintiff, plaintiff was entitled to recover on a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 17, 55; Dec. Dig. § 28.*]

3. Brokers (§ 13*)—Authority—Acceptance of Contract.

A broker who brought parties together, drew up a written contract, expressing their oral agreement, and, after it was signed by the buyer, kept it to be signed by the seller, was not an agent of the seller to the extent that his possession of the contract was the seller's possession, so as to estop the seller to claim that it was not signed by him.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 12; Dec. Dig. § 13.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Sam Aftergut Company against Joseph Mulvihill. Judgment for defendant, and plaintiff appeals. Reversed.

Hankins & Hankins, for appellant. Louis Ferrari, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment in favor of the defendant and against the plaintiff upon a nonsuit granted upon motion of the defendant.

The action is one to recover the sum of $1,474, the value of milk sold and delivered by plaintiff to defendant. The facts of the case are briefly as follows: After some negotiations, the parties to this action agreed orally that the plaintiff should sell, and that the defendant should purchase, a certain quantity of milk a day for a fixed price for a period of six months; and one of the stipulations of the oral arrangement was that the agreement thus arrived at should be reduced to writing and signed by both parties. It was accordingly reduced to writing, signed by the defendant, and left with McGuire & Son, milk brokers, to be signed by one Sam Aftergut, the president of the plaintiff corporation, some time when he should happen to be at the office of McGuire & Son. The contract, however, was never signed by Aftergut, nor by any one on behalf of the plaintiff, nor is it shown that the plaintiff even knew that it had been signed by the defendant. After delivering milk to the defendant for five or six weeks in the quantity specified in the contract, the plaintiff, for some reason not disclosed by the record, refused to make further deliveries; and, the defendant having failed to pay for the milk delivered, plaintiff commenced this action.

The complaint is in two counts; one for the reasonable value of the milk; and the other for the agreed price. Defendant contended in the court below, and contends here, that a recovery cannot be had on either count, for the reason that, if under the circumstances of the case the contract must be regarded as executed by the parties, the plaintiff cannot recover on the theory of an implied contract; and, on the other hand, if the contract is to be regarded as binding on both parties, then the plaintiff, not having shown any reason for discontinuing the delivery of the milk, cannot recover on the contract.

[1, 2] We think the court erred in granting the motion for a nonsuit. Plaintiff never consented to the terms of the contract, nor was it even read by any of its officers; and as it was the expressed intention of the parties that it should be reduced to writing and signed by them, certain it is that, this stipulation not having been performed, the contract cannot be regarded as binding on either of the parties (Spinney v. Downing,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

108 Cal. 668, 41 Pac. 797); but, on the other hand, it having been admitted that the milk was received and used by the defendant in view of a contract to be entered into covering such delivery, and that the price claimed in the complaint was the reasonable value of the milk delivered, the plaintiff, it must be held, was entitled to recover on quantum meruit.

The authorities sustain the view that the oral agreement between the parties, not having been reduced to writing and signed by the plaintiff, as contemplated by the parties, did not constitute a contract. This is especially true where, as here, the proposed contract contained reciprocal covenants. In Spinney v. Downing, supra, it appeared that the understanding and agreement between the plaintiff and the defendant was that the proposed contract should be reduced to writing and signed by both parties. This, for a reason not disclosed, was not done; and the court therefore held that it never became a binding and subsisting obligation upon either party, and in that connection said:

> "It is a general rule, to which this case presents no exception, that, when it is a part of the understanding between the parties that the terms of the contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon, or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other"—citing cases.

[3] The defendant also asserts that McGuire & Son were the agents of the plaintiff, and hence he claims on some theory of estoppel that plaintiff could not be heard to say that the contract was not signed by it. But the evidence does not show that McGuire & Son were any more the agents of the plaintiff than of the defendant. They, as brokers, brought the plaintiff and defendant together; they drew up the contract in question, and, as arranged, the defendant was to sign it and leave it with the brokers, who, some time when convenient, would have the plaintiff sign it also. This did not constitute them the agents of the plaintiff to the extent that their possession of the contract under the circumstances of this case would be equivalent to plaintiff's possession of it, and so give rise to a question of estoppel.

The judgment is reversed.

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26 Cal. App. 13

FASSETT v. CALDWELL. (Civ. 1413.)

(District Court of Appeal, First District, California. Nov. 20, 1914. Rehearing Denied by Supreme Court Jan. 18, 1915.)

EVIDENCE (§ 419*) — ADMISSIBILITY — PAROL EVIDENCE RULE.

Parol evidence that a demand in the form of an "I O U" executed by defendant was in reality a receipt for money delivered to defendant in payment of corporate stock, which plaintiff had the right to investigate before finally accepting, is admissible to show that there was no consideration; plaintiff having accepted the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. § 419.*]

Appeal from Superior Court, City and County of San Francisco; George L. Jones, Judge.

Action by Howard H. Fassett against E. J. Caldwell. From a judgment for defendant, plaintiff appeals. Affirmed.

Ernest K. Little, of San Francisco, for appellant. Henry J. Brodsky and Wm. M. Madden, both of San Francisco, for respondent.

PER CURIAM. This is an appeal by plaintiff from a judgment in favor of the defendant in an action brought to recover on a demand in the form of an "I O U" executed by the defendant to the plaintiff's assignor, who is the father of plaintiff.

In November, 1911, plaintiff's assignor inquired of defendant concerning a location where his son could open a store. A few days later defendant called his attention to a business conducted under the name of "Our Store, Incorporated," in which defendant was interested, and requested him to investigate it, advising him to invest $1,500 in it, if he found it a good proposition, by purchasing 300 shares of the capital stock of the corporation. Defendant took plaintiff's assignor to the store, introduced him to different persons connected with the business, requesting them to help him make a thorough investigation. After plaintiff's assignor had made a partial investigation of the business, and after, according to the evidence introduced by the defendant, he had stated that the proposed investment looked like a good one, plaintiff's assignor, at the request of the defendant, advanced $200, and two days later, on December 4, 1911, money being urgently needed in the business, advanced a further sum of $1,300. On December 6th following 300 shares were issued by the corporation in the name requested by plaintiff's assignor and delivered to him, and were subsequently receipted for by him on the books of the corporation.

Plaintiff's assignor testified that the understanding between him and the defendant was that if, after a thorough investigation of the affairs of the concern, he was satisfied to make the investment, the $1,500 was to be regarded as payment for the stock; otherwise defendant was to return the money to him—in other words, the defendant was to guarantee the investment and the "I O U" was given for this purpose. Defendant, on the other hand, introduced evidence tending to show that the understanding was that Fassett, Sr., should make a thorough examination of the business, and, if he concluded it could be made a paying proposition, he would buy 300 shares of the stock of the corporation; that he did make such investigation, declared himself satisfied, and subsequently the money was paid, and the stock delivered as just stated, and Mr. Fassett became a director and officer of the corporation. The defendant also testified that, upon receiving the second payment of $1,300, he himself suggested that he give to Mr. Fassett some memorandum showing the receipt of the money until the stock was delivered, and that he thereupon signed and gave him the "I O U" which is the basis of this suit; that he did not guarantee the purchaser against loss; that he did not personally deliver the stock; and that he forgot to demand the return of the "I O U" after such delivery.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On January 4, 1912, the business in question went into the hands of a receiver, and ultimately the creditors received 20 cents on the dollar.

This is the history of the case as disclosed by the record, and plaintiff's sole point is that all the evidence above narrated, which tends to show that the instrument was in the nature of a receipt, was inadmissible, for the reason that it was an attempt to vary the terms of a written contract. The evidence was admitted on the theory that it tended to show that there was no consideration passing from the plaintiff to the defendant for the "I O U," and that it was but an acknowledgment of the receipt of the $1,500. We think that for this purpose the evidence was clearly admissible. Braly v. Henry, 71 Cal. 481, 483, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; Muir v. Hamilton, 152 Cal. 634, 93 Pac. 857; 9 Ency. of Evidence, p. 382.

From the evidence introduced on behalf of the defendant it appears that the "I O U" was merely a memorandum for the receipt of the money advanced by the plaintiff's assignor pending his determination to make the proposed investment, and upon his conclusion to make the investment (which the court evidently considered was satisfactorily shown) the defendant was under no obligation to return the money, but was entitled to the cancellation or return of his "I O U."

Judgment affirmed.

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25 Cal. App. 787

FOOTE v. SAN FRANCISCO PRODUCE CO. (Civ. 1402.)

(District Court of Appeal, First District, California. Nov. 19, 1914. Rehearing Denied Dec. 19, 1914. Denied by Supreme Court Jan. 18, 1915.)

1. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

Where the evidence is conflicting, the court's findings will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Sales (§ 372*)—Rights of Seller—Measure of Damages—Statutory Conditions.

Where a contract called for the sale of a crop of grapes, and the time between the buyer's refusal to perform and the spoiling of the crop by frost was only a few days, the seller had not time to fix his measure of damages in the manner required by Civ. Code, §§ 3311, 3353, by sale of the grapes in open market, since, after their spoiling, they had no market value, so that the buyer could not defeat the seller's claim for damages because of the failure so to do.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1089; Dec. Dig. § 372.*]

Appeal from Superior Court, Alameda County; K. S. Mahon, Judge.

Action by R. M. Foote against the San Francisco Produce Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. L. Frick and Charles Quayle, both of Oakland, for appellant. Thomas M. Diviny, of San Francisco, and Law T. Freitas, of Stockton, for respondent.

PER CURIAM. This is an appeal from a judgment and order denying the defendant's motion for a new trial in an action for damages for the alleged breach of a written contract for the sale and purchase of a crop of grapes.

The record shows that the defendant, through its duly authorized agent, visited the plaintiff's vineyard at Linden, San Joaquin county, on October 9, 1909, and there inspected the latter's ripened crop of grapes, and thereupon, and after such inspection, entered into a written contract for the purchase of the entire crop, by the terms of which the buyer was to furnish the boxes, and the seller was to pick and deliver the grapes f. o. b. at Peters, a nearby station, for transportation to the defendant at its place of business in Oakland. On October 15th and 16th two car loads of grapes were shipped from Peters to Oakland, which arrived at their destination on or about the 19th of October. Thereupon a telephone communication occurred between the defendant and plaintiff, in the course of which the former told the latter not to ship any more grapes at that time. A few days later further talks over the telephone were had, as to the details of which the evidence is conflicting. The plaintiff testified that on these occasions he was demanding more boxes in which to pick and ship the grapes, and the defendant was objecting to the quality of the first two car loads already shipped and received, and was also instructing plaintiff not to send any more grapes until notified by the defendant so to do. The finding of the court was in favor of plaintiff's statement of the substance of these conversations, and such finding, in view of the conflict, will not be disturbed by this court.

Upon being thus advised by the defendant not to send on the rest of his crop, the plaintiff ceased picking his grapes for several days, at the end of which time he received a notification from the defendant to send on more grapes. In the meantime, however, the remainder of the unpicked crop had been ruined and rendered by rain and frost unmarketable and unfit for anything but feed for hogs. The plaintiff thereupon sold the grapes on the vines for hog food, realizing only a small part of their former value, and then sued the defendant in two counts to recover the purchase price of the two car loads of grapes which had been shipped and received by the defendant, and to also recover by way of damages the contract value of the rest of the grapes, less the modicum received upon their sale as hog food. Upon the trial of the cause the defendant conceded that the first two car loads of grapes were sound and merchantable, and that as to them the plaintiff was entitled to recover; but as to the rest of the grapes, and the plaintiff's claim of damages for their loss, the appellant makes two main contentions:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

First, that the evidence does not sustain the findings of the court in favor of the plaintiff as to the circumstances and terms of the defendant's refusal to receive any more grapes after the first shipment and before the time when it was too late to pick and save the rest of the crop.

[1] As already stated, however, the evidence is in conflict on this point, and the findings therefore will not be disturbed.

[2] The second contention of the appellant is that, this being an executory contract between plaintiff and defendant for the sale of these grapes, the defendant's liability for its breach thereof is to be arrived at and fixed under the terms of sections 3311 and 3353 of the Civil Code. These are the Code sections prescribing that it is the duty of the seller of personal property, upon breach by the buyer of the contract of sale, to proceed to resell the property with reasonable diligence in the nearest open market and in the manner provided for sales of pledged property, and by so doing to fix the amount of detriment caused by the buyer's breach of the contract. This the appellant contends the plaintiff did not do; but in this respect we think the evidence sufficiently shows that the plaintiff did not have time to put into effect this method of fixing the amount of his damages after it was definitely known that the defendant would not abide by its contract and accept the grapes, and before the remainder of his unpicked grapes had been ruined by rain and frost; and that, after they were so ruined, they had no market value which could by any diligence or effort on the part of the plaintiff be so ascertained. This being so, we think the appellant was not entitled to rely upon the aforesaid sections of the Civil Code to defeat the plaintiff's claim of damages.

We further find that there is no merit in the appellant's objection to the amount of interest allowed to plaintiff by the terms of the judgment.

The judgment and order are affirmed.

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26 Cal. App. 18

HERRON v. GEAR. (Civ. 1394.)

(District Court of Appeal, First District, California. Nov. 20, 1914.)

1. Appeal and Error (§ 1011*)—Findings—Conflicting Evidence—Conclusiveness.

In an action on a note, wherein the evidence was conflicting on the issue whether defendant's note, given for stock of a corporation, was given to the president as an officer of the corporation as contended by plaintiff, or to the president individually, in payment for his personal stock, a finding for plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Corporations (§ 116*)—Sale of Stock—Indorsement—Construction.

In such action, an indorsement on the certificate of stock issued to defendant that it was to be paid for by the note sued on, which was delivered on condition that the certificate should not be sold until the payment was completed and a certificate thereof indorsed by the president or secretary of the corporation, construed with findings that the stock was not the property of the corporation and that it had no interest in the note given for its purchase price, did not show that defendant was entitled to pay the note to the corporation and be thereby discharged from further liability, but was only a requirement that before the stock was transferred upon the books of the corporation its officers should be able to certify that it had been fully paid for by the payment of the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. § 116.*]

3. Bills and Notes (§ 383*)—Payment to Person Not in Possession—Effect.

Defendant, in an action on a note given to the president of a corporation in payment for its stock, who at all times knew that the president individually, and not the corporation, was the owner and possessor of the note, and that in making payment thereon to the corporation he was paying to one not in a position to deliver the note when paid, made such payments at his peril, and they were no defense to an action on the note by the president's indorsee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 956; Dec. Dig. § 383.*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by William F. Herron against Lewis S. Gear. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Thunen, of San Francisco, for appellant. William F. Herron and Weinmann, Wood & Cunha, all of San Francisco, and Le Roy M. Edwards, of Los Angeles, for respondent.

PER CURIAM. This is an action to recover the sum of $2,313 and interest, alleged to be due upon a promissory note executed by the defendant for said sum, payable six months after date to the order of himself, indorsed by him in blank, and delivered to one Wilkie L. Edwards. This note was given by the defendant in payment of a balance due upon the purchase price of 3,000 shares of the capital stock of the Pacific Slope Securities Company, a corporation, of which at the time of the transaction said Wilkie L. Edwards was president. At some time after its execution Wilkie L. Edwards indorsed and transferred the note to Lula Edwards Chase, who in turn indorsed and transferred it to the plaintiff in this action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Practically the only questions arising upon this appeal turn upon the issues presented by the pleadings as to the nature of the transaction in the course of which the note was given, and as to the real parties in interest therein. The appellant asserted in his answer and insisted upon the trial that the transaction for the purchase of the stock of the Pacific Slope Securities Company, in part payment of which this note was given, was one between himself and the Pacific Slope Securities Company, and that the part which Wilkie L. Edwards took in that transaction was simply that of president and representative of that corporation; that he received the note in question in that capacity and in none other, and that the stock which was issued to the defendant and in part payment for which this note was given was the stock of the Pacific Slope Securities Company, owned by it at the time and issued to the defendant as its purchaser; and the defendant follows up these pleadings and proofs with the showing that before the note was due he went to the office of the corporation and there paid the whole amount of this note, which said payment the said corporation accepted, as he contends, either as payment in full of the amount due upon the sale of its stock, or as the trustee of Wilkie L. Edwards or his successors in ownership of this note; and that by such payment the liability of the defendant on account of this note has been fully discharged.

These contentions on the part of the defendant were resisted by the plaintiff upon the trial, in the course of which evidence was presented on behalf of the plaintiff tending strongly to show that the original transaction was one between Wilkie L. Edwards individually and the defendant, that the stock transferred to the latter was the personal stock of Edwards, and that he was and was understood by the defendant to be the real party in interest in the matter, and as such the owner of the note. The evidence upon this subject being clearly conflicting, and the trial court having resolved such conflict in favor of the plaintiff's contention, this court will not undertake to disturb its findings in that respect.

During the course of the trial the defendant offered in evidence a certain indorsement upon the certificate of stock issued to him in the following words:

> "This certificate of stock is sold to Lewis S. Gear upon the following terms of payment: Promissory note for $2,313.00, dated May 13th, 1909, due November 15th, 1909, with interest at the rate of six (6%) per annum—and is delivered upon the express condition that the same shall not be sold, transferred, hypothecated, or otherwise disposed of, until the foregoing conditions of payment are fully met and completed, and a certificate of the same endorsed hereon by the president or secretary of this corporation; the above conditions subject, however, that any portion of this may be transferred upon the payment of a proportionate amount of money of said indebtedness.
>
> "[Signed] F. C. Ballentine, Secretary.
> "[Signed] Lewis S. Gear."

The defendant insisted at the trial, and here insists, that the terms of this indorsement establish two things: First, that the transaction was one with the corporation; and, second, that by the terms of this indorsement the defendant was required, and hence entitled, to pay the sum due upon his note to the corporation, and that having done so he was thereby discharged from further liability upon his obligation.

As to the first of these contentions, it is disposed of by the findings of the court.

[2] As to the second, it appears that the indorsement does not upon its face purport to require that any money shall be paid to the corporation, or that it shall be entitled to demand or receive any, but only requires that before the stock is transferred upon the books of the corporation its officers shall be placed in a position to certify that the stock has been fully paid for through the payment of the promissory note which had been issued for a portion of its purchase price. That this is the proper construction to be placed upon this document would seem quite clear when it is read in connection with the testimony of the officers of the corporation and the findings of the court to the effect that this stock was not the property of the corporation, and that it had no interest in the promissory note which had been issued for a portion of its purchase price.

[3] The court further finds, and the evidence is sufficient to sustain it in so doing, that the defendant knew at all times that Wilkie L. Edwards and not the corporation was the owner and was in the actual possession of this note, and that in making whatever payment he did make on account of this note to the corporation, or to any person other than its holder, he was paying the amount due on the note to a person or persons not in or entitled to its possession, and hence not in a position to deliver up to him his note when paid. One who pays a negotiable note before its maturity to another not its possessor does so at his peril; and this seems from the evidence and findings in this case to be what the defendant has done.

We find no error in the record sufficient to justify a reversal of the case.

Judgment affirmed.

26 Cal. App. 22

Ex parte CRANE. (Cr. 560.)

(District Court of Appeal, First District, California. Nov. 23, 1914.)

CONSTITUTIONAL LAW (§ 83*)—MASTER AND SERVANT (§ 69*)—PERSONAL RIGHTS—IMPRISONMENT FOR DEBT.

St. 1911, pp. 1268, 1269, providing for the time of payment of wages by employers, and making a violation of the act a misdemeanor punishable by a fine, is contrary to Const. art. 1, § 15, forbidding imprisonment for debt in any civil action, unless in cases of fraud, since a defendant charged with the offense thereby created may be arrested, and, if unable to give bond, be committed to jail until his trial.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150–151½; Dec. Dig. § 83;* Master and Servant, Cent. Dig. §§ 78–81; Dec. Dig. § 69.*]

Application by Arthur Crane for a writ of habeas corpus. Petitioner discharged from custody.

James W. Cochrane, of San Francisco, for petitioner. Albert T. Roche, of San Francisco, for respondent.

PER CURIAM. The court is prepared to render its decision from notes made at the argument.

In this proceeding the petitioner seeks by habeas corpus to be released from the custody of the chief of police of the city and county of San Francisco, who held and confined the petitioner in the city prison under a warrant of arrest which was issued out of the police court of said city and county upon a complaint which charged the petitioner with the commission of a misdemeanor in this, that he had violated the provisions of section 1 of an act entitled "An act providing for the time of payment of wages." The provisions of the act in question are as follows:

> "Section 1. Whenever an employer discharges an employé the wages earned and unpaid at the time of such discharge shall become due and payable immediately. When any such employé not having a contract for a definite period quits or resigns his employment the wages earned and unpaid at the time of such quitting or resignation shall become due and payable five days thereafter.
>
> "Sec. 2. All wages other than those mentioned in section 1 of this act earned by any person during any one month shall become due and payable at least once in each month and no person, firm or corporation for whom such labor has been performed, shall withhold from any such employé any wages so earned or unpaid for a longer period than fifteen days after such wages become due and payable; provided, however, that nothing herein shall in any way limit or interfere with the right of any such employé to accept from any such person, firm or corporation wages earned and unpaid for a shorter period than one month.
>
> "Sec. 3. Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars.
>
> "Sec. 4. None of the provisions of this act shall apply to any county, city and county, incorporated city or town, or other municipal corporation."
>
> Stats. 1911, pp. 1268–9.

It is the contention of the petitioner that the act above quoted is unconstitutional in this, that it, in effect, permits an imprisonment on mesne process for debt, and that therefore his arrest and detention by the respondent pending a hearing of the charge in the police court is illegal.

In our opinion, this contention is sound, and must be sustained. Section 15 of article 1 of our state Constitution provides in part that:

> "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud. * * *"

By this constitutional provision the right of a creditor to control and confine the person of his debtor by the process of arrest, which the law at one time gave the creditor for the enforcement of his debt, has been abolished, and, happily, is prohibited in this state, save and except that the body of a debtor may be seized and confined in cases where it is made to appear that the indebtedness was fraudulently contracted, or that there has been an attempted fraudulent disposition of the property of the debtor with the intent to delay or defeat the payment of the debt.

In the exceptional cases noted it will be observed that fraud must exist before a debtor may be subjected to arrest and imprisonment, and that in such cases the arrest and imprisonment permitted by various statutes do not fall within the inhibition of the Constitution, for the obvious reason that the penalty prescribed is not for or on account of the failure to pay the creditor's demand, but solely because of the fraud alleged to have been committed in the creation of the debt or in a subsequent attempt to delay or defeat its satisfaction, by a transfer, removal, or concealment of the property of the debtor.

It will be noted that the statute in controversy does not involve the element of fraud as an essential of the offense defined therein. True, the statute does not provide imprisonment as the penalty for the failure of an employer to pay a debt due to his employé. The statute, however, is silent as to the process by which the magistrate before whom complaint is made of an alleged violation of the statute may obtain jurisdiction of the person of the offender. In the case at bar jurisdiction was attempted to be obtained by a resort to the provisions of sections 812 and 813 of the Penal Code, which authorize the issuance of a warrant of arrest when the magistrate is satisfied from the deposition presented to him that the offense complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it. By this process and under our system of procedure a defendant unable to give bail is jailed and restrained of his liberty until such time as a hearing can be conveniently had of the charge made against him. It will thus be seen that the statute in controversy was attempted to be enforced by the issuance and execution of a mesne process which, in the case at bar, resulted in the temporary imprisonment of the petitioner, and the cause of his imprisonment is to be found primarily in the fact that he is unwilling or, perchance, unable to discharge a debt which was not conceived or contracted in fraud of his creditor. To this extent the arrest of the petitioner necessarily is in conflict with the fundamental law of the state, and therefore illegal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

For the reasons stated, it is ordered that the petitioner be, and he is hereby, discharged from the custody of the respondent.

25 Cal. App. 790

LOWENBERG v. L. JACOBSON'S SONS.
(Civ. 1300.)

(District Court of Appeal, Third District, California. Nov. 19, 1914.)

1. Attachment (§ 25*)—Grounds for Attachment—Nonresidence.

Code Civ. Proc. § 537, subd. 1, provides for attachment in an action on a contract for the direct payment of money, while subdivision 2 authorizes attachment upon a contract against a defendant not residing in the state. *Held* that, where a nonresident agreed to pay plaintiff a stipulated commission on sales, payments to be made within the state, attachment could be issued for the amount due as the contract was one for the payment of money.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 61–72; Dec. Dig. § 25.*]

2. Attachment (§ 92*)—Affidavits—Sufficiency.

Code Civ. Proc. § 538, subd. 2, provides that the affidavit for attachment shall recite that the defendant is indebted to plaintiff, specifying the amount, and that the defendant is a nonresident. An affidavit for attachment averred that, over and above all legal set-offs and counterclaims upon an express contract for the payment of money, defendant was indebted to plaintiff in a named sum, which indebtedness was not secured by any mortgage or lien, and that defendants were nonresidents. *Held*, that the affidavit was sufficient, for, while going further than the statute, it was not vitiated by reason of surplusage.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 238, 239; Dec. Dig. § 92.*]

3. Appeal and Error (§ 662*) — Record — Transcript—Conclusiveness.

The recitals of the transcript are conclusive as to the happenings at trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850–2852; Dec. Dig. § 662.*]

4. Attachment (§ 122*)—Affidavit—Amendment.

Under Code Civ. Proc. § 558, providing that, upon application to dissolve a writ of attachment, if improperly or irregularly issued, must be discharged, but shall not be discharged if at or before hearing the writ or the affidavit or the undertaking shall be amended so as to conform to law, the court may, after application to discharge a writ of attachment, but prior to adjudication, allow the affidavit to be amended so as to conform to law.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323–337; Dec. Dig. § 122.*]

5. Attachment (§ 129*)—Undertaking—Sufficiency.

Where the action was really against only one defendant, and plaintiff was uncertain whether it constituted a partnership or a corporation, an undertaking payable to the defendant which had a plural name instead of to the several defendants is sufficient to support an attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 356–359; Dec. Dig. § 129.*]

6. Appeal and Error (§ 190*)—Objections not Made Below.

The undertaking for an attachment cannot first be attacked on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216–1220; Dec. Dig. § 190;* Attachment, Cent. Dig. § 898.]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by H. Lowenberg against L. Jacobson's Sons. From an order refusing to dissolve an attachment, defendants appeal. Affirmed.

Lloyd S. Ackerman, of San Francisco, for appellants. Harry C. Morrison, of Oakland, for respondent.

BURNETT, J. The appeal is from an order refusing to dissolve an attachment. The complaint set forth that the defendants are residents of the state of New York; that they are engaged in the business of selling clothing and wearing apparel to the trade; that their principal place of business is located in said state; that each of them has been continuously absent from the state from September, 1907, up to and including the month of December, 1911; "that during the month of September, 1907, said plaintiff and said defendants entered into an agreement in writing, made and executed in the state of California, whereby it was understood and agreed that said plaintiff should handle defendants' lines of goods in that territory located west of Denver, Colo., selling the same by sample, on a basis of 7½ per cent. commission on all orders checked and shipped, deducting all returns, commissions to be paid from the 1st to the 10th of each month for goods shipped during the previous month; that said plaintiff's headquarters were located in the state of California; that said agreement was in full force and effect continuously from the said month of September, 1907, up to and including the month of December, 1911." Then followed allegations that during all of said time there existed between said parties an open, mutual, and current account; that defendants had withheld from plaintiff commissions to which he was and is entitled, and that erroneous charges against plaintiff had been made by defendants in said account; "that the aforesaid commissions, so withheld as aforesaid, and the charges so made and entered as aforesaid, amount to the sum of $460, in excess of any and all credits or sums of money due, owing, or coming to said defendants from said plaintiff; that said plaintiff has made many demands upon said defendants for said sum of $460, but that said defendants have refused, failed, and neglected to pay to said plaintiff said sum of $460; * * * that no part of said sum of $460 has been paid, and there is still due, owing, and coming to said plaintiff from said defendants the sum of $460."

[1] We entertain no doubt that the cause of action thus stated constitutes the legal basis for the issuance of a writ of attachment as provided by our statute. The said complaint, in connection with the affidavit thereafter filed, clearly discloses that the action was upon an express contract "for the direct payment of money," and that the said contract was made in this state, and was not "secured by any mortgage or lien upon real or personal property, or any pledge of personal property. The situation is therefore entirely within the contemplation of subdivision 1 of section 537 of the Code of Civil Procedure. But the provision of the statute applicable to this case is even more circumscribed. It is found in subdivision 2 of said section, as follows:

> "The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached: * * * 2. In an action upon a contract, express or implied, against a defendant not residing in this state."

As we have seen, the defendants, at the time of the beginning of the action, were residents of the state of New York, and it is positively averred that they entered into a written contract to pay plaintiff a certain commission for sales of merchandise, and that so much money was due and owing to plaintiff under said contract. It is not necessary that the contract itself should specify the total amount of money to be paid. That, of course, in this case depended upon the number and extent of the sales that should be made by plaintiff. The requirement of the statute is satisfied when the contract furnishes the measure of liability or the information from which the amount due can be ascertained. This is not at all the case of unliquidated damages for which an attachment cannot be had. The distinction is clear, and it is pointed out in several decisions of the Supreme Court. In De Leonis v. Etchepare, 120 Cal. 410, 52 Pac. 718, it is said:

> "Nor is it necessary, in order to give a right of attachment, that the amount in which the defendant may be liable should appear upon the face of the contract or instrument by or from which the liability is to be determined. It often happens that the amount due under a contract does not appear from the contract itself. 'Our Code does not require that the amount due on the contract shall appear from the contract itself (Code Civ. Proc. § 537), but that the amount of the indebtedness shall be shown by affidavit (Code Civ. Proc. § 538). Attachment may issue in an action for damages for the breach of a contract. Donnelly v. Strueven, 63 Cal. 182. And this, where proof is necessary at the trial to show the amount of damages. Drake on Attachment, §§ 13, 23. But there must exist a basis upon which the damages can be determined by proof.' Dunn v. Mackey, 80 Cal. 107 [22 Pac. 64]. Where the contract does not furnish the measure of the liability of the defendant, and the damages are unliquidated, an attachment cannot be had, and the language quoted by appellant from Hathaway v. Davis, 33 Cal. 161, means no more than that."

As to the cases from other states, cited by appellants, we may appropriately adopt the following comment from Kohler v. Agassiz, 99 Cal. 12, 33 Pac. 742:

> "The attachment laws of the several states differ in so many particulars that, without the utmost caution in comparing their provisions with our own, we are in constant danger of being led astray, or unduly influenced by decisions apparently in point, but in reality resting upon a different basis. Even our own adjudicated cases, many of them growing out of questions applicable to resident debtors, have no proper application to the different status occupied by nonresidents."

[2] There is no ground for any criticism of the sufficiency of respondent's amended affidavit, which was formally executed and contained the following averments:

> "That the above-named defendants are, and were on the 13th day of September, 1912, indebted to said plaintiff in the sum of $460, over and above all legal set-offs and counterclaims, upon an express contract for the direct payment of money, to wit, for commissions due plaintiff from said defendants for selling and disposing of said defendants' goods; that such contract was made and executed in this state, and that the payment of the same was not and has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property; that the said defendants are, and were on the said 13th day of September, 1912, nonresidents of the state of California, to wit, residents of the state of New York; that the said sum for which the attachment was and is asked and sought herein was and is an actual bona fide existing debt due and owing from the said defendants to the said plaintiff; that the said attachment was and is not sought, and the said action was and is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendants, or any creditor or creditors of either of said defendants."

How completely and punctiliously plaintiff thus complied with the demands of the statute is made apparent by a reading of section 538 of the Code of Civil Procedure. Indeed, he exceeded the requirement of subdivision 2 of said section, which is applicable to the present case. His redundant averments, however, did not vitiate nor impair the affidavit, nor interfere with its operation as a legal step in the statutory process of obtaining a writ of attachment.

[3, 4] There is some question, however, as to whether the amended affidavit was filed in time. The record shows that, on the 15th day of November, 1912, the court submitted

the motion to dissolve the attachment, and that the amended affidavit was not filed until December 20th following. It was filed, though, before the court passed upon said motion. It is stated by respondent that "said matter was not finally submitted on said 15th day of November, 1912, for both attorneys for appellants and respondent filed points and authorities thereafter," but the recital of the transcript must be accepted as conclusive. Section 558 of the Code of Civil Procedure provides that, upon application to dissolve a writ of attachment, if it satisfactorily appears that it "was improperly or irregularly issued it must be discharged; provided, that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." We think there is a substantial compliance with the requirement of this provision where the amended affidavit is filed before the actual determination of the motion to dissolve the attachment. Although not shown by the record, it may be, as stated by respondent, that:

> "On the 1st day of November, 1912, when the motion to dissolve attachment came on regularly for hearing, the respondent, through his attorney, moved the court for permission to amend the writ of attachment or the affidavit or undertaking upon which such attachment was based to conform to all the requirements of chapter 4, tit. 7, pt. 2, of the Code of Civil Procedure of this state, the court at that time informed the attorneys for appellants and respondent that if it was found that the action was one in which an attachment could properly issue, and that amendments to any of the requirements were necessary, that such permission would be granted."

We may assume that the proceeding was as thus indicated, and we think that the court had authority to allow the amended affidavit to be filed after the application was made, but prior to the adjudication of the motion to discharge the attachment.

[5] Appellants also question the sufficiency of the undertaking, and direct their attack particularly at the expression of the obligation of the surety in the following language:

> "Does hereby undertake and promise to the effect that, if the said defendants or either of them recover judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendants and all damages which they may sustain by reason of the said attachment, not exceeding the sum of $200, and that, if said attachment is discharged on the ground that plaintiff was not entitled thereto, under section 537 of the Code of Civil Procedure, the plaintiff will pay all damages which defendant may sustain by reason of the said attachment, not exceeding the sum of $200."

The point is that the obligation should have been assumed and declared in favor of each of the defendants, but by said undertaking liability was imposed upon the surety only for damages that might be suffered by all the defendants collectively. It is claimed that the same rule in this respect applies to the undertaking as to the affidavit and reference is had to Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911, wherein it was held that:

> "Where the writ of attachment was against the maker and indorsers of a promissory note, an affidavit for the writ, merely stating 'that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the defendants,' without adding the words, 'or any creditor of either of said defendants' is fatally defective, and a motion to discharge the writ on that ground should have been granted."

See, however, Nichols v. Davis, 23 Cal. App. 67, 137 Pac. 41.

But, passing that point, while the complaint here is somewhat loosely drawn, we think it sufficiently appears that the action was really against only one defendant—that is, L. Jacobson's Sons—the plaintiff being uncertain whether defendant constituted a partnership or a corporation, and it may be stated that there was no prayer for an individual judgment against the members of the association.

[6] Besides, the record does not show that any attack was made upon the amended undertaking; the notice of motion to dissolve having been addressed to the original bond. Indeed, it is declared by respondent in his brief that the attorney for appellants stated in open court that he did not rely upon any objection to the undertaking, and that he so stated to the judge of the lower court and to the attorney for respondent upon the settlement of the bill of exceptions; the attorney for the respondent requesting that a statement to that effect be inserted in said bill. It was not so inserted, but it may be said that it does not affirmatively appear that at the hearing of said motion any objection was made to said undertaking, and appellants have not denied nor questioned the accuracy of said statement in respondent's brief.

No sufficient reason has been presented for interfering with the action of the lower court, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

26 Cal. App. 26

SOUTHERN PAC. CO. v. CITY OF SANTA CRUZ. (Civ. 1400.)

(District Court of Appeal, First District, California. Nov. 23, 1914. Rehearing Denied Dec. 22, 1914.)

1. Limitation of Actions (§ 183*)—Pleading—Sufficiency—Statute.

Under Code Civ. Proc. § 458, providing that in pleading limitations it shall not be necessary to state the facts showing the defense, but the plea may state generally that the action is barred by a provision of the statute cited, and that if the special allegation is controverted the pleader must establish facts showing a bar, a plea "that said action is barred by the statute of limitations" was insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 683–695; Dec. Dig. § 183.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. Appeal and Error (§ 194*)—Sufficiency of Pleading—Waiver of Objection.

In an action for the price of merchandise, wherein the sole defense of limitations was insufficiently pleaded, plaintiff, who on the trial treated it as sufficient and stipulated for judgment on that issue, waived any objection to the plea, and could not be heard upon appeal to urge its insufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241–1246; Dec. Dig. § 194.*]

3. Municipal Corporations (§ 1022*)—Actions on Claims—Limitation.

A claim against a city, whose charter (St. 1875–76, p. 193, § 11) provided that every claim should be filed with the city clerk and presented to the common council, and if so allowed should be presented to the mayor for approval, and if he failed or refused to approve it within 10 days must again be allowed by the council, did not ripen into a cause of action prior to its presentation and rejection, and an action thereon brought within the statutory period thereafter might be maintained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2193; Dec. Dig. § 1022.*]

4. Stipulations (§ 14*) — Construction — Entry of Judgment.

In an action for the price of merchandise sold, where the only defense was that it was barred by limitations, a stipulation that if the court determined that the action was not barred it should render judgment for plaintiff, and that if the action was barred it should render judgment for defendant, a reversal of judgment for the defendant entitled plaintiff to a direction to the trial court to enter judgment in its favor for the amount of its claim.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

5. Sales (§ 187*)—Action for Price—Liquidated Damages—Interest.

Where the parties had agreed that the total price for goods sold should be the sum of $1,628, plaintiff on a recovery was entitled to interest at the statutory rate from the commencement of his action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 499; Dec. Dig. § 187.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the Southern Pacific Company against the City of Santa Cruz. Judgment of nonsuit, motion for new trial denied, and plaintiff appeals. Judgment and order reversed, with direction to another judgment for plaintiff.

Chas. M. Cassin, of San Jose (James L. Atteridge, of San Jose, of counsel), for appellant. J. Leslie Johnston, of Santa Cruz, for respondent.

PER CURIAM. This is an action brought to recover the sum of $1,628.59, and interest, alleged to be due upon an account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant at its special instance and request. The defendant in its answer denied the indebtedness and also pleaded that the action was barred by the statute of limitations. The essential facts of the case, as disclosed at the trial, are these: In the month of December, 1906, the plaintiff sold to the defendant 231 feet of new water pipe at a price which was not then fixed, but which was thereafter to be agreed upon. In February, 1907, the plaintiff made a further sale of old water pipe to the defendant, and it was then agreed between the plaintiff and the defendant through the duly authorized agents of each that the total price for both lots of pipe sold should be $1,628.59. In October, 1907, the plaintiff duly filed with the clerk and presented to the common council of the defendant its claim and demand in due form for the allowance and payment of the sum of $1,628.59 due upon this account, which claim the said council at some date in the month of October, 1907, by vote of its members rejected. This action was commenced on April 2, 1909. At the close of the plaintiff's case, in which the foregoing facts were proven, the defendant moved for a nonsuit, upon the sole ground that the cause of action was barred by the statute of limitations. During the course of the argument of this motion, the trial court inquired of counsel for the defendant if he proposed to offer any evidence in defense of plaintiff's case, to which counsel for the defendant responded that the defendant had no witnesses and did not propose to offer any testimony or evidence in defense. It was thereupon stipulated that the jury in attendance should be dismissed, and that, if the court determined upon the pending motion for nonsuit that the cause of action was not barred by the statute of limitations, it should render judgment for plaintiff for the amount due upon its claim, but that, if it should determine that the cause of action was barred by the statute of limitations, judgment should be for the defendant. The cause having been submitted upon this stipulation, the court held that the cause of action was barred by the statute of limitations, and a judgment of nonsuit was entered. It is from this judgment and from an order denying its motion for a new trial that the plaintiff prosecutes this appeal.

[1, 2] The first contention of the appellant is that the plea of the statute of limitations as a bar to this action was ineffectually presented in the answer of the defendant. The form of said plea is simply "that said action is barred by the statute of limitations." It is conceded by the respondent that a plea of the statute in this general way is insufficient to satisfy the requirement of section 458 of the Code of Civil Procedure; but it is further contended by the respondent that not only did the plaintiff fail to raise the question of the insufficiency of this portion of the answer by a demurrer thereto, but that, upon the trial, its plea of the statute was treated as sufficient, and that in point of fact the only question in the case presented to the court by the stipulation of the parties upon the motion for nonsuit was the question as to whether the plaintiff's cause of action was or was not

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

barred by the statute of limitations. The record in the case bears out this contention, and justifies this court in holding that the plaintiff, having treated the defendant's plea of the statute as sufficient upon the trial, must be held to have waived its objection to it and cannot be heard upon appeal to urge its insufficiency. Churchill v. Woodworth, 148 Cal. 669, 84 Pac. 155, 113 Am. St. Rep. 324; Mullenary v. Burton, 3 Cal. App. 263, 84 Pac. 159.

[3] The appellant further contends that the trial court was in error in holding that the plaintiff's cause of action was barred by the statute of limitations upon the undisputed facts before it. The question of law involved in this contention is this: The charter of the city of Santa Cruz (Stats. of California, 1875–76, p. 193, § 11) provides as follows:

> "Every claim and demand that shall arise against the city of Santa Cruz shall be filed with the city clerk, and presented to the common council, and, if found correct, shall be allowed and ordered paid by a majority vote of the councilmen elected; and, when so allowed, shall be presented to the mayor for approval, and if he approves such allowance, he shall endorse his approval upon such claim or demand, and if he fail or refuse to approve such allowance within ten days, the said claim or demand, in order to render the same payable, must be allowed and ordered paid by the votes of three councilmen."

The question is as to whether the plaintiff, prior to its presentation of its claim and demand to the city clerk and common council of the city of Santa Cruz in the manner provided by this section of its charter, had a ripened cause of action upon the account in question here, upon which it could and therefore should have commenced and maintained an action within the statutory period after the date of creation of the claim. Under the authorities from this and other states construing similar statutes and charters requiring the presentation of claims and demands to the officials of a city as a prerequisite to their payment, we are constrained to hold that in this case the plaintiff's claim and demand against the city of Santa Cruz had not ripened into a cause of action upon which it could have begun and maintained a suit prior to the date of the presentation and rejection of its claim. Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712; Sheridan v. City of Salem, 14 Or. 925, 12 Pac. 925; Stackpole v. School District, 9 Or. 508; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 432.

The respondent herein cites the case of Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150 as laying down a different rule; but an examination of the record in that case discloses that the charter of the city of Oakland as it stood at the time that case arose contained no provision for the presentation of claims to the council of the city before payment, and further discloses that the plaintiff in that case did in fact present his claim to the auditor of the city, as required by its charter, and only brought his suit after the failure or refusal of the proper officials of the city to take action thereon. We think that the contention of the appellant must therefore be sustained.

Counsel for the respective parties discuss in their briefs another point as to the nature of the account sued upon; but, in the light of the views last above expressed by the court as to the time when the plaintiff's claim first ripened into an actionable cause, it becomes unnecessary to pass upon the particular nature of the plaintiff's account, for, whatever its quality as an open or stated or simple account, the action upon it was brought within the time required by the statute.

[4, 5] The appellant claims that in the event of a reversal of the judgment it is entitled to have a direction to the trial court to enter judgment in its favor for the amount of its claim, together with interest at the statutory rate from the date of the commencement of the action. The right of the appellant to the entry of a judgment for the amount of its claim seems covered by the stipulation; and as to the allowance of interest upon a claim of this character, the action of the court is controlled by the case of Martyn v. Western Pacific Railway Company, 21 Cal. App. 589, 132 Pac. 602.

The judgment and order are reversed, and the cause remanded, with direction to the trial court to enter a judgment in favor of the plaintiff for the sum of $1,628.59, with interest thereon at the rate of 7 per cent. per annum from April 2, 1909, until the date of entry of such judgment.

26 Cal. App. 16

MACHADO v. MACHADO. (Civ. 1511.)

(District Court of Appeal, First District, California. Nov. 20, 1914. Rehearing Denied by Supreme Court Jan. 18, 1915.)

1. Appeal and Error (§ 1111*)—Reversal of Judgment—Power of Court.

Under Code Civ. Proc. § 53, providing that the Supreme Court of the state may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had, and under Const. art. 6, § 4, providing that all statutes in force allowing, providing for, or regulating appeals to the Supreme Court should apply to appeals to the District Courts of Appeal, the District Court of Appeal has full authority to affirm, reverse, or modify the judgment or order of the trial court in any case before it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411–4420; Dec. Dig. § 1111.*]

2. Divorce (§ 186*)—Appeal — Reversal of Judgment—Necessity of New Trial.

Where, in an action for divorce, it is apparent on appeal, from an inspection of the record, that the judgment cannot be reconciled with the findings, either on the theory that the trial court made a miscalculation based on the facts, or mistook the law, the power of the District Court of Appeal is not limited to a modification of the judgment to accord with the findings, but it is the court's duty to reverse the judgment and remand the case for correction by new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 574; Dec. Dig. § 186.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action for divorce by Maria Machado against Frank B. Machado. From a judgment awarding to the parties their respective proportions of the community property, plaintiff appeals. Reversed and remanded.

Joseph Rafael, of San Francisco, for appellant. A. M. Free and C. L. Witten, both of San Jose, and R. V. Burns, of Mountain View, for respondent.

PER CURIAM. This is an appeal from the judgment of the trial court in an action for divorce upon the ground of cruelty on the part of the offending spouse; the portion of the judgment which is assailed upon this appeal being that wherein the court undertook to award to the parties their respective and rightful proportions of the community property. The case is presented for review upon the judgment roll, and it is practically conceded by the respective parties that the judgment in the respect in question is not in accord with the findings and therefore cannot stand.

The only serious dispute between the parties is as to the power and duty of this court in the premises. The appellant contends that in appeals of this character it is the proper function and only duty of the court to modify the judgment so as to make it conform to the findings in the case, and her counsel cites numerous cases showing that this has been the frequent practice of courts of last resort in appeals involving as their only issue the disagreement between the judgment and the findings in the case.

[1, 2] We can well understand that in many cases where the court has made a miscalculation as to the proper amount of a money judgment, or has been mistaken as to the law applicable to the facts as found, it would be the plain and simple duty of the appellate court to modify the judgment so as to correct the mistake or conform to the law of the case; but we do not understand or agree that the power of this court upon appeal is limited in this class of cases to that form of relief. The Code provides that the Supreme Court of this state may "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." Code Civ. Proc. § 53. The Constitution, in the creation of the District Courts of Appeal, has expressly provided that "all statutes now in force allowing, providing for, or regulating appeals to the Supreme Court, shall apply to appeals to the District Court of Appeal." Const. art. 6, § 4. Under the plenary grant of power with which this court has thus been invested, we have no doubt as to our full authority to either affirm or reverse or modify the judgment or order of the trial court in any case before us, and we are further satisfied from an inspection of the record of this case that it is a proper one for reversal and for remission to the lower court for a new trial.

A comparison of the findings and judgment in the case made in the light of the express language and direction of section 146 of the Civil Code, defining the power and duty of the trial court in the matter of the proper division of community property in actions for divorce upon the ground of cruelty, leaves no doubt in our minds that the trial judge in this case either acted inadvertently in the adoption of the findings and determination of the proper judgment to be given thereon, or that he had other facts and circumstances in mind in rendering the judgment than those which the findings contain or the record discloses. In other words, it is impossible to reconcile this judgment with the findings, upon the theory either of a miscalculation based upon the facts found or upon a mistake in the terms of the law. This being so, it is clearly the duty of this court to reverse this judgment and remand the case to the trial court for the correction by it upon a new trial of the manifest error in its findings or its judgment, or both.

Judgment reversed, and cause remanded for a new trial.

26 Cal. App. 31

WAITE v. BRENDLIN. (Civ. 1636.)

(District Court of Appeal, Second District, California. Nov. 24, 1914.)

1. Elections (§ 273*)—Contest—Statutory Provisions.

Under Code Civ. Proc. § 1112, providing that the misconduct of the election officers specified in section 1111, subds. 1 and 4, must be "such as to procure the person, whose right to the office is contested, to be declared elected, when he had not received the highest number of legal votes," one who has been recalled from his office of city trustee cannot contest the right of another to succeed him, who has received all the votes cast for a new incumbent in case the contestant should be ousted; no attack being made on the legality of such votes, even though the election board refused to count certain legal votes against the recalled contestant.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 249; Dec. Dig. § 273.*]

2. Elections (§ 271*)—Contests—Statutory Provisions.

Under Code Civ. Proc. § 1114, to be good ground for contesting an election, it is necessary that illegal votes shall have been counted for the one declared elected, and that he would not have been elected but for such votes, so that one recalled from an office by the illegal exclusion of votes in his favor in contesting the right of his successor elected without aid of illegal votes cannot rely on the statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. ELECTIONS (§ 303*)—CONTESTS—STATUTORY PROVISIONS.

Code Civ. Proc. §§ 1111–1127, prescribing the judgment which the court may render in election contest, is not applicable to a contest by one recalled from office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 315; Dec. Dig. § 303.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Election contest by David Waite against Edward Brendlin. Judgment for contestant, and contestee appeals. Reversed.

Carlton W. Greene, of Paso Robles, for appellant. Alex Webster, of Paso Robles, for respondent.

SHAW, J. Election contest. David Waite, contestant, was a duly elected and qualified member of the board of trustees of the city of El Paso de Robles, when a proceeding was instituted for his recall and removal as such member of said board. At said election the contestee, Edward Brendlin, was the only candidate for election to said office in the event of a vacancy therein occurring by reason of a majority of the votes cast by the electors favoring the recall of Waite. The result of the election, as declared by the board of canvassers, was that upon the question, "Shall David Waite be recalled from the office of member of the board of trustees?" 345 votes were cast "yes" thereon, and 344 votes cast "no" thereon, and that Edward Brendlin received as a candidate for said office to succeed David Waite 304 votes; whereupon it was declared that Waite had been recalled and Brendlin elected to fill the office for the unexpired term. Thereupon Waite instituted this contest, and the proceedings had thereon were in accordance with the provisions of title 2, part 3, of the Code of Civil Procedure relating to the contesting of certain elections. Section 1111 of said title provides:

> "Any elector * * * of a * * * city * * * may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes: (1) For malconduct on the part of the board of judges, or any member thereof. * * * (4) On account of illegal votes."

The grounds of the contest, as alleged in the statement, are the first and fourth as above stated, namely, that the judges of election refused to count certain legal ballots voted against the recall of Waite, contestant herein, and did count and make return of certain illegal ballots voted in favor of his recall; it being further alleged that, had said illegal ballots counted in favor of the recall been rejected and said uncounted legal ballots against the recall counted, the result of the election would have been against the recall of contestant. The court upon trial found the number of votes cast "yes" on said proposition for the recall of Waite to have been 338, and those cast against said proposition to have been 341, and that the majority of the votes cast upon the proposition were against the recall. Judgment for contestant followed, from which the contestee appeals upon the judgment roll.

[1-3] Both by demurrer, which was overruled, and an answer the allegations of which were found to be untrue, the contestee alleged the insufficiency of the statement to constitute a cause of contest, want of legal capacity in contestant to maintain the contest, and further alleged that the court had no jurisdiction of the subject of the proceedings, which was the removal of Waite from office and not the election of Brendlin to fill the vacancy. The question presented, therefore, is whether or not the provisions of said title relating to the contest of certain elections can be invoked by one removed from office by means of the recall provisions of the statute. If malconduct, without any limitation or qualification on the part of the board of judges, or the reception of illegal votes in favor of the recall, were grounds of contest, it might well be said that the provisions of title 2, part 3, Code of Civil Procedure, were applicable to a case of this kind. But the effect of these two specified grounds for recall is limited by other sections of the Code. Thus in section 1112, Code of Civil Procedure, it is provided that the misconduct of the election officers specified in section 1111 must be "such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes." It thus appears that this ground of removal can only be invoked in a case where the contestee, or party declared elected, did not receive the highest number of legal votes. It is conceded that Brendlin, being the only candidate to succeed Waite in case of his recall, received all the votes cast, and no attack is made upon the legality of the votes so cast for him. Hence, having received the highest number of legal votes, no right of contest upon such ground is accorded to Waite. The fact that the board refused to count legal votes against the recall, while misconduct, is not made a ground for contest, since it is conceded that Brendlin did receive the highest number of legal votes for the office. And so with the reception of illegal votes, which, under section 1114, Code of Civil Procedure, constitutes no ground for contest unless the result would have been different and another candidate elected. It is not alleged that any illegal votes were cast for Brendlin; the alleged illegal votes were cast in favor of the recall of Waite. But, under the limitation provided in said section 1114, this is not made a ground for contest, since the illegal votes must have been counted in favor of the one declared elected and who would not have been so declared except for the counting in his favor of such votes. Other sections pre-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

scribing the judgment which the court may render clearly show that the provisions of the act are not applicable to a contest by one recalled from an office. As stated, the subject of the proceeding set forth in the statement is not misconduct affecting the election of Brendlin, or the counting of illegal votes in his favor; but the allegations relate solely and alone to the action of said board in so far as it brought about the recall of contestant. The provisions for removal of an official by recall proceedings are the subject of quite recent legislation, while the provisions for contesting an election were enacted in 1872 and have continued without material change down to the present date. Clearly it was not the intention of the Legislature that said provisions should apply to a recall election. And it is equally clear, when the language of said title is construed in accordance with the plain import of the language used, that said provisions have no application to such case.

"The right to contest an election is purely statutory, and must be determined in accordance with the terms of the statute." Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076; Austin v. Dick, 100 Cal. 201, 34 Pac. 655.

Conceding that illegal votes were cast and counted in favor of contestant's recall, and that he has suffered in being wrongfully ousted from office by another, his remedy is not a proceeding by contest pursuant to the provisions of title 2, part 3, Code of Civil Procedure.

Respondent insists that, conceding there be no statutory provision giving the right of contest in a recall election, such right nevertheless exists by implication. This by reason of the fact that the Constitution provides for an election and makes no provision for contesting the same. In answer to this we may repeat that this proceeding is pursuant to the provisions of title 2, part 3, of the Code of Civil Procedure, which is a statutory proceeding for the summary determination of the right to an office, limited and restricted to cases only mentioned therein and upon the grounds specified therein. Since this case does not fall within those provisions, it cannot be said that contestant has any right by implication to invoke the same.

The judgment is reversed.

We concur: CONREY, P. J; JAMES, J.

26 Cal. App. 35

BRUNNER v. TITLE INS. & TRUST CO.
(Civ. 1536.)

(District Court of Appeal, Second District, California. Nov. 24, 1914.)

1. Appeal and Error (§ 1010*)—Findings—Conclusiveness.

An appellate court will not disturb the findings below where supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. § 1010.*]

2. Husband and Wife (§ 246*)—Conveyance from Husband to Wife.

Where a husband put property into the hands of his wife in Missouri so as to give her no title thereto, on their removal to California the property remained his unless parted with by gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. § 246.*]

3. Evidence (§ 155*) — Conveyances from Husband to Wife—Admissibility of Evidence.

Where the allegations of a cross-complaint, seeking the recovery of property from a wife and another, as having been purchased with money received from the husband, did not reach back farther than the year 1904, but the plaintiff herself had testified to the receipt of moneys as gifts prior to 1904, it was proper for the trial court to admit testimony as to conversations between the parties as to investments of money in St. Louis property prior to 1904; it further appearing that the St. Louis property was in part the result of the investment of the moneys received, according to the wife, as gifts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 445–458; Dec. Dig. § 155.*]

Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Louisa Brunner against Herman Brunner for divorce, in which defendant filed a cross-complaint. Decree for defendant, from which and an order denying a new trial, plaintiff appeals. Pending the appeal, defendant died, and the Title Insurance & Trust Company, his special administrator, was substituted. Affirmed.

Earl Rogers, W. H. Dehm, and Waterman, Westover & Green, all of Los Angeles, for appellant. H. A. Massey and Hunsaker & Britt, all of Los Angeles, for respondent.

CONREY, P. J. In this action the plaintiff Louisa Brunner, one of the appellants herein, sought to obtain a decree of divorce from the defendant Herman Brunner, and to compel him to provide for the maintenance of plaintiff and the minor children of the marriage. In addition to his defense, Herman Brunner filed a cross-complaint against the plaintiff and their daughter Theresa Brunner (in whose name the plaintiff had placed certain personal property). By his cross-action the plaintiff's husband sought to establish his ownership of real and personal property in California, described in the cross-complaint, which property had been purchased by the plaintiff with sums of money brought by her from the state of Missouri, where these parties formerly resided. Herman Brunner alleged that all of this money was his own separate property, although held in the name of plaintiff. The plaintiff, while admitting that the entire estate was originally in the form of money earned by the defendant or acquired as profits of his business, alleged that all of this money had been received by her in various sums as gifts from the defendant, or was money derived by her from the sale of property which she had purchased with sums of money received by her as gifts from the defendant. The findings of the court were in favor of the defendant on the issues tendered by the complaint, and were also in his favor with respect to the cause of action stated in the cross-complaint. By the decree as entered it was adjudged that the transfers made by the plaintiff to Theresa Brunner were made without consideration and were fraudulent as against Herman Brunner and were declared to be canceled and annulled; that the plaintiff holds all right, title, interest, and possession acquired by her in said property (with certain exceptions not necessary to discuss) in trust for Herman Brunner as his separate property. The usual provision appropriate to such cases was made requiring conveyances and assignments of the property to the cross-complainant. After entry of the judgment and after appeal therefrom by the plaintiff, and while her motion for a new trial was pending in the superior court, Herman Brunner died, and the respondent was appointed special administrator of his estate. The motion for a new trial having been denied, an appeal was taken from the order denying that motion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appellant contends that the evidence is insufficient to justify sundry specified findings of fact, and particularly urges that the evidence is insufficient to justify the finding that the moneys received by her from Herman Brunner were not delivered to her as gifts from him. According to the laws of the state of Missouri, where all of the money above mentioned was acquired by the defendant, that money and the proceeds thereof in any form, in the absence of any gift thereof by the husband to the wife, remained his separate property. It is true that "property conveyed to the wife, but paid for by the husband, is prima facie a gift from him to her" (Pitkin v. Mott, 56 Mo. App. 401; Richardson v. Lowry, 67 Mo. 414); and the presumption is that such conveyance is made as a provision for and settlement upon the wife for her own benefit, and not as a resulting trust for the husband (Ilgenfritz v. Ilgenfritz, 116 Mo. 435, 22 S. W. 786). But this presumption is not conclusive and may be overcome by evidence that the gift to the wife or separate provision for her was not so made. Schuster v. Schuster, 93 Mo. 438, 6 S. W. 259. Evidence of declarations and of acts of the wife is competent to show that the intention of the parties was that the wife should hold for the husband, and the finding of the jury as to the fact is conclusive. It was so held in Seibold v. Christman, 75 Mo. 308, affirming 7 Mo. App. 254, wherein, at page 256, the court said:

> "Though upon the trial parol evidence was introduced to prove the intention of Charles Seibold and his wife, there is here no question of an express trust proved by parol. As the evidence tended to show that the lot was purchased with the money of one person, and the legal title taken in the name of another, there was the usual implication of a resulting trust. Coming more closely to the facts, it appears to be the case of a husband causing the deed to be taken in the name of his wife, and thus the usual presumption of a resulting trust is rebutted, and a prima facie case made out that the husband intended the conveyance to be a provision for his wife. This prima facie case may, however, in its turn, be rebutted by evidence, establishing the fact that it was the intention of the parties that the wife should hold for the husband; and this fact the jury here found. * * * There was ample evidence to sustain the finding of the jury; nor was there any error in the instructions given. The presumption of a provision for the wife was rebutted, and the ordinary implication of equity prevailed of a trust resulting for the benefit of the person who paid the consideration-money for the land. The evidence was competent, not as creating a trust by parol, but as showing the intention of the parties at the time. * * * Nor is it for the plaintiffs to object to matters which go to the weight of evidence, after the whole case was submitted to a jury without objection on their part."

It often has been declared that the evidence of an implied or resulting trust, such as that claimed by the cross-complainant in this case, "must be clear, strong, unequivocal and so definite and positive as to leave no room for doubt in the mind of the chancellor." Curd v. Brown, 148 Mo. 82, 49 S. W. 990. But the determination of the fact is primarily with the judge who tried the case.

> "It is clear that there can be no executed gift in the absence of any intention to give on the part of the donor. It is true that the facts and circumstances of a transaction may be such as to practically compel the conclusion that a gift was intended, and to render worthless any subsequent statement to the contrary on the part of the donor. But no such effect, we are satisfied, must necessarily be given to the mere fact that, in the case of the purchase of real property with community funds, the husband has directed that the deed shall run to the wife as grantee. There is nothing in the nature of such a fact that renders it consistent only with the theory of gift, and other facts and circumstances may so tend to show another reason than the desire and intent to make a gift as to furnish ample warrant for a conclusion that no gift was intended, and therefore that there has been no 'executed gift.'" Fanning v. Green, 156 Cal. 279, 282, 104 Pac. 308, 310.

And in an action of this character, involving on one side the claimed right to a divorce and on the other side claims of property rights by the husband, the court is entitled to consider all of the evidence, including that upon the cause of action for divorce, in determining the weight of evidence and the credibility of the parties as witnesses. Della v. Della, 98 Ark. 540, 136 S. W. 927.

[1] In this case it is not necessary to set forth an abstract of the evidence concerning the disposition made from time to time by these parties of money acquired by the husband and held in possession by the wife as bank credits, or held in the form of investments made in her name. This evidence is included in several hundreds of pages of transcript containing the testimony of sundry witnesses. The defendant testified (contrary to plaintiff's testimony) that he did not make

a gift of the money to plaintiff, and did not intend any such gift, and that he never stated that he was making or had made any such gift. The circumstances relating to the various transactions were extensively developed by testimony of witnesses and by documentary evidence. That there is a substantial conflict in the evidence cannot successfully be denied. That there is much evidence inconsistent with the theory of a gift of these funds or their proceeds by the husband to the wife is also clear from the record. We are of opinion that the facts found by the trial court after hearing this conflicting evidence should be accepted by us as the facts in the case, and that we would not be justified in disturbing these findings. An appellate court "will not disturb the finding of the trial court where there is substantial evidence warranting a clear and satisfactory conviction to that effect." Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 484, 111 Pac. 360, 364.

[2] It being thus established that the cross-complainant was the equitable owner of the money and property in question in the state of Missouri at the time that it was transferred to the state of California, it retained that character as his separate property in California; it being further shown that in connection with the investments in California there was no gift made to the plaintiff of the property purchased here. Estate of Burrows, 136 Cal. 113, 68 Pac. 488.

[3] Appellant claims that the court erred in overruling her objections to certain testimony of the witness Hermina White concerning conversations of date prior to 1904 between plaintiff and defendant (who were her mother and father) about the investment of money in property at St. Louis. The objection was based upon the fact that the allegations of the cross-complaint limited to the years 1904, 1905, and 1906 the claim of cross-complainant that he had intrusted these moneys to the plaintiff. But it appears that the plaintiff had previously testified to the receipt of moneys as gifts from the defendant during years prior to 1904, and that the property here in question was in part the result of investments of that money. On that state of the record the testimony objected to was correctly admitted.

Assuming that the court erred in permitting L. D. White to testify to certain statements made by Mr. Brunner to Mrs. White out of the presence of Mrs. Brunner, and further erred in permitting defendant's counsel to ask leading questions of the witness Sheitlein, we think that the errors so committed are of minor importance in relation to the entire case and do not appreciably affect the merits.

Counsel for appellants present in their brief an argument based upon a supposed appeal from an order made by the superior court vacating and setting aside an earlier order of that court requiring the payment of alimony pendente lite. The transcript fails to show any appeal taken from that order, and it is not involved in the appeal from the judgment. For that reason no ruling is made upon the question presented.

The judgment and order denying motion for a new trial are affirmed.

We concur: JAMES, J.; SHAW, J.

169 Cal. 100

Ex parte GAMBETTA. (Cr. 1902.)

(Supreme Court of California. Jan. 4, 1915.)

BASTARDS (§ 16*) — NEGLECT TO SUPPORT — STATUTES.

Pen. Code, § 270, making punishable a parent who fails to furnish necessaries for his child, did not, as originally adopted, apply to the father of illegitimate children, and was not made applicable to him by Civ. Code, § 196a, requiring the father of an illegitimate child to support it, and authorizing a civil suit by the child or its mother or guardian to enforce the obligation.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 21–23; Dec. Dig. § 16.*]

In Bank. Application by one Gambetta for a writ of habeas corpus. Petitioner discharged from custody.

J. A. Gendotti and C. J. Houston, both of San Francisco, for petitioner. Geo. L. Bell, of San Francisco, for respondent.

THE CHIEF JUSTICE. The court is unanimously of the opinion that section 270 of the Penal Code, as originally adopted, has no application to the father of illegitimate children, and that section 196a of the Civil Code, relied on, does not change the application of that section in any way. The prisoner will be discharged from custody.

168 Cal. 766

In re BAKER'S ESTATE. (L. A. 3798.)

(Supreme Court of California. Dec. 12, 1914.)

WILLS (§ 766*) — LEGACIES — "ADEMPTION" — STATUTES.

Where testatrix, by will executed July, 1912, gave to two nieces of her deceased husband $500 each, and in July, 1911, sent to them a certificate of deposit for $400, renewable each six months with interest, the principal of which they were not to use, stating that though she had mentioned them in her will, it was done that they might be sure of a little of their uncle's money, and subsequently wrote them that she was thinking of letting them have a $600 certificate upon the same agreement, which would make the $1,000 she intended to be theirs after her death, which certificate was also issued and paid to them, the letters and the gifts of the certificates were an "ademption" of the legacies contained in her will, within Civ. Code, § 1351, providing that advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1981–1985; Dec. Dig. § 766.*

For other definitions, see Words and Phrases, First and Second Series, Ademption.]

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Marian Baker Sutton and another, legatees under the last will of Mary M. Baker, deceased, appeal from a decree of final distribution. Affirmed.

Gurney E. Newlin and Roy V. Reppy, both of Los Angeles, for appellants. E. E. Leighton, of Los Angeles, for respondent.

ANGELLOTTI, J. This is an appeal by Marian Baker Sutton and Belle A. Baker, legatees under the last will of deceased, from the decree of final distribution in the matter of her estate, the court below having refused to award them therein any portion of the estate of deceased. The ground of the court's action was that certain transactions had by deceased with said legatees operated as ademptions of their legacies.

By her will executed July 24, 1902, deceased gave to each of said appellants, who were nieces of her deceased husband, $500. The will also provided for several other small legacies. Appellants resided in Boulder, Colo. In February, 1911, the First National Bank of Palo Alto issued a certificate of deposit payable to the order of deceased for $408, with interest from February 8, 1911, at the rate of 4 per cent. per annum if left for six months—no interest after maturity. On February 17, 1911, deceased wrote to Mr. M. A. Buchan, president of said bank, as follows:

"Those nieces in Boulder have been ill and are all alone and nothing but their earnings to go for their support so I must try to help them if possible."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On July 8, 1911, deceased wrote a letter to appellants in which she said:

> "I have been thinking all the morning about you two dear girls and how hard you both have to struggle along if your expenses are anywhere as expensive as ours are and you have to work so hard. Well I wish I dare do for you as I have been thinking I would. I have a $400 certificate on the First National Bank of Palo Alto which I would sign over to you both to put in your bank as your own to draw interest my lifetime or while I live, unless I go broke and have to have it back, and you never need tell any one about it or break it until after I pass away, then you would be sure of a little of your uncle's money. I would give you full instructions how you would do with the bank and tell Mr. Buchan, the president of the First National Bank, about it. Of course, I have mentioned you in my will. My money goes out so fast I often feel I may outlive it and if I do have to go to you and if it was not for Sister Adelia, I would any way and we would use what I have together."

On July 22, 1911, she wrote another letter to appellants, in which she made the following statement:

> "So in view of what may happen I am going to send you a piece of pink paper by name a certificate of the First National Bank of Palo Alto, Mr. M. A. Buchan, president and first cashier. It is at four per cent interest and has to be sent to the bank to be renewed every six months from the time of date. I will send it over to you * * * and rather than have you break or use any of it only the interest I would rather you would ask me for help some other way."

On July 24, 1911, deceased indorsed on the back of the certificate the following: "Mary M. Baker sign this certificate to Miss Belle Baker and Mrs. Marian Baker Sutton of Boulder, Colorado"—and on the said date, or within a few days thereafter delivered the certificate thus indorsed to the appellants.

Mr. Buchan testified that he received from deceased a letter dated July 28, 1911, written by her, which informed him of the assignment of the $408 certificate, and in her letter she made the following condition:

> "That she was placing the certificate with her late husband's nieces, Marian Baker Sutton and Belle A. Baker, during her lifetime, to be renewed every six months as long as she should live unless she should get broke and need it, and they must not break the principal. That she wished to make sure of the small amount to be given Belle A. Baker and Marian Baker Sutton, her Boulder nieces, in case they should ever need it, and that she had sent it to them, together with directions how to proceed, and that they should send it to M. A. Buchan for renewal."

At the expiration of the six months for which the $408 certificate was made the same was sent to the bank by appellants for renewal, and a new certificate was issued by the bank in the place thereof for $408, dated August 8, 1911, which certificate recited that Marian Baker had deposited in the bank $408 payable to the order of Belle A. Baker and Marian B. Sutton at the death of Mrs. Mary M. Baker and to be renewed every six months after date and to bear interest at the rate of four per cent. per annum. After the expiration of six months from August 8, 1911, a new certificate was issued in renewal, which last-named certificate was paid to appellant some four months after the death of deceased. Subsequently, the date not appearing, deceased wrote to Marian B. Sutton as follows:

> "I am thinking I will let you have a $600 certificate on the same agreement of the $400, not to use any of it which will make the $1000 I intend will be yours and Belle's after I am gone. No one will ever know anything about it only M. A. Buchan."

On April 11, 1912, deceased wrote to Buchan the following:

> "I remember I had thought of sending this $600.00 to my Boulder nieces the same as I did the $400.00 and let them keep it my lifetime and draw the interest unless I live long enough to need it. They must not draw the principal while I live, making them sure of the $1000.00 I intend they would have if they outlive me."

On June 11, 1912, deceased again wrote to M. A. Buchan, saying:

> "I am writing to ask a favor in regard to sending another certificate to my Boulder nieces. * * * I want to make them even $1000 on the same terms as the $400 certificates they already have as that amount is what I am intending they shall have if they outlive me, and if what I have of my own does not last me I am to have it back with the proviso: that if I do have that when I draw it they may draw an equal amount to use as they are a mind to."

In response to the requests in these letters, Buchan on June 14, 1912, issued a certificate of deposit of said bank for $600, the certificate reciting that Mrs. Baker has deposited in this bank $600, payable to the order of Belle A. Baker and Mrs. Marian B. Sutton at the death of Mrs. Baker, with interest from May 29, 1912, at the rate of 4 per cent. per annum. On July 27, 1911, deceased executed a codicil to her will, appointing her nephew, Robert B. Emery, executor thereof, and revoking the appointment of P. H. Atkinson as executor made by the original will. Deceased died July 11, 1912, being at that time of about the age of 85 years. The bank paid the amount of the $600 certificate to the appellants in December, 1912.

The lower court found that by the letters of the testatrix she expressed her intention that the certificates of deposit should be in ademption and satisfaction of the legacies to appellants, and that appellants are not entitled to any further moneys or properties of the estate.

Section 1351 of the Civil Code provides:

> "Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing."

The question in this case is whether such an intention is sufficiently expressed by the deceased in the writings to which we have referred. We are of the opinion that this question must be answered in the affirmative. Of course, the requirements of section 1351, Civil Code, are satisfied if the intention there referred to is fairly shown by the writings of the deceased, taken in connection with the circumstances under which such writings were made. We have here a will by which appellants were given $500 each, or $1,000 in all, and various other small legacies were provided for. It is quite apparent from her letters that deceased was continually in fear that she might exhaust the greater part of her property, if not all of it, before she died, and that she was very desirous that appellants should be preferred to all the other legatees in the event that the estate left by her was not sufficient in amount to pay all. She desired them to have as much as possible of the amount bequeathed, from the property left her by their uncle, if she did not require it for her own use during her own life. So she put the certificate of deposit for $408 in appellants' possession, indorsed to them, with the condition expressed and understood by all parties, including the bank, that the principal of the same should not be paid to them during her lifetime, but only the interest thereon, and that she was to have the certificate back if she needed it for her own expenses of living. The condition as to the payment of the principal was incorporated in each of the renewal certificates. Her idea, as expressed in her letter of July 8, 1911, to appellants, was that they would thus be "sure of a little of" their uncle's money, and, as expressed in her letter of July 28, 1911, to Mr. Buchan, that she wished "to make sure of the small amount to be given" to appellants. Taken alone, the evidence as to this transaction of the year 1911 relative to the $408 certificate may not sufficiently show an intention that the amount to be received thereunder should be in satisfaction pro tanto of the legacies to appellants of $500 each, but when considered in connection with the evidence as to the later transaction in the year 1912, the intention as to both transactions is beyond serious question sufficiently shown. We think that under the circumstances it may properly be so considered. She wrote appellant Marian B. Sutton, "I am thinking I will let you have a $600 certificate on the same agreement of the $400, not to use any of it *which will make the $1000 I intend will be yours and Belle's after I am gone*," and she wrote Mr. Buchan:

> "I remember I had thought of sending this $600.00 to my Boulder nieces the same as I did the $400. * * * They must not draw the principal while I live, making them sure of the *$1000.00 I intend they would have if they outlive me.*"

And again to Mr. Buchan:

> "I want to make them even $1000 on the same terms as the $400 certificates they already have as that amount is what I am intending they shall have if they outlive me."

The intention was manifest that appellants should have the amount that she intended to give them by her will so placed that they would get it at her death, whatever the condition of her estate might be, and appellants received the $600 certificate with that intention as to both certificates clearly expressed to them. There is nothing in any of the writings of deceased or in the evidence that is necessarily inconsistent with our conclusion.

We do not consider it necessary to discuss here any other suggestion or claim made in the briefs. Whether or not the money evidenced by the certificates belonged at the death of deceased to the estate rather than to appellants appears to be immaterial here. The bank has in fact paid the money to appellants, and the executor has acquiesced in such payment as one in effect made from the estate; the ground of his opposition to any distribution of further money to appellants being that they have thus received the $1,000 to which they were entitled under the will.

The decree appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

169 Cal. 77

In re HELLIER'S ESTATE.

In re ROOKER et al. (S. F. 6342.)

(Supreme Court of California. Dec. 29, 1914. Rehearing Denied Jan. 28, 1915.)

1. JUDGMENT (§ 688*)—CONCLUSIVENESS—EXECUTORS AND ADMINISTRATORS.

Under Code Civ. Proc. § 1504, providing that a judgment against an executor on a claim shall only establish the claim as if allowed by the executor, and section 1636, providing that the allowance of a claim may be contested, a judgment against an executor on a claim did not estop the residuary legatee from contesting the claim on settlement of the executor's account; a judgment on a claim against an estate for money being an exception to the rule, under section 1582, that a judgment against an executor in enumerated actions, including actions founded on contract, concludes legatees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. § 688.*]

2. STATUTES (§ 225½*)—CONSTRUCTION—GENERAL AND SPECIAL PROVISIONS.

In construing a statute, a general provision will be controlled by one which is special.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. § 225½.*]

3. TRIAL (§ 330*)—GENERAL VERDICT—INCONSISTENT ISSUES.

A judgment on a general verdict within Code Civ. Proc. § 624, authorizing such verdicts, will not be reversed on the ground that the verdict is uncertain and inconsistent, though the prevailing party has presented inconsistent issues, where such verdict necessarily decides at least one of such issues for such party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777–781½; Dec. Dig. § 330.*]

4. TRIAL (§ 330*)—GENERAL VERDICT—EVIDENCE.

Where several issues are tried and submitted to the jury, a general verdict must stand if the evidence on one issue alone is sufficient to sustain it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777–781½; Dec. Dig. § 330.*]

5. PLEADING (§ 93*)—INCONSISTENT DEFENSES—RIGHT TO PRESENT—CLAIM AGAINST ESTATE.

A legatee, contesting a claim based on a note signed by testator, may present inconsistent defenses and offer evidence in support thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. § 93.*]

6. TRIAL (§ 345*)—GENERAL VERDICT—OBJECTION—WAIVER.

Where, on the trial of a claim against an estate, evidence in support of inconsistent defenses is introduced, and claimant fails to demand that special issues be submitted to the jury, he waives his right to object to the rendition of a general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 816–820; Dec. Dig. § 345.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

A claim presented by A. F. Rooker against the estate of William Hellier, deceased, was contested by Catherine Hellier, and from a judgment declaring the claim invalid and denial of a new trial, claimant appeals. Affirmed.

Roger Johnson and R. P. Henshall, both of San Francisco, for appellant. Lewis F. Byington, of San Francisco, for respondent.

SULLIVAN, C. J. Appeal from judgment of the superior court of the city and county of San Francisco declaring invalid the claim of A. F. Rooker against the estate of William Hellier, deceased.

William Hellier died testate. His daughter, Catherine Hellier, was named in his will as residuary legatee. A. F. Rooker in due time presented to the executor of the will of deceased a claim against his estate for the sum of $5,000, with interest. The claim was based on a promissory note for that amount payable to Rooker and purporting to bear the signatures of G. S. Switzer and William Hellier. The executor rejected the claim. Thereafter Rooker commenced an action in the superior court against the executor to establish the claim. Upon trial before a jury in that action Rooker was awarded a verdict for the full amount of the note, with interest. Judgment upon the verdict was accordingly entered. On appeal by the executor the judgment was affirmed. After issuance of the remittitur Rooker applied to the lower court for an order requiring the executor to pay the judgment. His application was contested by the residuary legatee, Catherine Hellier, who filed written objections to the claim. Her contest raised substantially the same issues as were raised and determined in the action brought by Rooker against the executor to establish his claim. These issues were as follows: (1) That the note in question was not signed by the testator or by any one with his authority; (2) that the note was a forgery; (3) that no consideration was received for the note; (4) that if the note had been executed the testator paid the same before his death. On the trial before a jury Rooker introduced in evidence the judgment roll in the case brought by him against the executor, the judgment rendered by the appellate court in his favor, the remittitur from that court, and an account of the executor approved and settled after the appellate court had affirmed the judgment. Accompanying the account introduced in evidence was a statement of the claims against the estate, in which the executor declared that he "rejected this claim [referring to the Rooker claim] and has contested the same and will contest the same until the final determination thereof, upon the ground that he does not believe it to be a charge against the estate." On behalf of the contestant evidence was presented to the jury tending to prove that the note was never executed by the testator or by his authority. The claimant introduced evidence in rebuttal. The jury returned a general verdict in favor of the contestant. Following the verdict judgment was entered in her favor adjudging the claim invalid, and that the claimant have and recover nothing thereon or upon the prior judgment based on said claim. Thereafter the claimant moved for a new trial, which was denied. From the judgment and order denying the motion for a new trial he appealed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

[1] The appellant takes the position that the judgment recovered by him against the executor establishing the validity of his claim was final and conclusive and bound all parties interested in the estate, including the contestant. This position is untenable. A judgment establishing the validity of a claim has no other or greater effect than the allowance of a claim by an executor or administrator and judge of the superior court. Having the right to attack the validity of any claim approved by an executor or administrator and judge, a legatee under a will of a testator has the same right to attack a claim the validity of which has been established by final judgment.

> "A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, *only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge*," etc. Section 1504, Code Civ. Proc.

Until a claim has been passed upon on settlement of an account or rendition of an exhibit, or in making a decree of sale, whether the claim be one approved by the executor or administrator and the judge, or one established after rejection by a final judgment, it may be contested by the heirs or legatees.

> "All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. * * * Whenever an allowed claim is contested by any heir, or other person entitled to contest it, either the contestant or claimant is entitled to a trial by jury of the issues of fact presented by the contest," etc. Section 1636, Code Civ. Proc.

The claim of Rooker had not been passed upon on settlement of any account or on the rendition of any exhibit or in any decree of sale, and was therefore subject to attack as in the manner provided in section 1636, Code of Civil Procedure. The plain language of these sections, 1504 and 1636, has been repeatedly construed in accordance with the unmistakable intent therein expressed. In Hall v. Cayot, 141 Cal. 13, 74 Pac. 299, this court said:

> "The sole object of an action upon a rejected claim for money is to place it among the allowed claims against the estate. A judgment rendered against an executor or administrator upon any claim for money against the deceased only establishes a claim in the same manner as if it had been allowed by the executor or administrator and the judge, * * * and such a judgment is no more effectual as an estoppel than an allowance of the claim would be, for it can be contested by the heirs on settlement of an account in the same manner as a claim allowed by an executor or administrator and judge can be contested. Code Civ. Proc. § 1636."

To the same effect see Estate of More, 121 Cal. 635, 54 Pac. 148; Haub v. Leggett, 160 Cal. 491, 117 Pac. 556; Estate of Schroeder, 46 Cal. 315; Estate of Wiley, 138 Cal. 301–306, 71 Pac. 441; Estate of Glenn, 74 Cal. 567, 16 Pac. 396; Shivley v. Harris, 5 Cal. App. 513, 90 Pac. 971; Shiels v. Nathan, 12 Cal. App. 605–615, 108 Pac. 34. We must hold, in accordance with the plain letter of the law, and consistently with the decisions in the cases cited, supra, that the contestant, respondent herein, was not bound by the judgment recovered by Rooker against the executor, and that she had the same right to contest his claim as if the same had been allowed by the executor and judge and no judgment had been recovered thereon by the claimant.

[2] Appellant contends, with apparent earnestness, that under section 1582, Code of Civil Procedure, and decisions of this court construing that section, the judgment obtained by Rooker against the executor bound the legatee. That section reads as follows:

> "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

This section has been construed by this court in actions to foreclose mortgages, to quiet title, in ejectment, etc., and the decisions construing the section all hold that in the cases enumerated therein a judgment rendered against an executor or administrator concludes heirs, legatees, and devisees. The principal case upon which appellant relies is McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681. In that case this court held that in an action to foreclose a mortgage executed by an intestate the administrator was the only necessary party defendant; that the judgment against the administrator concluded the heirs of the intestate and that a foreclosure sale under the judgment divested them of their interest in his estate. While section 1582, Code of Civil Procedure, provides that "all actions founded upon contracts" may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, sections 1504 and 1636, Code of Civil Procedure, qualify the effect of a judgment recovered against an executor or administrator in an action to establish the validity of a claim for money. The three sections must be construed together. Sections 1504 and 1636, Code of Civil Procedure, deal with one particular subject only, i. e., "claims for money against an estate." Section 1582 is general in character and applies to a number of subjects, including "all actions founded upon contracts." It is a well-settled rule of statutory construction that a general provision of the law must be controlled by one that is special. Sections 1504 and 1636, Code of Civil Procedure, applicable only to judgments based upon claims "for money against an estate," in so far as they qualify the effect of such judgments, must be held to control the provisions of section 1582 as construed by this court in the cases cited by appellants. In other words, we must hold that by reason of sections 1504 and 1636 of the Code of Civil Procedure a judgment on a claim against an estate for money is an exception to the rule resulting from the provisions of section 1582, Code of Civil Procedure, that a judgment against an executor or administrator in the actions enumerated in that section, including actions "founded upon contract," concludes the legatees, devisees, and heirs of testators and intestates.

[3, 4] It is urged by appellant that the verdict was uncertain and inconsistent, by reason of the inconsistency of the issues claimed by him to have been submitted to the jury, and for that reason he contends that the judgment should be reversed. Undoubtedly, the issue as to the genuineness of the note was inconsistent with the issue that no consideration was received therefor and the issue that if the note had been executed the testator paid the same before his death. But the verdict was general, one which is declared by section 624, Code of Civil Procedure, to be pronounced "generally upon all or any of the issues either in favor of the plaintiff or defendant." The jury by its verdict decided upon at least one of the issues in favor of the contestant. The bill of exceptions does not purport to contain all of the evidence introduced upon the trial. The only evidence in behalf of contestant that does appear in the record relates to the issue involving the genuineness of the note in question. Appellant does not contend that the evidence presented to the jury was insufficient to justify the verdict against him on that issue. On his motion for a new trial he did not rely on the insufficiency of the evidence. The bill of exceptions contains no specifications of particulars wherein he claims that the evidence was insufficient, and in his opening brief he admits that "the sufficiency of the evidence is not before the court." We must therefore conclusively presume that the evidence was sufficient to justify the verdict upon the only issue in support of which the record shows the contestant offered proofs.

[5, 6] The contestant, defending against the note, had the right to set up inconsistent defenses and offer evidence in support thereof. Upon demand of the claimant the court might have submitted special issues to the jury, if evidence in support of inconsistent issues had been introduced. But he made no such demand. He was apparently satisfied to take his chances upon a general verdict. The verdict being against him, he cannot now be heard to complain. Where several issues are tried and submitted to the jury, the general verdict must stand, if the evidence upon one issue alone is sufficient to sustain the verdict. Crosett v. Whelan, 44 Cal. 200; In re Sanderson, 74 Cal. 199, 208, 15 Pac. 753; Verdelli v. Gray's Harbor Commission Co., 115 Cal. 517, 525, 47 Pac. 364, 778.

A number of other points are urged by appellant in support of his appeal, but they do not warrant a reversal, and we do not consider them of sufficient importance to require discussion here.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

169 Cal. 83

BORGES v. DUNHAM. (S. F. 7132.)

(Supreme Court of California. Dec. 29, 1914.)

1. Appeal and Error (§ 544*) — Record — Bill of Exceptions.

An appeal, taken under the old method from an order appointing a receiver to collect the rents of the property in controversy, in a suit to set aside a deed conveying the same, is ineffectual for purpose of review, where the record contains no bill of exceptions showing what papers were used or evidence introduced on motion for a receiver.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

2. Appeal and Error (§ 634*)—Record—Bill of Exceptions.

Though, on appeal from an order appointing a receiver, taken under Code Civ. Proc. §§ 953a-953c, providing for the preparation of papers on appeal, jurisdiction of the court on appeal is acquired by the filing of notice of appeal in the trial court, yet, where a mere inspection of the record shows that appellant is not entitled to any relief, the court, in response to the motion to dismiss, will affirm the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829; Dec. Dig. § 634.*]

In Bank. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Joseph F. Borges against Ida J. Dunham, sometimes known as Ida J. Borges. From an order appointing a receiver, defendant appeals. Affirmed.

Harold Ide Cruzan and E. L. Webber, both of San Francisco, for appellant. Clarence N. Riggins, of Napa, for respondent.

SULLIVAN, C. J. Motion to dismiss appeal from order appointing receiver.

Plaintiff brought an action in the superior court of Napa county to cancel a deed which he had executed and delivered to the defendant and for an accounting of the rents and profits derived from the land described in the deed. Defendant answered, denying specifically the material allegations of the complaint, and with her answer filed a cross-complaint, in which she sued to quiet her title to the land in controversy. After issue joined, plaintiff, pursuant to notice given to the defendant, moved the trial court for an order appointing a receiver to receive the rents, issues, and profits of the real property involved in the action. The motion was noticed for the day set for the trial, and, as stated in the notice of motion, was based "upon all the papers, files, records, and proceedings in said action, and upon all the evidence that may be received at said trial, and upon further evidence to be introduced in support of the motion." At the trial, and after some testimony had been taken, the court granted plaintiff's motion and appointed a receiver. From the order appointing the receiver, defendant appealed. Plaintiff now moves to dismiss the appeal upon the ground that the appellant has failed to present a record upon which the order appealed from can be reviewed.

The transcript on appeal contains no bill of exceptions. It contains a copy of the following papers and records: The pleadings; notice of motion for appointment of receiver; minutes reciting that the trial of the action was commenced, that a witness was sworn and testified, and that plaintiff's motion for the appointment of a receiver was granted; the order appointing the receiver, his bond and oath; notice of appeal and undertaking thereon. Appended to the transcript is a stipulation signed by counsel for respondent (reserving all objections to the record), wherein he agrees that the transcript contains a full, true, and correct copy of all the papers therein set forth now on file in the office of the county clerk of Napa county, and that the minutes therein contained are full, true, and correct copies thereof. There is also included in the transcript a certificate signed by the clerk, in which he certifies the correctness of the copies of the papers and minutes contained in the transcript.

[1, 2] Not only is there no bill of exceptions, but there is nothing in the record indicating that any of the papers, copies of which are contained in the transcript, were used on the hearing of the motion, nor is there a statement of any testimony given in support of the motion or at the trial of the case. If we consider the appeal as taken under the old method, it is ineffectual for the purposes of review, because it contains no bill of exceptions showing what papers were used or what evidence was introduced on the motion. If we consider the appeal as taken under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appeal is abortive, because appellant, after filing notice of appeal, took no further steps under those Code sections to procure a record to be used on appeal. For the reasons stated, it is impossible, with the record before us, to review the order appointing the receiver. As the filing of the notice of appeal in the court below, treating the appeal as taken under the new method, conferred jurisdiction upon this court, and as a mere inspection of the record shows that appellant is entitled to no relief, the proper order for this court to make in response to the motion to dismiss is to affirm the order appointing a receiver. Hibernia Sav. & Loan Soc. v. Doran, 161 Cal. 118, 118 Pac. 526.

It is therefore ordered that the order appealed from be affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

169 Cal. 101

STRAUSS v. CANTY. (Sac. 2124.)

(Supreme Court of California. Jan. 5, 1915.)

1. HUSBAND AND WIFE (§ 267*)—COMMUNITY PROPERTY—CONVEYANCES.

A husband has the right to convey community property for a valuable consideration.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 896, 929–938; Dec. Dig. § 267.*]

2. QUIETING TITLE (§ 44*)—TITLE OF PURCHASER—EXECUTION SALE.

Plaintiff, in an action to quiet title, showing a judgment, the execution with the sheriff's return showing the sale, the affidavit showing due publication of notice of sale and the sheriff's deed in proper form, showed his acquisition of the judgment debtor's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

3. TAXATION (§ 615*) — TAX SALE — NOTICE —APPLICATION OF STATUTE.

Pol. Code, § 3897, as amended, requiring that a copy of the notice of a sale of property for nonpayment of taxes should be mailed to the party to whom the land was last assessed at his last known post office address, applied to sales after the section went into effect, even though publication of notice had been commenced before such mailing was necessary.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. § 615.*]

4. TAXATION (§ 760*)—TAX DEED—RECITAL—STATUTE.

Under Pol. Code, § 3898, requiring the deed of a tax collector to recite the fact necessary to authorize a sale and conveyance, a deed, not reciting the mailing of notice prescribed by section 3897, was not a valid tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509; Dec. Dig. § 760.*]

5. TAXATION (§ 810*)—TAX DEED—ACTION TO ESTABLISH TITLE—BURDEN OF PROOF.

In an action to quiet title, the burden of showing compliance with the statutory requirement of mailing notice, not recited in the collector's deed, was on the defendant claiming thereunder.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605–1608; Dec. Dig. § 810.*]

6. ADVERSE POSSESSION (§ 114*)—SUFFICIENCY OF EVIDENCE—STATUTE.

In an action to quiet title, wherein defendant set up a title by prescription, and the statute of limitations, evidence *held* to justify a finding that the property had not been held and possessed adversely to plaintiff's legal title for five years before the commencement of the action, as required by Code Civ. Proc. § 321.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682, 683, 685, 686; Dec. Dig. § 114.*]

7. ADVERSE POSSESSION (§ 34*)—EXCLUSIVE POSSESSION—PASTURAGE.

While possession may be maintained by using land for pasturage during the grazing season, even though there be no inclosure, the possession must be of an exclusive character.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 136; Dec. Dig. § 34.*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by Max Strauss against D. J. Canty. Judgment for plaintiff, and from the judgment and an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed.

Royle A. Carter, of Fresno, for appellant. Samuel M. Samter, of San Francisco, and Frank Kauke, of Fresno, for respondent.

SLOSS, J. The defendant appeals from a judgment quieting plaintiff's title to a tract of land in Kings county. He also appeals from an order denying his motion for a new trial.

The plaintiff claims as successor in interest of Arney L. Weddle, to whom the land was granted by a United States patent on March 7, 1892. The defendant claims under a tax deed, and also relies upon a title by prescription and the statute of limitations.

[1, 2] The plaintiff showed a good deraignment of title from Weddle. The record contains reference to a deed from Lucinda E. Weddle (wife of Arney L.) to Arna L. Weddle. The deed was intended to convey any possible interest of the wife to the husband. Waiving the question of the effect of the mistake in the grantee's name, there is nothing to show that the wife had any interest, and, so far as the proof goes, Arney L. Weddle was the sole owner of the land. Even if it was community property, he had the right to convey it for a valuable consideration. He did convey it to Frederick in 1907 by a deed reciting such consideration. Thereafter the plaintiff obtained a money judgment against Frederick, had execution levied, and purchased the property at the execution sale. The sheriff's deed was executed to the plaintiff on December 12, 1909. The evidence offered by plaintiff in this behalf consisted of the judgment against Frederick, the execution, with the sheriff's return showing the sale, and the affidavit showing due publication of notice of sale, and the sheriff's deed in proper form. These papers were sufficient to show the acquisition by plaintiff of Frederick's title. Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Hihn v. Peck, 30 Cal. 280; Peterson v. Weissbein, 75 Cal. 174, 16 Pac. 769.

[3, 4] The land was sold to the state for nonpayment of taxes in 1895. The tax collector made his deed to the state in 1900. The property was offered for sale and sold to the defendant on May 5, 1905, and a deed was thereafter executed. At the time of the sale section 3897 of the Political Code had been amended by adding certain requirements regarding the notice of sale by the state of property which had been sold to it for nonpayment of taxes. One of these requirements was that a copy of the notice should be mailed to the party to whom the land was last assessed at his last known post office address. By the terms of section 3898 the deed of the tax collector was required to "recite the fact necessary to authorize such sale and conveyance." This requirement of mailing notice applied to sales had after the amended section went into effect, even

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

though, as here, the publication of notice had been commenced before such mailing was essential. Buck v. Canty, 162 Cal. 226, 121 Pac. 924. Such mailing was one of the facts necessary to authorize the tax collector to make the sale. Smith v. Furlong, 160 Cal. 522, 117 Pac. 527. The deed in this case did not recite the mailing of notice. It was not, therefore, the deed provided for by section 3898. Canty v. Staley, 162 Cal. 379, 123 Pac. 252.

[5] But, if compliance with the requirement of mailing could be shown, although not recited, the burden of proof is on the party claiming under the deed (Buck v. Canty, 162 Cal. 226, 121 Pac. 924; Krotzer v. Douglas, 163 Cal. 49, 124 Pac. 722; Davis v. Peck, 165 Cal. 353, 132 Pac. 438), and, as this burden was not sustained by the defendant, the court rightly ruled that he had not acquired title by virtue of the tax proceedings.

[6, 7] The questions arising on the pleas of the statute of limitations and of prescriptive title may be considered together. Plaintiff having shown title in himself, he was presumed to have been in possession within the time required by law, and the presumption could be overcome only by proof that the property had been held and possessed adversely to the legal title for five years, before the commencement of the action. Code Civ. Proc. § 321; Nathan v. Dierssen, 146 Cal. 62, 79 Pac. 739. The plea of the statute of limitations would therefore not be sustained unless the defendant showed adverse possession for the same period necessary to the acquisition of a prescriptive title. The court found against defendant's allegations in this regard. We think this finding is amply supported by the evidence. The defendant testified that in May, 1905, he went on the land, measured it off, and placed stakes at the corners. He was on the land at that time during parts of two days. In the fall of 1905 he rented it for the purpose of feeding sheep. He rented it similarly during the succeeding years up to 1912, receiving a total rental of about $50 for five years. He saw sheep feeding on the land several times. His testimony was somewhat qualified by the later statement that he gave no written lease, but merely charged and collected money "for the feed of the sheep on the land." The first transaction of this kind was between September and November, 1905. The action was commenced in August, 1910.

The court was entirely justified in concluding that the defendant had not proven an exclusive and continuous possession sufficient to satisfy the statute. While possession may be maintained by using the land for pasture during the grazing season (Webber v. Clarke, 74 Cal. 11, 15 Pac. 431), even though there be no inclosure (Bullock v. Rouse, 81 Cal. 595, 22 Pac. 919), the possession must be of an exclusive character. The proof here was silent on the question of occupancy by others and was entirely consistent with the view that the possession of those holding under Canty was casual and intermittent. Besides, this possession, such as it was, began in the fall of 1905, less than five years before the commencement of the action. It was not unreasonable for the court to conclude that the formal act of marking corners in May, 1905, if it was a taking of possession, was not connected with the later renting of the feeding rights so as to make the possession continuous between May, 1905, and the autumn of the same year.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

169 Cal. 113

COOK v. LOS ANGELES RY. CORPORATION. (L. A. 3431.)

(Supreme Court of California. Jan. 5, 1915.)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTION ON DAMAGES.

In an action for personal injuries in a collision between plaintiff's automobile and a street car, where it was undisputed that plaintiff suffered some injury, so that the verdict for defendant could have been reached only upon a finding of plaintiff's own negligence or defendant's want of negligence, any error in an instruction that, under Code Civ. Proc. § 1881, the physicians attending plaintiff could not testify without his consent, and that from his failure to call them or the nurse as witnesses to the extent of his injury the law presumed that their testimony would have been against him, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

2. STREET RAILROADS (§ 81*)—ACCIDENT AT CROSSING—SPEED OF STREET CAR.

There is no arbitrary or set limit of speed for street cars, but negligence as to speed depends upon whether the car was being run at a speed beyond that which would be employed by one exercising ordinary care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172–177; Dec. Dig. § 81.*]

3. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

Where the complaint charged that defendant's street car was being negligently run at 30 miles an hour, and the court correctly charged as to defendant's negligence in that respect, an instruction that there was no allegation or proof as to any ordinance limiting the rate of speed at the place of collision, if outside the issues, was not prejudicial, where it was not claimed that there was any limit fixed by ordinance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by C. A. Cook against the Los Angeles Railway Corporation. Judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

E. B. Drake, of Los Angeles, for appellant. Gibson, Dunn & Crutcher and Norman Sterry, all of Los Angeles, for respondent.

SLOSS, J. The plaintiff appeals from an order denying his motion for a new trial. The action was brought to recover damages for personal injuries sustained by plaintiff as the result of a collision between an automobile driven by him and an electric street car of the defendant. There was a jury trial and a verdict and judgment in favor of the defendant.

The testimony on the issues of defendant's negligence and plaintiff's contributory negligence was sharply conflicting, and no question is made of the sufficiency of the evidence to support the verdict. While it was shown without contradiction that the plaintiff had suffered some physical injuries, there was a good deal of controversy over the extent of these injuries, the defendant claiming that plaintiff was greatly exaggerating their severity. After the accident, the plaintiff was taken to a hospital. There he was attended by two physicians. He also had the care of a nurse. None of these three persons was produced as a witness.

[1] The court gave an instruction in which, after stating that, by reason of the privilege defined in section 1881 of the Code of Civil Procedure, the physicians who had attended plaintiff could not testify without his consent, it charged that if plaintiff had failed to call them as witnesses, and showed no reason for such failure, the law presumed that their testimony would have been against him. A like presumption was declared to arise from the unexplained failure to call the nurse. These instructions are assigned as error. So far, at least, as the physicians are concerned, the instruction given is in conflict with the views expressed in Thomas v. Gates, 126 Cal. 1, 58 Pac. 315, where it is said, in effect, that the raising of a presumption against a party for the failure to introduce or to permit the introduction of testimony which he had the right to exclude as privileged, would go far toward destroying the value of the privilege. But of this instruction, as well as the one relating to the nurse, it is sufficient to say that, if they were erroneous, they were not prejudicial. They dealt with witnesses who could have testified on no subject other than that of the extent of the plaintiff's injuries. As has been said, the fact that he had suffered some injuries was undisputed. The verdict in favor of defendant could therefore have been reached only upon a finding that, by reason of plaintiff's own negligence or the defendant's want of negligence, there was no liability for the injuries, whatever their extent. In this state of the record, errors in instructions bearing solely on the amount of damage could not have influenced the verdict, and present no ground for reversal. Wilhelm v. Donegan, 143 Cal. 50, 76 Pac. 713.

[2, 3] Only one other point is made. It is claimed that the court erred in instructing the jury that there was no allegation or evidence of any ordinance limiting the rate of speed at which defendant might propel its cars at the place where the collision occurred, "and defendant had a right to drive or propel its said car at any rate which it saw fit which was not inconsistent with the exercise of ordinary care." The complaint charged that the car was being negligently driven at a rate of speed of about 30 miles an hour. Whether the speed was in excess of a rate which, under all the circumstances, would be compatible with the exercise of due care, was therefore an issue in the case. The instruction informed the jury that there was no arbitrary or set limit of speed, but that they must determine whether the car was being run at a rate beyond that which would be employed by one exercising ordinary care. This was a correct statement of the obligation of the defendant so far as the speed of the car was concerned. The plaintiff was not prejudiced by the charge that there was no limit fixed by ordinance, since it is not pretended that there was any such limit. If this part of the instruction was outside of the issues, it could not have misled the jury in any way. See George v. L. A. Ry. Co., 126 Cal. 357, 361, 58 Pac. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184. The case relied on by appellant in this behalf (Cooper v. L. A. Term. Ry. Co., 137 Cal. 229, 70 Pac. 11), does not support his contention. There a requested instruction had been refused, and the action of the trial court was sustained on the ground that the instruction was directed to facts not in issue. It does not follow, of course, that the same ground would have required a reversal, if the instruction had been given. Furthermore, the instruction in the Cooper Case was condemned on the additional ground, not applicable to the charge given here, that it would have taken from the consideration of the jury the question whether the rate of speed was in fact reckless.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

169 Cal. 106

CARDOZA v. PILLSBURY et al. (S. F. 7262.)

(Supreme Court of California. Jan. 5, 1915.)

MASTER AND SERVANT (§ 250¾, New, vol. 16 Key-No. Series) — COMPENSATION — JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—JUDICIAL REVIEW.

An application for review of proceedings of the Industrial Accident Commission on the grounds that the findings of the Commission are not sustained by evidence, and that the applicant has new evidence, does not state grounds for review within Workmen's Compensation Act (St. 1913, p. 317) § 84, but states grounds on which the Commission, under section 82, may grant a rehearing, and the application will be denied.

In Bank. Application for a writ of review by Joseph Cardoza against A. J. Pillsbury and others, constituting the Industrial Accident Commission, for a review of proceedings of the Commission. Denied.

Joseph Rafael, of San Francisco, for petitioner.

THE CHIEF JUSTICE. The application for a review by this court of the proceedings of the Industrial Accident Commission of the state of California states no ground upon which this court is authorized to entertain the same. The grounds stated—namely, that the findings of the Commission are not sustained by the evidence, and that the applicant has discovered new evidence material to him—are grounds upon which the Commission itself may grant a rehearing (section 82, Workmen's Compensation Act), but the courts are restricted to the grounds stated in section 84 of said act.

The application for a writ is denied for these reasons.

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169 Cal. 116

In re SILVA'S ESTATE. (S. F. 6772.)

(Supreme Court of California. Jan. 6, 1915.)

1. WILLS (§ 449*)—CONSTRUCTION—INTESTACY.
Under Civ. Code, § 1326, a will is to be so construed as to prevent intestacy, if reasonably possible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

2. WILLS (§ 94*) — CONSTRUCTION — WHAT CONSTITUTES.
A document, duly signed by the testator, reciting that he left all his "business" to his wife "so that she got to pai" all "my deads" and obligations due, is a "will," notwithstanding the English was incorrect, it appearing that the document was executed by the testator at a time he was sick and despaired of recovery.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 226, 236; Dec. Dig. § 94.*]

3. WILLS (§§ 119, 120*)—EXECUTION—SUFFICIENCY.
A testator while ill, told one of the witnesses that he desired to make a will, and the witness drew it and presented it to the testator for his signature. The testator signed and thereafter the witnesses affixed their signatures, although they were not specially requested to do so. *Held*, that as it was the obvious intention of the testator to execute his will, the execution was sufficient; it not being necessary that he should expressly declare the document to be his will, or expressly request the witnesses to sign it as such.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 305–317; Dec. Dig. §§ 119, 120.*]

4. WILLS (§ 303*) — ESTABLISHMENT — EVIDENCE.
A will may be established although the witnesses to its execution gave conflicting testimony.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 711–723; Dec. Dig. § 303.*]

5. WILLS (§ 177*)—REVOCATION—WHAT CONSTITUTES.
Under Civ. Code, § 1292, declaring that a will can be revoked only by a writing of the testator executed with the same formalities as the will declaring such revocation, or by being burnt, torn, canceled, obliterated or otherwise destroyed with the intention of revocation, the testator's direction to his wife to destroy his will, and her destruction of the envelope which he was informed contained the will, does not amount to a revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 443, 444; Dec. Dig. § 177.*]

6. WILLS (§ 177*)—REVOCATION.
Where the beneficiary under a will fraudulently informed the testator that she had destroyed it according to his directions, probate of the document which was not destroyed cannot be denied on the ground that it was revoked, but relief must be sought in a court of equity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 443, 444; Dec. Dig. § 177.*]

7. WILLS (§ 123*)—EXECUTION.
Where as part of one transaction the testator signed his will and the subscribing witnesses signed, it was immaterial which signed first.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 321–331; Dec. Dig. § 123.*]

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Application by Antonio Da Rosa Brazil and others for revocation of the probate of the will of Frank V. Silva, deceased. There was an order denying the application, and from the refusal of a new trial petitioners appeal. Affirmed.

Everts & Ewing, of Fresno (H. P. Brown, of Fresno, of counsel), for appellants. James Gallagher, M. B. Harris, and E. M. Harris, all of Fresno, for respondent.

SHAW, J. The decedent, Frank V. Silva, died on March 22, 1912. On April 22, 1912, an order was made admitting a certain document to probate as his last will. Thereafter, within the time here allowed by law, the appellants filed a petition for the revocation of the probate of the will. After trial the court denied the revocation, the appellants moved for a new trial, and the court thereupon denied the motion. From this order the petitioners appeal. The decedent left no issue. The appellants are his brothers and sisters.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] The first point made in support of the appeal is that the document admitted to probate is not testamentary in character. The following is a copy of the paper:

> Fresno, July 2th, 1906.
>
> I leave all the Busines I got To my wife Luiza Rosa Silva so that she got to pai all my deads and wages of the working men and all the Bills that ivoe to be in Count ect.
>
> Frank V. Silva.
>
> Antone J. Breves
> Joe M. Silva

The appellants claim that the instrument does not describe any property, nor in any way refer to property so as to constitute a disposition thereof. We think, however, that this contention cannot be sustained. A will is always to be interpreted so as to prevent intestacy if such interpretation is reasonably possible. Civ. Code, § 1326. The courts are very liberal in construing words in a will written by one unfamiliar with the English language or unused to technical terms. Mitchell v. Donohue, 100 Cal. 208, 34 Pac. 614, 38 Am. St. Rep. 279. At the time this document was executed the decedent was very sick, and evidently believed that he would not live long. He announced his desire to make a will and of those present only Antone J. Breves was able to write English. All of them were Portuguese, unfamiliar with English. The decedent explained his intention to Breves, who thereupon prepared the above document. The use of the word "leave" is sufficient evidence of testamentary intent. The argument of the appellants is that the word "busines" cannot by any reasonable construction, be held to refer to property. The context shows that it was used to describe whatever property the decedent at that time possessed. Taking the document as a whole, it sufficiently indicates the purpose of the testator to devise and bequeath to his wife all the property that he possessed and to require her to pay all his debts. Antone J. Breves testified that the word "deads" was his mode of spelling the word "debts," that the word written "ivoe" was his method of writing the expression, "I owe" and that by the words "in Count" he meant "account." Whether these explanations were proper and competent or not we need not consider, for without them, in the light of the attending circumstances, the will should be given effect as if the words so used by him were properly written as he states they were intended to be.

[3, 4] The appellants next claim that there is no sufficient evidence of the execution of the document as a will. There was testimony to the effect that the decedent stated that he wished to make a will, and that he asked Antone J. Breves to write it, that Breves then wrote out the paper and handed it to the decedent, that decedent signed it and passed it back to Breves, who signed it as a witness, and that it was then handed to Joe M. Silva, who also signed as a witness. It does not appear that the testator in words asked that these persons sign as witnesses, or declared to them that the document was his will, but from the whole transaction as shown by the testimony it is very clear that all of them understood that he was promulgating the document as his will, that he desired these persons to sign the same as witnesses, and that they were signing in compliance with his desire so manifested by his manner and actions.

It is not necessary that the testator should have spoken words declaring the document to be his will, or that he should expressly request the witnesses to sign it as such. It is sufficient if this declaration and request are unmistakably indicated to the persons signing as witnesses by the testator's conduct and actions, although there is no declaration in words to that effect. The testimony leaves no doubt that the testator signed the document as his will, that he gave all persons present to understand that it was his will, and that he desired the subscribing witnesses to attest the same for the purpose of constituting it a will. Nothing more on this point is required by the statute. There is, it is true, much confusion and conflict in the testimony of the several witnesses with regard to the occurrences at the time of the execution of the will. This is not surprising, and indeed it was to be expected, since the persons present were called upon to testify in regard to the facts six years after they occurred. The law does not require that all the witnesses shall testify without conflict concerning the execution of the will, nor that at the time of the probate both of the subscribing witnesses shall testify to all the facts necessary to constitute a statutory execution thereof. There was sufficient evidence given to support the conclusion of the court that the facts occurred as above stated. There is therefore suffiicent evidence to support the finding that the will was duly executed.

[5] The appellants further claim that the court erred in refusing to admit evidence that the will was subsequently revoked. The evidence was properly rejected. The allegations of the appellants in their petition for revocation of probate were insufficient to justify the admission of evidence tending to show revocation. The Code provides that no written will can be revoked except, first, by a writing of the testator declaring such revocation, executed with the same formalities as a will, or, second, "by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction." Civ. Code, § 1292. The allegations of the petition for revocation were to the effect that the wife of the decedent, respondent herein, some time after the execution of this will, was requested by the decedent to destroy the same; that thereupon in his presence she did destroy an

envelope, declaring to the decedent at the time that the will was inclosed therein; that the decedent then believed that the said will was in the envelope and was then destroyed by burning the same; that from that time forward until his death he continued to believe that the said will had been destroyed; that in fact some other paper was inclosed in said envelope; that the will aforesaid was not destroyed or burned; and that all this was done by the said respondent for the purpose of deceiving the decedent and securing to herself the property left to her by said document. These acts did not, under the statutory provisions aforesaid, constitute a revocation of the will. In order to constitute such revocation, there must be an actual burning, tearing, canceling, obliteration, or destruction, with the intention to revoke the document as a will. The mere intent, unperformed, to destroy or burn the will is not sufficient. There must be a joint union of act and intent in order to accomplish the revocation. Estate of Olmsted, 122 Cal. 229, 54 Pac. 745; 1 Underhill on Wills, §§ 223–226; Boyd v. Cook, 3 Leigh (Va.) 32; Kent v. Mahaffey, 10 Ohio St. 204; Hise v. Fincher, 32 N. C. 139, 51 Am. Dec. 383; Clingan v. Mitchelltree, 31 Pa. 25; Mundy v. Mundy, 15 N. J. Eq. 290. The decisions in other states having no statute similar to section 1292 of our Civil Code are inapplicable here. In re Comassi, 107 Cal. 5, 40 Pac. 15, 28 L. R. A. 414. Inasmuch as there was no allegation to show revocation, it was not error to refuse evidence in support thereof.

[6] In a proceeding under the statute for the revocation of the probate of a will, the court cannot give relief for a fraudulent prevention of a revocation of the will. The statute does not provide for the presentation of such an issue as ground for revoking the admission to probate. If relief can be given at all for such a wrong, it must be sought by suit in equity to declare the wrongdoer a trustee for the heirs with respect to the property received by such wrongdoer in virtue of the will. 1 Underhill on Wills, § 153.

The last point urged by the appellants is that the court erred in giving the following instruction:

> "The court instructs you that it is not necessary that a testator should in words say that an instrument is his will or request the subscribing witnesses thereto to witness the same as such. Such statement and request on the part of the testator may be indicated by his manner, conduct or demeanor."

We see no error in this instruction. It is in accord with the law on the subject as we understand and have stated it to be.

[7] It was not error for the court to instruct the jury that it was immaterial whether the testator signed his name before or after the witnesses signed their names to the document executed as a will, if it appeared that all the parties signed it at the same time and as a part of the same transaction. The statute does not make the order of signing material. We find no other objections worthy of consideration.

The order denying new trial is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

169 Cal. 71

PEOPLE v. RONGO. (Cr. 1861.)

(Supreme Court of California. Dec. 28, 1914.)

1. Criminal Law (§ 576*)—Trial—Time—Continuance—Consent—Presumption.

Where, at the time accused was arraigned, he did not object to the setting of his case for trial at a date more than 60 days after the filing of the information, his consent thereto would be presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1297–1304; Dec. Dig. § 576.*]

2. Criminal Law (§ 581*)—Trial—Continuance.

Where a motion to dismiss because accused had not been brought to trial within 60 days after the filing of the information was denied because the case had been set for trial by his implied consent, a continuance, without further objection on his part, because of the illness of the district attorney and the state of the calendar, was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1308; Dec. Dig. § 581.*]

3. Homicide (§ 254*)—Evidence.

Evidence *held* to sustain a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

4. Homicide (§ 166*)—Evidence—Motive.

Where the people asserted the motive of a homicide to have been robbery, evidence that decedent, about 1½ or 2 weeks prior to the homicide, had on his person $180, and that another witness cashed a check for decedent a few days prior to the homicide, at which time he had a purse containing probably $200, was not objectionable for remoteness.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320–331; Dec. Dig. § 166.*]

5. Homicide (§ 233*)—Motive—Evidence—Knowledge of Accused.

To establish robbery as a motive for a homicide, it is not necessary to show knowledge on accused's part that decedent had money on his person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.*]

6. Homicide (§ 166*)—Evidence—Motive.

Where robbery was claimed to have been the motive of a homicide, the fact that proof of decedent's possession of money on his person was of a date somewhat remote from the time of the killing affected the probative value, but not the admissibility of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320–331; Dec. Dig. § 166.*]

7. Homicide (§ 233*)—Motive—Robbery—Evidence.

That decedent was in the habit of carrying money, and that he had about $200 on his person a few days before the homicide and had none when his body was discovered, was strong evidence of motive for the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 481; Dec. Dig. § 233.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Yolo County; Eugene P. McDaniel, Judge.

John Rongo was convicted of second degree murder, and he appeals. Affirmed.

Julian & Gibbs, of Winters, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and A. G. Bailey, Dist. Atty., of Woodland, for the People.

HENSHAW, J. Defendant was convicted of murder in the second degree and was sentenced to imprisonment for the term of 25 years. His motion for a new trial was denied, and he took his appeal from the judgment and from the order denying his motion for a new trial to the Court of Appeals. Owing to a disagreement of the justices of that court, the case was certified to this court.

[1] Upon appeal the first proposition presented is that the court erred in refusing to grant defendant's motion to dismiss the criminal charge on the ground that he had not been brought to trial within 60 days after the filing of the information. The information was filed on October 12, 1912. He was arraigned October 14th, and the time to plead was continued to October 16, 1912, on which day he pleaded not guilty, and the case was set for trial December 17, 1912. So far as the record shows, there was no objection made by defendant, on October 16th, to setting the case for trial on December 17th, although that date was beyond the 60-day limit. Consent will therefore be presumed. People v. Douglass, 100 Cal. 1, 34 Pac. 490; People v. Peter, 20 Cal. App. 151, 128 Pac. 415.

[2] Defendant moved for a dismissal on the above grounds, on December 16th. It appeared, at the hearing of the motion, that the district attorney was sick and unable to appear in court. Evidence was taken as to his physical condition which showed this to be the fact and that some days would elapse before he could safely undertake the trial of the case. A further continuance became necessary because the district attorney had no deputy and no attorney was available to take up the prosecution who had any knowledge of the facts. The court called attention to the fact that other cases were set for trial that would occupy all of December and would run into January. From the condition of the calendar and engagements of the court the judge stated that January 20, 1913, was "the earliest date this case could be continued to." The case was finally set for January 21st. No motion was made to dismiss after December 16th, and defendant went to trial on January 21st without further objection. The order was not error.

[3] It is next contended that the evidence is insufficient to justify the verdict. The homicide occurred in the evening of May 20, 1910. Upon that day the defendant, an Italian, and two of his countrymen—the deceased and a third man—met in Sacramento. They spent the better part of the day together, visiting saloons and drinking therein. The deceased paid for some of these drinks. In the afternoon they took the train to the town of Yolo, where they arrived at about half past 7 in the evening. Defendant carried a valise containing personal effects, which he left in the baggageroom of the railway station. The three men then left town, walking out on a public highway. The next morning the body of the deceased was found lying in the grass alongside of the traveled part of the highway. The ground gave evidence of a severe struggle and bore the marks of three distinct sets of footprints. Bruises and abrasions and incised wounds—the latter as though made with a knife—were found upon the head and body of the deceased, and in addition there was a punctured wound in the front of the body below the short ribs, which ranged upward and backward, passing entirely through the body, through the right lobe of the liver and the lower edge of the left lung. The hemorrhage resulting from this wound was the immediate cause of death. It was inflicted, according to the admissions of defendant, by a three-eighths inch iron bar or rod sharpened to a point which the third member of the party drove through the body of the deceased. Some small articles, a comb, and pocket pencil, were found lying in the grass and "ten cents, fifty cents, something like that," in money. No other money was found on the person of the deceased. The two men who were in company with deceased disappeared; this defendant abandoning his valise at the Yolo railway station. Two years afterward he was discovered, arrested, and put on trial for the murder. After his arrest he made a statement in substance as follows: He first met the third man, who he declares committed the murder, in Sacramento about a month before the day of the homicide. He did not know his name. On the morning of the homicide, the two met the deceased, and again in the afternoon. They drank together. Defendant did not notice any money in the possession of the deceased, saving one dollar, which deceased put upon a saloon counter to pay for a drink. The three together went to Yolo county, seeking work upon a ranch. They left the town in the evening for this purpose. The deceased and the third man quarreled on the train and again on the road. He did not know the cause of the quarrel, other than it was "some lady quarrel." They called each other vile names. They began to fight, and he saw the third man jab the deceased with the iron bar. Fearful of being implicated in the crime, he fled. Being ignorant of the English language and of American laws, he was in terror of arrest, and so abandoned his personal effects at the railway station, and walked all night, eventually going to Oregon.

A murder had been committed. Admittedly the defendant was present at the scene of the homicide. The condition of the ground bore evidence of a protracted struggle (the deceased was a powerful man). The wild oats and grasses were trampled down for a radius of 60 yards. Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict.

[4] The single proposition upon which the justices of the District Court of Appeal differed was over the admissibility of certain evidence offered and received by the court in an effort to establish a motive for the crime, which motive the prosecution asserted to be robbery. In its effort so to do, the prosecution offered, and the court received, the testimony of two witnesses, Nardini and Martinelli. Martinelli testified that he saw deceased about 1½ or 2 weeks before the homicide, and that he had about $180 with him. Nardini testified that he cashed a check for the deceased a few days previous to the homicide, and at that time the deceased had a purse under his vest which contained probably $200. Appellant's objection to the introduction of this evidence was overruled, and his motion to strike it out was denied. It is conceded, of course, that proof of motive, while never indispensible, is always permissible and often valuable. People v. Durrant, 116 Cal. 179, 48 Pac. 75; People v. Owens, 132 Cal. 469, 64 Pac. 770. The objection to this evidence, it is said, consists in this: That the time when it was shown that the deceased had money upon his person was too remote to give it any probative value in the case, and that it is not shown that the defendant knew that the deceased had this money. So the question is asked:

> "But how can the possession of money be evidence of a motive for robbery when the assailant has no knowledge of the fact?"

[5] But to this there is a twofold answer: First, the jury was not bound by the declaration of the defendant that he saw in the possession of the deceased only a silver dollar, and it would be a perfectly legitimate inference for the jury to draw that if the deceased did have any considerable sum of money upon the day of the homicide he may have exhibited it in one or another of the saloons or the railway ticket office; and the second answer is that to establish robbery as a motive it is not at all necessary that knowledge that the deceased had money should be brought home to the assailant. It is not required that thugs and highwaymen shall know that their victims' purses are well lined or lined at all. They commit their crimes for what the victims may chance to have upon their persons.

[6] Again, it is said that the last date upon which the deceased is shown to have money in his possession was too remote to give the evidence probative value, and therefore to render it admissible; it being argued that he might have spent all of that money between the date when last it was seen upon his person, and the date of the homicide. This is quite true. But the argument goes to the probative weight of the evidence, and not to its admissibility. Marable v. State, 89 Ga. 425, 15 S. E. 453; State v. Rice, 7 Idaho, 762, 66 Pac. 89; State v. Bailey, 79 Conn. 589, 65 Atl. 954; State v. Shelton (Mo. Sup.) 122 S. W. 736; Shumway v. State, 82 Neb. 152, 117 N. W. 407; Thurman v. Commonwealth, 107 Va. 912, 60 S. E. 99; Spates v. State, 62 Tex. Cr. R. 532, 138 S. W. 394.

[7] The proof of the fact that the deceased was in the habit of carrying money upon his person; that he had about $200 upon his person a few days before the homicide; that he had none when the body was discovered—affords strong evidence of motive, and there was no error in admitting the evidence.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.; ANGELLOTTI, J.

SLOSS, J. I concur in the judgment.

169 Cal. 86

REHFUSS v. REHFUSS. (S. F. 6171.)

(Supreme Court of California. Jan. 2, 1915.)

1. Divorce (§ 165*) — Interlocutory Judgment—"Excusable Neglect."

Where a husband, who was seeking divorce, represented to his wife that if she contested his charges and made countercharges their minor child would be given into the custody of a public institution and she could never see it, and her attorney corroborated him, her failure to oppose the suit was "excusable neglect," within Code Civ. Proc. § 473, authorizing the vacation of judgments taken against a party through his excusable neglect.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533–542, 546, 548; Dec. Dig. § 165.*

For other definitions, see Words and Phrases, First and Second Series, Excusable Neglect.]

2. Divorce (§ 165*)—Judgments—Vacation.

Where a wife, in consideration of an agreement with her husband as to the custody of a minor child and to the disposition of his property, agreed not to oppose his suit for divorce, an interlocutory judgment of divorce should be set aside, being based on collusive agreement.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533–542, 546, 548; Dec. Dig. § 165.*]

3. Divorce (§ 151*) — Judgment — Relief from—"New Trial."

Where the defendant in a divorce suit filed an answer admitting the allegations of the complaint, her remedy to set aside an interlocutory judgment for plaintiff is under Code Civ. Proc. § 473, authorizing relief from judgments obtained through excusable neglect, and not by a motion for new trial, for that motion is to obtain a review of issues already tried.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 509–513; Dec. Dig. § 151.*

For other definitions, see Words and Phrases, First and Second Series, New Trial.]

4. Divorce (§ 160*)—Actions—Judgment.

Though the defendant in a divorce action defaults, judgment cannot be granted until the facts upon which the relief is sought are established.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 521; Dec. Dig. § 160.*]

5. Divorce (§ 161*) — Actions — Judgment—Setting Aside.

A default judgment of divorce will be set aside on slight showing, for the state is also interested, being concerned with the preservation of the marriage relation.

[Ed. Note.—For other cases, see Divorce Cent. Dig. §§ 522–526; Dec. Dig. § 161.*]

6. Divorce (§ 11*)— Proceedings — Parties Interested.

The state is interested in divorce proceedings, being concerned with the preservation of the marriage relation.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 13, 472; Dec. Dig. § 11.*]

7. Divorce (§ 165*)—Judgment—Vacation.

Where the defendant wife, who filed an answer and cross-bill, withdrew her answer and filed another admitting the allegations of the complaint, the court, on motion to set aside an interlocutory judgment, may consider that the cross-bill was not denied, although the fact that the cause was not at issue is not usually ground for the vacation of a judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533–542, 546, 548; Dec. Dig. § 165.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Herman E. Rehfuss against Elizabeth A. Rehfuss. From an order setting aside an interlocutory judgment of divorce, plaintiff appeals. Affirmed.

Austin Lewis, of San Francisco, and R. M. Royce, of Oakland, for appellant. Stafford & Stafford, of San Francisco, for respondent.

SULLIVAN, C. J. Plaintiff brought an action against defendant for divorce, on the ground of extreme cruelty. Defendant answered, denying specifically the acts of cruelty alleged against her. With her answer she filed a cross-complaint charging plaintiff with extreme cruelty and praying for a divorce from him. No answer to the cross-complaint was ever filed. After filing her original answer and cross-complaint, the defendant filed an amended answer in which she admitted all of the averments of the plaintiff's complaint. Thereafter the case was tried. At the trial the defendant appeared in person. Her attorney was not present, and she was not called upon to testify. Plaintiff's attorney testified to the fact of plaintiff's residence for the requisite length of time in California and in the county wherein the action was brought. Plaintiff, the only other witness, testified that on one occasion defendant fired a shot at him from a pistol, with intent to kill. He testified to no other act of cruelty. The testimony as to the shooting was not corroborated. In her original answer, referring to the shooting, the defendant alleged that on a certain occasion she "discharged a pistol near plaintiff, but not at him or with intent to kill or injure him, but merely to frighten him, shortly after he had cursed and sworn at defendant and called her vile and low names, and after plaintiff had badly beaten, hurt, and badly injured defendant." At the trial no reference was made to defendant's cross-complaint on file. On the testimony of plaintiff and his attorney the court granted an interlocutory judgment, adjudging that he was entitled to a divorce and awarding him the custody of the minor child of the parties, aged two years. After judgment the defendant employed other attorneys to represent her in place of her original attorney. Through her substituted attorneys she moved the court, within four months after the trial, to set aside the judgment taken against her, upon the following grounds: (1) That the judgment was taken against her by reason of her mistake, inadvertence, surprise, and excusable neglect; (2) that the cause was not at issue at the time of trial. In her affidavit used upon the motion, defendant alleged that the denials and averments contained in her answer and cross-complaint are true, and averred that "she reiterates the averments and statements contained in her answer and said cross-complaint." She further deposed that it was her intention to contest plaintiff's application for a divorce; that in pursuance of her intention she filed her answer and cross-complaint; that on June 19, 1911, her attorney then representing her advised her to sign an amended answer admitting the truth of all of the allegations of plaintiff's complaint, although the same were untrue; that she "was solely induced to sign said amended complaint (answer) on the advice of her said attorney, who told her that if she contested said action the court would award the custody of the only child of plaintiff and said defendant, namely, Herman E. Rehfuss, Jr., to some public institution, and that the care and custody of said child would be taken from both plaintiff and defendant; * * * that she was deeply attached to said child and interested in its welfare, and moved solely by love for said child she consented to sign said so-called amended answer." In her affidavit she stated that her attorney advised her that if the child were awarded to the plaintiff she would be permitted to see the child and "have him more or less in her care," and if the child were placed in some public institution she would not have such right or privilege; that she appeared at the trial at the request of plaintiff, who told her that "the judge might want to see her and ask some questions." She also stated in her affidavit that "her husband had told her that if she contested said action her child would be taken from him and her and given to some public institution." One of plaintiff's attorneys in an affidavit used in opposition to the motion averred that notice of the time and place of trial had been given to the defendant; that her attorney, upon whom the notice had been served, "stated that he would not be present at said trial, as there were no issues, but that defendant should be present; * * * that on the 31st of May defendant's attorney wrote to affiant a letter in which he stated: 'I will file a withdrawal of Mrs. Rehfuss' answer, so you can serve me with notice of trial and I will not appear.'" He further deposed in his affidavit that on the 19th day of June, 1911, he received from defendant's attorney another letter in which the latter stated:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

> "I have to-day had Mrs. Rehfuss verify the amended answer and filed it. You stated when I last saw you that you would have Mr. Rehfuss sign the agreement regarding the custody of the child and file it. Would you kindly let me know when you do file same. I hope you will now have the matter set for trial and would deem it a favor if you would notify me of the result of the court's decision."

In an affidavit by defendant's former attorney, filed in opposition to the motion, he denied that he had given the advice or made the statements alleged in defendant's affidavit to have been given and made. He alleged in his affidavit that pending the action the parties arrived at an agreement concerning their property rights and the custody of their child; that this agreement was the result of a meeting of the parties and their attorneys in the office of the attorneys for the plaintiff; that pursuant to this agreement the plaintiff executed and delivered to his wife a quitclaim deed conveying to her certain real property in dispute between them; and that the defendant on her part in consideration of the deed, executed an agreement relinquishing to the husband her right to the custody of the child; that when the defendant received the deed she instructed her attorney to withdraw her answer and cross-complaint and said to him, "Let him (referring to her husband) go ahead now and get his divorce." He further deposed, using his own language, "that the defendant instructed me immediately after the said meeting of the said parties in Mr. Austin Lewis' office, that after all documents were executed carrying out the terms therein agreed upon that I was to then file a withdrawal of the answer and cross-complaint filed therein by the defendant, and the plaintiff was to proceed with the divorce as he thought fit"; that on June 13th he called upon plaintiff's attorneys "with a view to filing a withdrawal of the answer and cross-complaint"; that one of the plaintiff's attorneys in the interview "suggested that it would be better for the court records if the defendant were to file an amended answer admitting the charges in the complaint." He further stated in his affidavit:

> "The next day I consulted with the defendant and she remarked that she was agreeable to signing this (amended answer), as she wanted him now to go ahead and get his divorce; that she was well satisfied with the matters as I had arranged them for her."

Plaintiff himself filed no affidavit in response to that of defendant, nor did he testify at the hearing of the motion, although oral testimony was then taken.

[1-4] The failure of plaintiff to deny the averments of defendant's affidavit that he "had told her that if she contested said action her child would be taken from him and her and given to some public institution" warranted the court in believing that the plaintiff had made such representations to her. The record before us shows beyond doubt that the interlocutory judgment was taken against defendant through her excusable neglect or through a collusive agreement entered into between the parties. In either event, the judgment was properly set aside. Upon the showing made by the defendant, if the court believed the declarations contained in her affidavit, the court was justified in holding that her failure to defend the action was due to her excusable neglect, induced by fear that, if she did defend, her infant child would be taken from her and its father and placed in some public institution. This fear was engendered in her, according to her sworn statement, by the representations made

to her by her husband and her own attorney. Her neglect, under the circumstances detailed in her affidavit, was excusable in law.

Section 473, Code of Civil Procedure, provides that:

> "The court may, * * * in its discretion, * * * relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The defendant was entitled to relief under this section. Her remedy could not be by motion for a new trial. Her original answer was superseded by her amended answer, which admitted all of the allegations of the complaint and raised no issue of fact. No issue of fact having been raised or tried, defendant had no right to move for a new trial, as a new trial is a re-examination of issues already tried.

In a divorce action, "whether the defendant suffered default or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere ex parte showing, his remedy in seeking relief from the judgment is in section 473 of the Code of Civil Procedure, and not upon motion for a new trial." Foley v. Foley, 120 Cal. 33–37, 52 Pac. 122, 123 (65 Am. St. Rep. 147).

If the trial court disbelieved the statements made by defendant in her affidavit and her oral testimony given at the hearing of the motion, and accepted as true the allegations of the affiants contained in their affidavits used in opposition to the motion, the court was bound to vacate the interlocutory judgment on the ground of collusion between the parties. In Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621, an action for divorce, the defendant moved to set aside a default judgment. The motion was denied and the defendant appealed. In reversing the order denying the motion the court said:

> "The facts stated in the affidavit of defendant show either collusion between the parties, or that the defendant was grossly misled and deceived by her husband. * * * In either case the court should have been prompt to set aside the judgment and to allow the defendant to answer, so that the case might be heard and determined on its merits."

[**5, 6**] The rules of practice applicable to divorce actions differ in many respects from those which govern other actions. In an action for divorce, upon very slight showing the court will set aside a default, if application for relief be made in due time. And although in other actions a party seeking relief from default must support his motion by an affidavit of merits, no such affidavit is required on motion to set aside the judgment in an action for divorce. The law is at all times very solicitous to preserve the integrity of the marriage relation. That relation is the basis of the family, the foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. An action for divorce concerns not only the parties immediately interested, but also the state. The attorneys in the case represent the respective parties—the court in a sense represents the state. It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together. As well said by the Supreme Court of Connecticut in Allen v. Allen, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. Rep. 135:

> "When an attempt is made through the courts to undo a marriage, the state becomes in a sense a party to the proceedings, not necessarily to oppose, but to make sure that the attempt will not prevail without sufficient and lawful cause shown by the real facts of the case, nor unless those conditions are found to exist at the time the decree is made upon which the state permits a divorce to be granted. The state has an interest in the maintenance of the marriage tie, which neither the collusion nor the negligence of the parties can impair."

Where it becomes manifest to the court, before it loses jurisdiction of the case, that a judgment decreeing a divorce has been obtained by collusive agreement between the parties, or through fraud practiced upon the court, the court has the inherent power to set aside the judgment. This it may do on its own motion. McIntyre v. McIntyre, 9 Misc. Rep. 252, 30 N. Y. Supp. 200; Welch v. Welch, 16 Ark. 527; 2 Nelson on Marr. & Div. § 1050; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Earle v. Earle, 91 Ind. 27; Johnson v. Coleman et al., 23 Wis. 452, 99 Am. Dec. 193; Allen v. Maclellan, 12 Pa. 328, 51 Am. Dec. 608; Boyd's Appeal, 38 Pa. 241; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Graham v. Graham, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999; Rush v. Rush, 46 Iowa, 648, 26 Am. Rep. 179.

[7] One of the grounds of defendant's motion was that the cause was not at issue at the time the interlocutory judgment was rendered. Although ordinarily this ground would not be sufficient to warrant the court in setting aside a judgment, yet the court had a right to take into consideration, in passing upon the motion to vacate the judgment, the fact that there was an unanswered cross-complaint of defendant on file containing allegations which, if true, should prevent the plaintiff from obtaining a divorce.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.

169 Cal. 107

MILLER et ux. v. PACIFIC ELECTRIC RY. CO. (L. A. 3437.)

(Supreme Court of California. Jan. 5, 1915. Rehearing Denied Feb. 4, 1915.)

1. Carriers (§ 318*)—Personal Injury—Sufficiency of Evidence—Invitation to Leave Car.

In an action for the death of plaintiffs' son, evidence *held* to warrant a finding that he left the car and walked back over the track to the station upon the express or the implied invitation of defendant's conductor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. § 318.*]

2. Carriers (§ 303*)—Duty to Passengers—Setting Down Passenger.

A carrier owes to a passenger the duty of safely delivering him at his destination, and, when the passenger is carried beyond his station and is directed by the conductor to alight, must provide him with a safe means of return to the station; and the relation of carrier and passenger does not terminate until the passenger has had a reasonable opportunity of leaving the carrier's premises.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226–1232, 1234–1240, 1243; Dec. Dig. § 303.*]

3. Carriers (§ 347*)—Personal Injuries—Question for Jury—Contributory Negligence.

On evidence in an action for the death of plaintiffs' son, who was carried by his station and then invited to leave the car and walk back over the track to the station, and who was killed by the backing train, his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. § 347.*]

4. Appeal and Error (§ 1056*)—Harmless Error—Exclusion of Evidence.

In such action, where a witness for defendant, whose testimony was of slight bearing on the cause of death, testified that deceased had taken three or four drinks, but refused to state that he was drunk, and where plaintiffs' cross-examination undertook to show that the witness had been influenced in favor of defendant by reason of his relations with defendant, the exclusion of an explanation offered to sustain the credit of the witness, if erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

Department 1. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by George Miller and wife against the Pacific Electric Railway Company. Judgment for plaintiffs, and, from the judgment and an order denying a new trial, defendant appeals. Judgment and order affirmed.

J. W. McKinley, Frank Karr, A. W. Ashburn, Jr., and R. C. Gortner, all of Los Angeles, and Leonard & Surr, of San Bernardino, for appellant. Willis & Guthrie, John Brown, Jr., and Daley & Byrne, all of San Bernardino, for respondents.

SLOSS, J. The plaintiffs brought this action to recover damages for the death of their son, George E. Miller, who, it was claimed, was killed through the negligent acts of the defendant's servants. There was a verdict and judgment for $7,500 in favor of the plaintiffs. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The main contention of the appellant is that the evidence did not support the findings, implied in the verdict of the jury, that the defendant was guilty of negligence proximately causing George E. Miller's injuries and death, and that said George E. Miller was himself free from contributory negligence.

The defendant operated a line of electric railway from the city of San Bernardino to the town of Highland. One of the points on the line was Harlem Springs, where the defendant maintained a regular station for receiving and discharging passengers. Coming from San Bernardino, the track, as it approached Harlem Springs, ran in a northeasterly direction. At the station there was a platform and a covered shed or pavilion. Beginning about 40 feet beyond the end of the platform, a bridge or trestle, about 80 feet in length, carried the track over a depression some few feet in depth.

On the night of December 26, 1911, at about 10 o'clock, George E. Miller (whom we shall in this opinion call "Miller") took passage at San Bernardino upon a car of defendant bound for Highland and intermediate points. He had a ticket for Harlem Springs, and, during the progress of the journey, presented his ticket to the conductor. There were other passengers desiring to alight at Harlem Springs, but the conductor, through an oversight, omitted to signal for a stop at that point until the car was opposite the station. The motorman ran on until he had crossed the trestle and then brought the car to a standstill. As the car passed Harlem Springs station, Miller, who had been sitting in the open section at the rear of the car, arose and took a position on or near the steps. The conductor told him not to get off the car until it stopped. Miller left the car after it had crossed the trestle, and started to walk along the track toward the station. (The railroad ran upon its private right of way, and not on a public highway.) Meanwhile the conductor had notified other passengers that the car would return to the station, and he gave the signal to back. The motorman, remaining at his post at the front of the car, reversed the power and started the car backward toward the station. When the car had gone a part of the way over the trestle, it struck Miller and killed him. The conductor did not see Miller on the track until the car was almost upon him, and the signal to stop, which he then gave, was too late.

[1] The instructions presented the case to

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the jury upon the theory, briefly stated, that the defendant was not liable unless Miller left the car and returned over the track toward the station upon the invitation, express or implied, of the conductor, and unless, further, he was struck while in the exercise of due care in consequence of the negligent act of the conductor in running the car back upon him without proper warning and in disregard of the action taken by Miller in reliance upon the said invitation. The defendant insists that the evidence did not warrant a finding of the invitation referred to in the instructions. But this position is not tenable on the record. There was evidence that the night was dark, cold, and stormy. The ground under the trestle was wet and swampy. The most direct and convenient way of returning to the station was along the track. Any other course would have involved a long detour through private property and across wire fences. The warning not to leave the car until it stopped might very reasonably have been understood by Miller and by the jury to carry with it an affirmative authorization to alight when the car should stop. And, under the circumstances above detailed, it was well within the province of the jury to infer that an invitation to leave the car on the further side of the bridge was an invitation to the passenger to return to the station by way of the railroad track. The appellant's arguments on this point are, to a great extent, based upon a view of the evidence which the jury, by its verdict, rejected. Thus, it is claimed that Miller left the car before it stopped, or after the conductor had announced, in his hearing, that the car would be backed to the station. But there was testimony, which the jury apparently accepted, to the effect that Miller got off the car just after it stopped, and that the conductor's announcement regarding the backing was not made until after Miller had alighted and disappeared into the night.

[2] The authorities are clear to the point that a carrier owes to a passenger the duty of safely delivering him at his destination, and that the relation of carrier and passenger does not terminate until the passenger has had a reasonable opportunity of leaving the carrier's premises. Melton v. Birmingham Ry. Co., 153 Ala. 95, 45 South. 151, 16 L. R. A. (N. S.) 467; Burke v. C. & N. Ry. Co., 108 Ill. App. 565; Glenn v. Lake Erie, etc., R. R. Co. (Ind. App.) 73 N. E. 861; Texas, etc., Ry. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895. When the passenger is carried beyond his station, and is directed by the conductor to alight, the carrier owes him the duty of providing him with a safe means of return to the station. Nellis on Street Railways (2d Ed.) § 326; Kentucky Ry. Co. v. Buckler, 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. Rep. 234; N. Y. C. & St. L. Ry. v. Doane, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451; Adams v. Mo. P. Ry. Co., 100 Mo. 555, 12 S. W. 637, 13 S. W. 509. The cases cited by appellant are not in conflict with these views. In C. H. & I. R. Co. v. Carper, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, the injured person was on the wrong train, having boarded it by his own mistake. It was held that the conductor was not acting within the scope of his authority in directing the mode of return to the station. A similar situation was presented in Finnegan v. Chic., etc., Ry. Co., 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399. In State v. Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258, as in Buckley v. Old Colony R. Co., 161 Mass. 26, 36 N. E. 583, there was no invitation to alight; the passenger knowing that the train had not been stopped for that purpose. Our own decision in Benson v. C. P. R. R. Co., 98 Cal. 45, 32 Pac. 809, 33 Pac. 206, does not aid the appellant. There the passenger had disembarked at the station next after the one for which she was bound, and had received injuries in walking back along the track. A verdict in favor of the carrier was sustained, the court basing its ruling upon the ground that the passenger had been left in a place of safety and was not called upon to return to her destination by way of the railroad track. The case of N. Y. Ry. Co. v. Doane, supra, is distinguished on this ground, the court citing with approval the declaration found in section 617 of Hutchinson on Carriers, that:

> "Where the passenger is carried past the platform, or usual alighting place, and is required either expressly or impliedly to leave the car without assistance, and to find his way unaided to the station, during which time he receives injury, the carrier is liable."

[3] The appellant contends that, even if it be granted that Miller was upon the trestle by defendant's invitation, he was still, as matter of law, guilty of contributory negligence. We cannot agree with this claim. According to the finding of the jury, he was rightfully on the track, having started to walk to the station at the conductor's suggestion and without any knowledge that the car was to be backed. The conductor signaled the motorman to back by sounding three bells. But it is not clear that Miller was then in a position to have heard this signal, nor is there any evidence that he knew what it meant if he did hear it. He was on the trestle when the car came near him, and it was clearly for the jury to say whether he should have become aware of its approach sooner and whether he then acted as a reasonably prudent man would act under the circumstances.

[4] The appellant assigns as error the action of the court in sustaining objections to certain testimony offered by defendant with a view to sustaining the credit of one of its witnesses. This witness had given testimony, which was, in fact, of slight moment. He knew little or nothing of the material facts bearing directly upon the cause of Miller's death, but had testified that, in the course

of the evening, Miller had taken three or four drinks. He expressly refused to state, however, that Miller was drunk. The plaintiffs, in cross-examination, sought to show that the witness was biased in favor of the defendant. This was done by questioning him regarding a dance hall leased to him by the defendant. He was also asked whether he had not recently acquired an automobile. To meet this line of testimony, the defendant undertook to go into the particulars of the lease, and to show just how the automobile had been acquired. The court sustained objections to questions directed to this end. Without going into a technical consideration of the admissibility of the proposed evidence, we think the rulings, if erroneous, are not to be regarded as substantially prejudicial. Whether the witness might have been influenced in favor of defendant by his business dealings with it, or whether those dealings enabled him to acquire an automobile, had a very remote and indirect bearing on any issue in the case. The testimony given by the witness in chief was of such slight value that the verdict could hardly have been influenced by it one way or the other. Certainly a reversal would not be justified by the fact that an attempted impairment of the force of this testimony had not been overcome, even if defendant was entitled to overcome it.

Similar reasons preclude favorable consideration of the objections based on the attempt to impeach the same witness by proof of a conversation in which he referred to the receipt of a letter from the railroad company.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

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169 Cal. 131

WESTINGHOUSE ELECTRIC & MFG. CO. v. CHAMBERS, State Controller.

(S. F. 7011.)

(Supreme Court of California. Jan. 8, 1915.)

1. STATES (§ 213*)—CLAIMS AGAINST STATE—JUDGMENT—PAYMENT.

A judgment against a state, in cases wherein the state has permitted an action to be maintained against it, merely liquidates and establishes the claim, and, without an express statutory provision, cannot be collected by execution against the state or its property or by any of the ordinary processes of law.

[Ed. Note.—For other cases, see States, Cent. Dig. § 201; Dec. Dig. § 213.*]

2. STATES (§ 130*)—NECESSITY OF APPROPRIATION—REFUNDMENT OF TAXES PAID.

Pol. Code, § 3669, provides that corporation taxes shall be paid to the state treasurer "as other moneys are required to be paid into the treasury," and if the corporation is aggrieved it may bring an action against the treasurer, and the controller shall draw his warrant for the payment of any final judgment rendered in such action. Section 454 provides that payments to the state treasurer shall go into the general fund unless otherwise provided by law. *Held*, that section 3669 is violative of Const. art. 4, § 22, providing that no money shall be drawn from the treasury except on appropriation by law, since the statute contemplated a payment of money from the general fund without an appropriation.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. § 130.*]

3. STATUTES (§ 107*)—APPROPRIATION BILL—SEVERAL ITEMS.

Const. art. 4, § 29, provides that the general appropriation bill shall be confined to state salaries and expenses of the state government. Section 34 provides that appropriation bills other than the general appropriation bill shall not contain more than one item of appropriation for a single and certain purpose. *Held*, that Pol. Code, § 3669, is violative of Const. art. 4, § 34, since, if such section 3669 can be considered an appropriation bill, it is not limited to a single and certain item, as many and different judgments may be paid thereunder.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121–134; Dec. Dig. § 107.*]

4. STATES (§ 130*) — PAYMENT OF INDEBTEDNESS—NECESSITY OF APPROPRIATION — CONSTITUTIONAL PROVISIONS.

Const. art. 13, § 14g, providing that injunction shall not lie to restrain the collection of taxes, but that an action may be maintained "to recover" taxes illegally collected, does not abrogate Const. art. 4, § 22, forbidding the payment of state money without an appropriation, and hence the provision of Pol. Code, § 3669, directing the state treasurer to pay warrants drawn by the controller for the payment of judgments for taxes illegally collected without an appropriation, is unconstitutional.

[Ed. Note.—For other cases, see States, Cent. Dig. § 128; Dec. Dig. § 130.*]

5. STATUTES (§ 105*) — TITLES OF ACTS — APPROPRIATION.

Const. art. 13, § 14g, does not abrogate Const. art. 4, § 34, providing that appropriation bills other than the general appropriation bill shall be confined to a single item for a single and certain purpose, and hence Pol. Code, § 3669, authorizing the payment of judgments against the state for taxes illegally collected without an appropriation, is not thereby taken out of the operation of such section 34 of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. § 105.*]

6. STATES (§ 191*)—LIABILITY TO SUIT—STATUTES IN DEROGATION OF SOVEREIGNTY.

Public rights will not be treated as relinquished or conveyed away by inference or construction, and statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179–184; Dec. Dig. § 191.*]

7. TAXATION (§ 543*) — RECOVERY OF TAXES PAID — CONSTITUTIONAL AND STATUTORY PROVISIONS.

In view of their legislative history, Pol. Code, §§ 3664–3670, relating to assessment of property, and to the recovery of taxes illegally collected, apply exclusively to taxes therein provided for under the former system of railroad taxation, and Act April 1, 1911 (St. 1911, p. 530), enacted to carry into effect Const. art. 13, § 14, as amended November 8, 1910, allowing payment of taxes under protest and an action to recover taxes illegally collected in the manner then or thereafter provided, applies exclusively to taxes levied and collected under the constitutional amendment, and covers the entire legislation applicable to recovery of such taxes by action.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1006–1016; Dec. Dig. § 543.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In Bank. Application for writ of mandate by the Westinghouse Electric & Manufacturing Company against John S. Chambers, State Controller. Application denied.

J. C. Campbell and Weaver, Shelton & Levy, all of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Deputy Atty. Gen., for respondent. Edward F. Treadwell, of San Francisco, as amicus curiæ.

SHAW, J. Mandamus to compel the state controller to issue a warrant in favor of the plaintiff on the state treasury for the amount of a judgment recovered by the plaintiff against the state of California in an action to recover state taxes illegally collected.

The plaintiff was a foreign corporation doing business in this state. Subdivision "d" of section 14, art. 13, of the Constitution, provides that the franchises of all corporations, other than those engaged in certain public service, insurance, or banking, shall be valued, in a manner to be provided by statute, and taxed at the rate of one per centum each year on such value. This section was added to article 13 by an amendment adopted in November, 1910. Section 14 of the act of 1911, passed to carry out this provision (Stats. 1911, 530), prescribes the method of valuation. Under these laws, the plaintiff was regularly taxed in the sum of $2,700 as one per centum of the value of its franchise to do business in this state. This business consisted entirely of interstate commerce. For this reason it claimed exemption from this tax, and upon that claim it paid the tax under protest and thereupon brought suit to recover the amount paid and obtained the judgment in question. This judgment has become final. With its merits we have nothing to do, our concern in this proceeding being wholly upon the question of the mode of obtaining payment from the state.

[1] The general rule is well established that a judgment against the state, in cases wherein the state has permitted actions to be maintained against it, merely liquidates and establishes the claim against the state, and that, in the absence of an express statute so providing, such judgment cannot be collected by execution against the state or its property, or by any of the ordinary processes of law provided for the enforcement of judgments; it remains for the state, after such judgment, to provide for the payment thereof in such manner as it sees fit, or to refuse to do so at its pleasure, and the judgment creditor can obtain payment in no other way than that provided. Sharp v. Contra Costa County, 34 Cal. 291; Smith v. Broderick, 107 Cal. 650, 40 Pac. 1033, 48 Am. St. Rep. 167; Gilman v. Contra Costa County, 8 Cal. 57, 68 Am. Dec. 290; Emeric v. Gilman, 10 Cal. 404, 410, 70 Am. Dec. 742; 68 Am. Dec. 297, note; People v. San Joaquin, etc., Ass'n, 151 Cal. 806, 91 Pac. 740.

[2] The petitioner claims that a provision for the payment of this judgment and for the issuance of the warrant therefor is made by section 3669 of the Political Code as amended in 1905 (St. 1905, p. 823). The material parts of the section are as follows:

> "Each corporation, person or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, * * * and the filing of notice with the controller of an intention to begin an action, may, * * * bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof. * * * When any person, corporation or association has made payment of any of the taxes, * * * herein referred to, which have been subsequently adjudged illegal, and still remain in the hands of the state treasurer, such person, corporation or association shall be entitled to a refund thereof, although the payment of such taxes * * * may not have been under protest, nor a notice filed with the controller, * * * as hereinbefore provided. And in case of failure or refusal by the state treasurer to pay the same to such person, corporation or association upon its demand, an action may be brought against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer or any part thereof. * * * *If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the state treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected;* and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated and the controller may demand and receive from the county, or city and county interested, the proportion of such costs."

We have italicized the particular clause which, it is claimed, authorizes the issuance of the warrant to the plaintiff. If this clause is valid, and is applicable to the taxes in question, the warrant should be issued as prayed for. We have reached the conclusion that the clause is both invalid and inapplicable. We proceed to state the reasons.

[3] This provision for the payment of money out of the state treasury is contrary to the specific mandates of the Constitution. Section 22 of article 4 provides that:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller."

Section 34 of the same article is as follows:

> "No bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose, to be therein expressed."

Section 3669 opens with the statement that the person assessed must pay the taxes each year levied upon the property assessed to it, to the state treasurer, "as other moneys are required to be paid into the treasury." The suit to be brought for the recovery of taxes illegally collected cannot be begun until after the taxes in controversy have been thus paid into the treasury "as other moneys" are paid in. There is no provision of law appropriating such money to any special fund or requiring it to be kept in a separate account; hence it would go into and be a part of the general fund. Pol. Code, § 454. It would be out of this fund that the money must come to pay the warrant of the controller issued to satisfy the judgment in the action when it became final. Money thus paid into the treasury is not earmarked; it becomes a part of the mass and cannot be distinguished from any other money. It is all subject to payment out of the treasury whenever a warrant on the general fund is presented, under a valid appropriation. There can be no doubt therefore that the money to be paid out under the italicized clause of section 3669 above quoted is money in the state treasury, or that in order to get it out it must be taken from the state treasury. This brings it within the prohibition of section 22 of the Constitution aforesaid; it cannot be drawn out "but in consequence of appropriations made by law," and upon the warrant of the controller, duly drawn. Section 29 of the same article declares that the general appropriation bill shall contain no item or items of appropriation except for state salaries, and expenses of state government and state institutions; hence appropriations for these claims could not be embraced in the general appropriation bill. They must be paid out, if at all, by virtue of a specific appropriation. This means that the authority for such payment must be found in a bill containing only one item of appropriation, for one single and certain purpose therein expressed.

By no stretch of construction can this paragraph of section 3669 be transformed into a specific appropriation bill of the kind described in section 34 of article 4 of the Constitution. This section was first enacted in 1883. It was amended in 1891 and again in 1905. This particular paragraph has been included in it from the beginning. If it has any force at all, therefore, instead of being a bill containing but one item of appropriation and that for one single and certain purpose, it authorizes warrants for different items due to different persons for different years, embracing every final judgment that may have been rendered for such claims in any and every year since the last amendment of the section in 1905, or which may hereafter be rendered. The best that can be said of it in this regard is that it is a general appropriation bill to authorize the payment of all future judgments for such claims. It does not contain but one item of appropriation; it embraces as many items as there may be persons having such claims and obtaining final judgments therefor. These separate claims are not itemized at all. And no specific amount is stated. It has no resemblance to a specific appropriation. It is not payable out of revenues of a specified year; it is a continuing general appropriation of the revenues of each succeeding year, as such claims may arise and are converted into final judgments. It is a kind of legislation that is positively forbidden by the sections of the Constitution above quoted, and it is therefore void.

It is urged that the same objections will apply to the validity of sections 3804 and 3819 of the Political Code, so far as they provide for the refunding by the state of state taxes illegally collected. It is to be observed that these sections do not provide for payments of money out of the state treasury, but only allow deductions to be made from collections of taxes that would otherwise be paid into the state treasury. Whether this distinction will place these provisions without the scope of sections 22 and 34 of the Constitution, or not, is a question upon which we express no opinion. The enactment of these sections can have no proper bearing upon the meaning and effect of the prohibitions in the Constitution concerning payments from the state treasury.

[4, 5] It is claimed, however, that this provision of section 3669 is referred to and practically incorporated into the Constitution itself by subdivision "g" of the aforesaid section 14 of article 13. This subdivision, after declaring that no injunction shall ever issue against the collection of any tax levied under the section, proceeds as follows:

> "But after payment action may be maintained to recover any tax illegally collected in such manner and at such time as may now or hereafter be provided by law."

The argument is that this authorizes an action "to recover" taxes illegally collected under color of the constitutional scheme, that to "recover" a sum of money due is to obtain payment thereof, and, consequently, that this is an express recognition, affirmance, and adoption of the provision of section 3669 and, in effect, a constitutional declaration that an action may be maintained for such taxes, and judgment recovered against the state therefor, and that such judgment when final, shall be paid out of the treasury on warrant drawn thereon by the controller. If this is the meaning of subdivision "g," it supersedes and overrides sections 22 and 34 of article 4 in so far as they involve appropriations of money to satisfy final judgments against the state for taxes illegally collected by the state treasurer and, to that extent, takes from the state its sovereign power to control payments of money from the state treasury.

[6] It is a rule of statutory construction that public rights will not be treated as relinquished or conveyed away by inference or legal construction. 2 Sutherland on Stat-

utory Construction, § 568; Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; Ruperich v. Baehr, 142 Cal. 193, 75 Pac. 782, and cases first above cited. In pursuance of this rule it has been held that statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed. Raymond v. State, 54 Miss. 562, 28 Am. Rep. 382. These rules are applicable to the present case.

The word "recover," when used in connection with actions at law for money, does not necessarily, or even ordinarily, include the actual payment of the money sued for. The Century Dictionary defines its meaning as a law term as follows:

> "To recover damages for a wrong, or for a breach of contract. It does not necessarily imply the actual gain of satisfaction or possession, but ordinarily only the obtaining of judgment therefor."

It is true that in some connections it has been given a broader significance. For example, in Leslie v. York, 112 Ky. 712, 66 S. W. 751, it was held that, in a contract by a litigant to pay his attorneys "one-half they may recover," it meant the actual receipt of the money sued for. But the opinion states that ordinarily the word did not include more than the recovery of judgment for the money. In ordinary usage the phrase "action may be maintained to recover any tax illegally collected," as used in subdivision "g," would not be understood to refer to or include a mode or means of obtaining satisfaction of the judgment to be rendered in such action, or the actual receipt of the money sued for. It was not so used in section 3669. The declaration of that section that "an action may be brought against the state treasurer for the recovery of the amount of taxes," if this were the meaning of the word "recover," would have included the actual payment of the money by the state treasurer and the additional provision for a warrant by the controller would have been unnecessary. The rule of strict construction therefore does not warrant the meaning which the plaintiff here desires to have attributed to the word "recover."

Furthermore, the subdivision itself does not declare that the taxes illegally collected shall be repaid to the taxpayer. Its declaration is that he may maintain an action to recover them. The maintenance of an action to recover money is not ordinarily understood to include the collection of the money after judgment. The presentation of the certified copy of the judgment to the controller, and the issuance of the warrant thereon by him, as provided for in section 3669, were not parts of the proceedings in the action authorized by that section. The action was complete when the judgment became final. Likewise, the action authorized by subdivision "g" would be complete when final judgment was obtained, and there is nothing in that subdivision that can be understood as a declaration concerning the manner of satisfaction of the judgment when recovered. Our conclusion is that subdivision "g" does not continue in force or incorporate the provision of section 3669 for the payment of the money out of the state treasury after final judgment.

[7] Upon a consideration of the history of the legislation which culminated in the enactment of section 3669, we are of the opinion that the provision here invoked has no application to the payment of taxes collected under section 14 of article 13 of the Constitution. Prior to the adoption of the Constitution of 1879, railroad taxes were assessed and collected in each county by the county authorities. That Constitution made a radical change in the manner of collection with respect to railroads operated in more than one county. It provided that the operative property of such railroads should be assessed by the state board of equalization and apportioned to the respective counties in proportion to mileage. Article 13, § 10. In 1880 an act was passed adding sections 3664 and 3665 to the Political Code to carry out this provision of the Constitution. The scheme thus provided was not complete, and in 1883 another statute was passed amending sections 3664 and 3665 and adding new sections from 3666 to 3670, inclusive, embracing substantially the scheme in force at the time the constitutional amendment of 1910 was adopted. Some of these sections were subsequently amended, the last amendment of 3669 being in 1905. This entire statutory provision was enacted to provide for the assessment and collection of railroad taxes in pursuance of the constitutional provision requiring the same to be assessed by the state board of equalization. Section 3666 required the state board to prepare a record of the railway assessments and of the apportionment thereof to the counties and that the same should be transmitted to the state controller. The controller was required to enter the amount of the state and local taxes due upon the whole assessment from each railroad company assessed. Section 3668 specified the time when such taxes should be deemed delinquent and the penalties to be thereupon imposed, and provided further that the state's portion of the taxes collected by the state treasurer should be distributed by the treasurer to the funds entitled thereto and that the portion of each county should be reported to the officers thereof. It was this tax so to be assessed to which the provisions of section 3669 requiring it to be paid to the state treasurer applies. The opening sentence of that section does not in terms specify that it refers to the railroad taxes assessed under the immediately preceding provisions of the Code; but, when taken in connection with those provisions and the subject of the act as originally enacted and subsequently amended, it is clear that it can mean no other tax

than the railroad tax therein authorized to be assessed and collected. It is not therefore a general continuing provision made for the purpose of applying to any state tax which might thereafter by any subsequent scheme be imposed upon taxpayers. By the amendment to the Constitution in 1910 providing for a percentage tax upon corporation earnings or capital as a means of raising state revenues an entirely distinct and different scheme was enacted. The old provision for the valuation and assessment of all operative railroad property by the state board of equalization was entirely superseded. The provisions of the law relating to that scheme were by their terms necessarily inapplicable to the new scheme. These provisions of the Code related to the assessment of property and the imposition of a tax according to the valuation thereof. The new constitutional scheme provided for no valuation of property except franchises. It included all public service corporations as well as banking and insurance corporations. In order to supplement this constitutional provision a new act was necessary. To meet this exigency the Legislature passed the aforesaid act of April 1, 1911 (Stats. 1911, 530), entitled:

"An act to carry into effect the provisions of section fourteen of article thirteen of the Constitution of the state of California as said Constitution was amended November 8, 1910, providing for the separation of state from local taxation, and providing for the taxation of public service and other corporations, banks and insurance companies for the benefit of the state, all relating to revenue and taxation."

This act embraces an elaborate scheme covering every detail of the proceedings deemed necessary to carry out the constitutional provision referred to. Section 23 of the act covers the same subject-matter, with respect to the taxes levied under the constitutional plan of taxation, as that covered by section 3669 of the Political Code with respect to taxes collected under the old system of railroad taxation superseded by the Constitution. It provides for payment under protest and an action against the state treasurer for the recovery thereof if the taxes are illegally collected; but it omits any provision for warrants by the controller or payment of the judgment out of the state treasury. The only reasonable conclusion from this legislative history is that the provisions of sections 3664 to 3670, inclusive, of the Political Code were intended to apply and do apply exclusively to taxes therein provided for under the old system of railroad taxation, and that the provisions of the act of April 1, 1911, aforesaid, were intended to and do apply exclusively to taxes levied and collected under the constitutional amendment of 1910, and that the latter act covers the entire legislation applicable to the recovery of such taxes by action. The provisions of the Political Code are therefore inapplicable to taxes levied under the Constitution as supplemented by the act of 1911.

For these reasons we are of the opinion that the plaintiff is not entitled to the warrant which he here seeks. The petition for a writ of mandamus is denied.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

169 Cal. 93

Ex parte THROOP. (Cr. 1851.)

(Supreme Court of California. Jan. 3, 1915.)

1. MUNICIPAL CORPORATIONS (§ 625*)—REGULATIONS—FACTORIES.

A city ordinance, prohibiting the maintenance of certain factories, including stone crushers, within a large district of the city which was sparsely inhabited and which contained 500 acres which were unimproved and practically uninhabited, but permitted them within a much smaller district which was densely inhabited, though by the poorer classes, is unreasonable and void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

2. MUNICIPAL CORPORATIONS (§ 611*)—REGULATIONS—FACTORIES.

The business of producing crushed stone for concrete work cannot be arbitrarily suppressed or interfered with by a city unless it is a nuisance or injurious to the health, comfort, safety, or welfare of the inhabitants.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344–1349; Dec. Dig. § 611.*]

3. MUNICIPAL CORPORATIONS (§ 626*)—POLICE POWER—FACTORY REGULATIONS.

The prohibition of the operation of stone crushers in certain districts within a city cannot be justified under the police power if such operation is permitted in another district where it interferes more with the health, welfare, or safety of the surrounding residents.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. § 626.*]

In Bank. Application by R. A. Throop for a writ of habeas corpus. Petitioner discharged.

Guy Eddie, of Los Angeles, for petitioner. Wm. J. Carr, of Los Angeles, for respondent.

SULLIVAN, C. J. The petitioner was taken into custody by virtue of process issued out of the recorder's court of the city of South Pasadena for alleged violation of ordinance of that city No. 264, adopted in 1908, and certain ordinances amendatory thereof. He seeks discharge on the ground, among others, that the ordinances which he is charged with violating are unreasonable and void. The ordinance divides the city into three districts, numbered 1, 2, and 3. The entire area of South Pasadena comprises approximately 2,200 acres of land. District No. 1 contains 25.25 acres, district No. 2 contains 11.65 acres, and in district No. 3 there are 2,163 acres. District No. 1 embraces the retail business section; district No. 2, known as the "Industrial District," is situate in a populous part of the city. As stated in the petition for the writ, it is "densely surrounded by residences and other buildings on all sides for a distance of many blocks in every direction, and is itself very largely built up." District No. 3 is known as the "Residence District," and, as stipulated in this proceeding by the respective parties, "the greater part of the district is sparsely settled, one area containing 500 acres being unimproved, undeveloped and practically uninhabited."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Section 51B of the ordinance, as amended, reads as follows:

> "It shall be unlawful and is hereby declared to be unlawful for any person, persons, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, occupy or cause to be occupied any factory, warehouse, storehouse, blacksmith shop or horse shoeing shop, livery stable, lumber yard, planing mill, coal yard, hay and feed yard, machine shop, bottling works, brick yard, canning works, carpet cleaning works, railroad shop, power house, feed or flour mill, feed or sales stables, foundry, packing house, ice factory, laundry, oil tank, piano or organ factory, pattern works, *stone crusher*, rolling mill, fireworks factory, gasworks, moving picture development works, moving picture photographic works or camp, or a place where persons congregate or assemble for the purpose of making and producing moving picture views and scenes, or any manufacturing establishment, or any storage or warehouse business of any kind or character in district No. 3 of said general fire limits."

The ordinance excludes from district No. 1 the buildings, occupations and businesses prohibited in district No. 3 but inferentially permits them in district No. 2. Presumably the stone crusher is included in the list mentioned in the section by reason of the noise and dust which usually result from its operation. The petitioner at the time of his arrest maintained and operated in district No. 3 a stone crusher, in plain violation of the provisions of section 51B. The plant of the petitioner is situate in the "Arroyo Seco," on the western boundary of the city. The petitioner owns 14 acres in this area. The Arroyo Seco is what is known as a "wash." In the vicinity of the crusher the "wash" is three-quarters of a mile wide. For a distance of approximately one-half a mile on the east side of the "wash" the area consists almost entirely of vacant and unimproved land. There are only four dwellings within a radius of 200 yards from the crusher. As stated in the petition for the writ, the environment in the neighborhood of the stone crusher is made up of a "large area contained in a rugged, rocky, and bushy wash, cut off from the rest of neighborhood by high bluffs." These bluffs range in height from 50 to 100 feet and upward. In the neighborhood and closer to the populous part of the city are several railroads in operation, the Salt Lake operating daily 10 trains, the Santa Fé 20 trains daily and the Pacific Electric (an interurban line) operating a train every 10 minutes. In the dry season the floor of the Arroyo Seco presents the appearance of a desert waste, here and there dotted with cacti and brush. In the rainy season torrential freshets occasionally spread over and cover the entire area. It contains large deposits of sand, gravel and rock which are very valuable for building purposes, particularly so because of the proximity of the market for building materials in the nearby cities. The rock consists of boulders of various sizes which are put through the crusher to reduce them to marketable form. The freshets which occur in the rainy season cause material to take the place of that removed in the dry season, making the supply of rock, sand, and gravel practically inexhaustible. Plaintiff's land has scarcely any value other than that due to the building material found thereon.

Before he applied for a writ of habeas corpus, the petitioner commenced an action in the superior court of Los Angeles county against the city of South Pasadena to enjoin the enforcement against him of the Ordinance No. 264 and amendatory ordinances, on the ground of their alleged illegality. In that action the court adjudged the ordinances valid. By stipulation entered into between the petitioner and respondent the same evidence presented to the superior court upon the hearing of the application for the injunction is considered as evidence in this case. The findings of fact and conclusions of law in the injunction proceeding are also before us as evidence, but they are in no way binding upon this court and will be disregarded in view of the conclusion which we have reached concerning the invalidity of the ordinances. The Chief Justice of the court, in company with counsel for the respective parties, viewed the premises where the stone crusher is located, observed its operation at close range and at different points more or less remote from it. He also visited districts 1 and 2 and observed conditions in and about the same.

After a careful consideration of the evidence in the case we must hold that the ordinances under which the petitioner is being prosecuted, in so far as they relate to the right to maintain and operate a stone crusher in district No. 3, are unreasonable and therefore void. In the injunction suit brought by the petitioner against South Pasadena, the petitioner introduced in evidence affidavits of 19 witnesses, who testified to the conditions surrounding the stone crusher and resulting from its operation. Several of these witnesses testified that the noise and dust produced by the operation of the crusher were not observable at their places of residences. Among the witnesses so testifying for the petitioner were four dairy proprietors who conducted their dairies in the vicinity of the crusher, three at a distance of 300 yards therefrom, and one at a distance of 450 yards. They all deposed that if the amount of dust claimed by the witnesses for the defendant to come from the crusher, emanated therefrom, they would notice it "as the dairy business would be especially sensitive to such an annoyance." The other witnesses for the plaintiff, living at distances varying from 100 to 300 yards from the crusher, deposed that at their respective places of residence they noticed very little, if any, dust or noise.

As is usual in cases of this character there is a decided conflict in the testimony produced by the respective parties. The affidavits of eight witnesses were presented as evidence in favor of the defendant in the injunction suit. Six of these witnesses testified to the offensive character of the dust and noise emanating from the crusher, while in operation; several of them joining in the statement that:

> "The stone crusher maintained on plaintiff's property is injurious to the health of the residents along the bank of the Arroyo Seco by reason of the noise and large amount of dust caused thereby and for like reasons is offensive to the senses of the residents and interferes with the use of property in the vicinity thereof and interferes with the comfortable enjoyment of life and property and is a nuisance."

J. W. Moore, building inspector of South Pasadena, in his affidavit denied that industrial district No. 2 is not suitable for or adapted to the existence or maintenance of businesses prohibited in district No. 3 as claimed by plaintiff. He declared:

> "On the contrary said district (No. 2) is located in the vicinity of railroad tracks and *it is immediately surrounded by a poorer class of residences.* There are vacant lots in said industrial district on which manufacturing and industrial enterprises may be located."

He further deposed that the crusher by its operation "creates noise and dust so as to seriously impair and destroy the value of lots in the city of South Pasadena along the bank of the Arroyo Seco and in the vicinity of said stone crusher."

[1] Notwithstanding the evidence produced by respondent we deem the ordinances unreasonable and void. As already stated, the only district (No. 2) in which a stone crusher may be maintained contains 11.65 acres situated in the heart of the city and surrounded by residences and other buildings on all sides. While the ordinances permit the maintenance of a stone crusher in this restricted territory surrounded by residences, the same ordinances make it a crime to erect or mantain one in a remote corner of the district No. 3, containing 2,163 acres, a greater part of which is sparsely settled, or to maintain or erect one in the center of an area containing 500 acres in district No. 3 which is admittedly unimproved, undeveloped, and practically uninhabited. Although, as Inspector Moore, in his affidavit says, district No. 2 where the business prohibited in No. 3 may be maintained is "immediately surrounded by a poorer class of residences," the occupants of these residences are entitled in law to as much consideration as those occupying the magnificent residences on the banks of the Arroyo Seco several hundred yards away from the objectionable crusher. The unreasonable restrictions as to the place where a stone crusher may or may not be erected or maintained render the ordinances void.

[2] Concrete has become a very important factor in the construction of improvements in our cities and towns and in the construction of roads and highways. Rock, sand, and gravel and cement are necessary ingredients in concrete construction and must be obtained. The business of producing these materials, if maintainable within the confines of a city or county without becoming a public nuisance or injurious to the health, comfort, safety, or welfare of the inhabitants, cannot, by legislative bodies, be arbitrarily suppressed or interfered with.

[3] The city of South Pasadena, in the exercise of the police power vested in it by our state Constitution, has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety, or welfare. As stated by the Supreme Court of the United States in Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169:

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In the case now under consideration, it is plainly manifest that the attempted regulation of the business conducted by the petitioner has no relation to the ends for which the police power exists, namely to protect the public health, comfort, safety, or welfare. An ordinance which prevents the operation of a stone crusher in a sparsely settled territory of 2,163 acres, 500 of which are undeveloped and practically uninhabited, and allows its operation in a small area of 11.65 acres in the center of a city surrounded by "poorer classes of residences," does not subserve the ends for which the police power exists.

The ordinances which the petitioner is charged with having violated being void and his arrest being illegal, it is ordered that he be discharged.

We concur: LORIGAN, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

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169 Cal. 122

C. M. STAUB SHOE CO. v. BYRNE.

(L. A. 3419.)

(Supreme Court of California. Jan. 7, 1915. Rehearing Denied Feb. 4, 1915.)

1. LANDLORD AND TENANT (§ 101*)—PROVISIONS FOR TERMINATION—CONSTRUCTION—"WHOLLY UNFIT FOR OCCUPANCY"—"UNFIT FOR OCCUPANCY."

A lease provided that if the building was destroyed by fire, or partially destroyed so as to render the premises wholly unfit for occupancy, or so badly injured that they could not be repaired within sixty days, the lease should terminate and the lessee should surrender and pay rent only to the time of surrender, and that in case of such destruction or partial destruction the lessor might repossess the premises discharged of the lease, but that, if they could be repaired within 60 days, rent should not run after injury and during repairs, and that the lessor should repair with reasonable speed; that, if the premises were so slightly injured as not to be unfit for occupancy, the lessor should repair with reasonable speed; and that rent should not cease. The premises were damaged by fire and rendered wholly unfit for occupancy, and the tenant, after being excluded from possession, brought action for the value of the term. Civ. Code, § 1641, requires that the whole of a contract be taken together so as to give effect to every part, if reasonably practicable. *Held*, that "wholly unfit for occupancy" and "unfit for occupancy" were not equivalent, and that if the premises were so damaged as to prevent or greatly interfere with the conduct of the lessee's business, though not requiring him to vacate during repairs, they were "unfit for occupancy," relieving the lessee from rent during repairs, but not terminating the lease; but that, where the premises were so damaged as to be "wholly unfit for occupancy," the lease was terminated, so that the lessee could not recover.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*]

2. LANDLORD AND TENANT (§ 101*)—TERMINATION OF LEASE—FORFEITURE.

Such provision did not declare a forfeiture, because fixing events having no relation to any act or default of the parties upon which the lease should terminate, and hence there was no basis for applying the rule of strict construction prescribed by Civ. Code, § 1442, against conditions involving forfeiture.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*)

3. LANDLORD AND TENANT (§ 101*)—LEASE—CONSTRUCTION.

A provision in a lease for termination upon damage or destruction by fire, etc., was to be interpreted in the light of the conditions existing when it was made, and not against the lessor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a lessee's action to recover the value of the use and occupation for the term of a lease found to have been terminated under a provision thereof by damage from fire, error, if any, in admission of evidence as to the time within which the premises could be repaired, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

5. LANDLORD AND TENANT (§ 213*)—TERMINATION OF LEASE—RIGHT TO RECOVER RENT.

Under a lease providing that upon damage or destruction of the premises the lease should terminate and the lessee should immediately surrender the premises and pay rent only to the time of such surrender, the lessee, who had paid rent in advance for February, during which month the lease terminated by damage or destruction of the premises, could not recover the proportionate rent for the remainder of the month, as the provision was not a covenant to repay rent due and paid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 846–848, 850, 852, 854, 856, 857–860; Dec. Dig. § 213.*]

6. LANDLORD AND TENANT (§ 231*)—RECOVERY OF RENT—BURDEN OF PROOF.

If such provision entitled the lessee to recover the proportionate part of advance monthly rental, after termination and surrender, the burden of alleging and proving a surrender was on him.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926–934; Dec. Dig. § 231.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the C. M. Staub Shoe Company against James W. Byrne. Judgment for defendant, and, from the judgment and an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. Denis & Loewenthal and O'Melveny, Stevens & Millikin, all of Los Angeles, for respondent.

SLOSS, J. On March 9, 1910, Mrs. Margaret Irvine was the owner of a store and office building situated at the northwest corner of Broadway and Third streets in the city of Los Angeles. On that day she executed a lease of the corner store and basement in said building to the plaintiff for the term of five years commencing on the 1st day of January, 1911, at a monthly rental of $1,250, payable in advance on the 1st day of each month. On February 16, 1911, the building and the premises occupied by the plaintiff were damaged and injured by fire. Prior to the last-mentioned date the defendant James W. Byrne had succeeded to the interest of the lessor in the lease. This action is the outgrowth of a controversy arising over certain provisions of the lease relative to the effect of destruction of or injury to the premises by fire or other cause. The plaintiff contended that it was entitled to remain in possession of the store and basement under its lease. The defendant's position was and is that the lease was terminated at the date of the fire, and he has excluded the plaintiff from the possession and leased the premises to another tenant. The action was brought to recover the sum of $45,000 alleged to be the value, at the date of the fire, of the lease and the value of the use and occupation of the premises during the remainder of the term. The complaint also seeks to recover the sum of $580.40, being the proportion of the monthly rent representing the part of the month of February elapsing after the fire. The case was tried without a jury, and judgment went in favor of the defendant. The plaintiff appeals from the judgment and from an order denying its motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The case turns largely upon the construction of the fourth clause of the lease. This clause reads as follows:

> "If, during the term of this lease, the building or premises are destroyed by fire, or other action of the elements, or partially destroyed so as to render the premises demised wholly unfit for occupancy, or if they shall be so badly injured that they cannot be repaired within sixty days after the happening of the injury, then this lease shall cease and become null and void from the date of such damage or destruction, and the lessee shall immediately surrender said premises, and all interests therein, to said lessor, and said lessee shall pay rent within this term only to the time of such surrender; and in case of destruction or partial destruction as above mentioned, the said lessor may re-enter and repossess said premises discharged of this lease, and may remove all parties therefrom; and if said premises shall be repairable within sixty days from happening of said injury, then said rent shall not run or accrue after such injury and while the process of repairs is going on, and the lessor shall repair the same with all reasonable speed, and the rent shall recommence immediately after said repairs shall be completed; but if said premises shall be so slightly injured by fire or the elements as not to be rendered unfit for occupancy, then the said lessor agrees that the same shall be repaired with reasonable promptitude; and in that case the rent accrued and accruing shall not cease or determine. In no case shall the lessee be entitled to compensation or damages on account of any inconvenience or annoyance, or destruction by fire or earthquake or by other actions of the elements or by reconstruction or repair of any portion of said building; nor for any damage to or loss of property in said premises from any cause."

The complaint alleges that the leased premises were repairable and could have been repaired within the period of 60 days after the said 16th day of February, 1911; that the defendant did not repair said premises within said period of 60 days and did not use reasonable or any diligence in that behalf. The answer denies these allegations, and further alleges that the demised premises occupied by plaintiff were destroyed and were rendered by said fire wholly unfit for occupancy. Upon all these issues the findings were in favor of the defendant.

One of the conclusions of law was that, by reason of the fact that the building and premises were partially destroyed by fire so as to render the demised premises wholly unfit for occupancy, said lease became and was terminated. A like conclusion was drawn from the fact that the premises were so badly injured that they were not repairable and could not be repaired within 60 days after the happening of the said injury by fire. The court further concluded that the defendant was entitled under the terms of the lease to retain the sum of $1,250 paid in advance for the month of February, 1911.

With respect to the main cause of action, i. e., that based upon the defendant's refusal to permit the plaintiff to occupy the premises during the remainder of the term, the appellant contends that under a proper construction of the lease the tenancy did not terminate by a mere partial destruction rendering the premises wholly unfit for occupancy, but that such result followed only if the premises were so badly injured that they could not be repaired within 60 days. Unless this position be well taken, the appellant's claim that it was wrongfully ousted from the premises must fail, since it cannot be doubted that the evidence amply warranted the finding that the fire rendered the premises wholly unfit for occupancy. If, on the other hand, the fact so found did not terminate the tenancy, the plaintiff must still overcome the conclusion that the lease ceased by reason of the fact that the premises were not repairable within sixty days. In this regard the appellant contends with great vigor and earnestness that the evidence does not support the finding that the premises could not have been repaired within the time specified.

[1] The first subject of inquiry, then, is the proper interpretation of the clause defining the conditions which may terminate the lease. By the clear and express language of the opening part of this clause, it is provided that the lease shall cease and become null and void upon the occurrence of any one of three contingencies: (1) If "the building or premises are destroyed by fire or other action of the elements"; (2) "if the building or premises are partially destroyed so as to render the premises demised wholly unfit for occupancy"; or (3) "if they shall be so badly injured that they cannot be repaired within sixty days after the happening of the injury." Up to this point the clause is expressed in plain and simple words, and there is no room for the play of rules of interpretation. The appellant contends, however, that the later provisions of the clause so modify and limit the effect of the portion just referred to as to destroy the second contingency outlined and to terminate the lease in the case of partial destruction or injury only in the event that the premises are not repairable within 60 days after the happening of the injury. This claim is based upon the following provision:

> "That if said premises shall be repairable within sixty days from the happening of said injury, then said rent shall not run or accrue after such injury and while the process of repairs is going on and the lessor shall repair the same with all reasonable speed and

the rent shall recommence immediately after said repairs shall be completed; but if said premises shall be so slightly injured by fire or the elements as not to be rendered unfit for occupancy, then the said lessor agrees that the same shall be repaired with reasonable promptitude, and in that case the rent accrued or accruing shall not cease or terminate."

The argument is that the provision last quoted obviously contemplates the liability of the lessor to repair and the right of the tenant to continue under his lease in either of two events: (1) If the injury or the necessary repair work be so extensive as to prevent occupancy by the tenant, in which case rent shall be remitted during the time of repair; or (2) if the injury be so slight as not to render the premises unfit for occupancy, in which case the obligation to pay rent shall continue during the period of repair. It being provided therefore that the right of the tenant shall continue even though there be an injury rendering the premises unfit for occupancy, there is presented, it is urged, a conflict between the later and the earlier parts of the clause, and the conflict should be resolved in favor of the tenant by holding that no partial injury shall terminate the lease unless the premises be injured to such an extent that they cannot be repaired within 60 days. The necessary effect of this contention is to deny all meaning to the provision for a termination in the event of a partial destruction rendering the premises demised wholly unfit for occupancy, for, under the construction thus suggested, the only event (short of a total destruction of the building or premises) which would terminate the lease would be an injury not repairable within 60 days—an event which is provided for in separate and distinct terms. It is, of course, unnecessary to cite decisions in support of the fundamental rule of interpretation requiring effect to be given to every part of a contract if reasonably practicable. Civ. Code, § 1641. Unless the later provisions relied on by the appellant are fairly susceptible of no interpretation other than one which will totally destroy an independent provision of the contract, they should not be interpreted in the manner suggested. We are satisfied that it is "reasonably practicable" to give effect to every part of the fourth clause, without doing violence to the intent of the parties as manifested by the language used by them. The opening part of the clause contemplates three different kinds or degrees of destruction or damage: (1) A total destruction (which is not in question here); (2) a partial destruction or damage rendering the premises wholly unfit for occupancy; and (3) an injury which cannot be repaired within 60 days. Since these three situations are stated in terms connected by the disjunctive article "or," the three contingencies specified are to be understood as representing alternatives, each of which operates independently of the other two. An injury which cannot be repaired within 60 days may or may not render the premises wholly unfit for occupancy. But since the lease specifies the two conditions alternatively as events terminating the lease, the natural meaning of the clause is that a damage rendering the premises wholly unfit for occupancy will terminate the lease, regardless of the time necessary for repair, and that an injury that cannot be repaired within 60 days will have the same effect, whether the injury be one that renders the premises wholly unfit for occupancy or not.

There remains a fourth contingency, upon the occurrence of which the lease is not determined, although there has been an injury to the premises, i. e., if the premises are not rendered wholly unfit for occupancy, and if they can be repaired within 60 days. The later clause dealing with the abatement of rent during the period of repair deals with this contingency. The lessor is required to repair with all reasonable speed, and no rent is to be paid during the period of repair unless the injury is so slight that the premises are not rendered unfit for occupancy. This provision does, no doubt, contemplate the possibility of a continuance of the lease even though the premises have been rendered unfit for occupancy. Is there a necessary conflict with the earlier provision for a termination in the event of partial destruction rendering the premises "wholly unfit for occupancy"? We think not. The word "wholly" is not found in the later provision, and we must assume that, in the minds of the parties, this word had some meaning and purpose. "Wholly unfit for occupancy" is not the same thing as "unfit for occupancy." The rational conclusion is that the parties foresaw the possibility of injuries affecting the availability of the premises for occupancy in three different degrees: (1) An injury which would make them totally unfit for occupancy; (2) an injury which would seriously interfere with their enjoyment and occupancy; and (3) one which was so slight as to create virtually no impediment to their occupancy. The premises were to be used, and were used, as a retail shoe store. The parties were contracting with reference to occupancy for such use. The premises might be damaged to such an extent as to prevent or greatly hamper the conduct of business, while not requiring the tenant to vacate while repairs were being made. This would render the premises "unfit for occupancy" within the meaning of the clause relieving the tenant from the payment of rent during the period devoted to repairs, but would not terminate the lease by rendering them "wholly unfit for occupancy."

[2] This construction, as we have already suggested, gives effect to every provision of the contract and does not distort any word or phrase from its fair meaning. So interpreted, the fourth clause makes entirely rea-

sonable provision for the various contingencies that might result in case of fire or other injury to the building or premises. There is here no basis for applying the rule of strict interpretation against conditions involving forfeiture. Civ. Code, § 1442. The clause terminating the lease in certain contingencies does not declare a forfeiture. It fixes events, having no relation to any act or default of the parties, upon which it is agreed that the lease shall end.

[3] The further argument of appellant that the clause should be interpreted against the lessor is equally inapplicable. The meaning of the lease is, of course, to be ascertained in the light of conditions existing when it was made. Whatever it meant then it means now. There is no ground for saying that the provision terminating the lease in the event of damage rendering the premises wholly unfit for occupancy was for the benefit of the lessor rather than the lessee. So far as could be known in advance, it might be highly advantageous to the tenant to be released if the premises should be rendered wholly unfit for occupancy.

The interpretation put by us upon the lease dispenses with the necessity of any inquiry into the sufficiency of the evidence to sustain the finding that the premises were not repairable within sixty days. Nor is it important to examine the finding, also assailed by appellant, that the lessor used reasonable diligence in repairing the premises. Whether the premises could be repaired within a given time, or whether they were repaired diligently or at all, does not concern the appellant if his lease ended on the day of the fire by reason of the fact that the premises had been rendered wholly unfit for occupancy.

[4] It is claimed that the court erred in certain rulings on the admission of evidence, but the evidence involved all bore on the issue of the time within which the premises could have been repaired. If error was committed in any of these rulings, it was not prejudicial.

[5, 6] The only other point raised by appellant is that it should have been given judgment for a portion of the February rent paid by it in advance. The fire occurred on the 16th day of the month. The fire clause, which we have already quoted in full, provided that, upon the occurrence of any of three events, the "lease shall cease and become null and void from the date of such damage or destruction, and the lessee shall immediately surrender said premises, and all interests therein, to the lessor, and said lessee shall pay rent within this term only to the time of such surrender." It is settled in this state that a tenant who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, cannot, in the absence of any covenant in the lease, recover the rent so paid in case of the destruction of the premises by fire without any fault of either party to the lease. Harvey v. Weisbaum, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, Ann. Cas. 1912B, 1115. And this is true even though, by the terms of the lease, or under a statute, the destruction of the premises terminates the lease. The appellant was not therefore entitled to repayment of a proportion of the February rent unless the lease contained a covenant for such repayment. The appellant relies on the provision that the lessee shall, in certain events, "surrender said premises * * * and said lessee shall pay rent within this term only to the time of such surrender." This is not a covenant to repay, in whole or in part, any installment of rent which had become due and been paid prior to the fire. It merely declares that the tenant shall not be called upon to pay any further rent after surrendering the premises. But, if the language relied on could be given the effect claimed for it, the right to repayment would arise only upon the tenant's surrender of the premises. There is neither allegation, proof, nor finding that the plaintiff surrendered the premises at any time which would entitle it to a refund of any part of the February rent. In any view, the burden was on the plaintiff to allege and prove such surrender.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.

MEMORANDUM DECISIONS

168 Cal. 797

POLKINGHORN v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al. (L. A. No. 3984.) Supreme Court of California. Dec. 16, 1914.) In Bank. Application by W. P. Polkinghorn for writ of prohibition directed against the Superior Court of the State of California in and for the County of San Bernardino and another. Ordered that peremptory writ issue. Tyrrell, Abrahams & Brown, of Los Angeles, for petitioner. E. W. Freeman and William B. Ogden, both of Los Angeles, for respondents.

PER CURIAM. In this proceeding the petitioner, a creditor of the Gibraltar Investment & Home Building Company, filed a petition for a writ of prohibition arresting the proceedings in a certain action pending in the Superior Court of San Bernardino county entitled "Brookings Timber & Lumber Company, a Corporation, Plaintiff, v. Gibraltar Investment & Home Building Company, a Corporation, Defendant," wherein one S. F. Kelley was appointed receiver of the assets of the defendant. On the authority of C. Edgar Elliott, Petitioner, v. Superior Court, etc., et al. (L. A. No. 3949), 145 Pac. 101, heretofore decided by this court, in which the order appointing said receiver was adjudged void, it is ordered that a peremptory writ of prohibition issue out of this court as prayed for in the petition on file in the above-entitled proceeding.

25 Cal. App. 729

PEOPLE v. ZERMAN. (Cr. 551.) (District Court of Appeal, First District, California. Nov. 11, 1914.) Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge. Edward Zerman was convicted of crime, and appeals. Affirmed. Jas. F. Sheehan, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. We are satisfied that the point made in this case in support of the appeal is not well taken, namely, that the evidence is insufficient to support the verdict and judgment. From a reading and consideration of the evidence, we are satisfied that the contrary is the case. The judgment and order appealed from are affirmed.

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